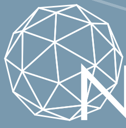

Network for Innovative Corporate Governance

Board Dynamics

Corporate Crescendo

we are curious and free spirits

NICG 2023/2

NICG – Network for Innovative Corporate Governance

Dialog. Discourse. Determination.

«For good ideas and true innovation, you need human interaction, conflict, argument, debate.»
Quote from Margaret Heffernan: entrepreneur, CEO, writer and keynote speaker.

We are all familiar with conflicts, arguments, and debates. They are commonplace in organizations, at work, among friends and within families. In fact, you might even think you know them too well and recall your last argument with a sense of dread. Although everyone experiences friction in their daily life, we need to ask ourselves critically whether we have learned to deal with arguments effectively and if we use them beneficially? Frankly, conflict management research has repeatedly shown that organizations fostering a culture of productive disagreement, debate, and conflict resolution enable open communication and innovation that ultimately lead to competitive advantages.[1]

In current times, companies find themselves in a maze of market events – from social upheavals, geopolitical complexities, and the looming climate crisis to the tangled ballet of inflation and supply chain bottlenecks. One thing we can be sure of: the debates will certainly not run out. The ones responsible for the company, the boards of directors, are well advised to foster a culture of productive debate throughout the organization. First, however, boards of directors must «walk the talk» themselves.

«I love argument, I love debate.
I don't expect anyone just to sit there and agree with me, that's not their job.»
Quote from Margaret Thatcher: Britain's first female Prime Minister.

Margaret Thatcher's quote is certainly accurate in this context. Board members can't just be "yes-sayers". That's not their job. To all boards of directors: take the trouble to create an environment that encourages productive discussion and disagreement within your board. Love the argument, love the debate. Ask critical questions as well as welcome, encourage, and address difficult questions from your colleagues. It will be worth it.

The 2023/2 edition of our Board Dynamics proves how diverse corporate governance is. As evidenced by the multi-faceted articles written by our authors, the NICG – a curious academic network full of free spirits – contributes to advancing topics with both experienced experts and young, talented researchers.

We are at the pulse of the time. Are you too? Let us have tough debates, tackle new projects together and drive corporate governance forward.

Kind regards

Prof. Dr. Michèle Sutter-Rüdisser
Director Institute for Law & Economics
University of St.Gallen

Dr. Cornel Germann
Vice-Director Institute for Law & Economics
University of St.Gallen

1 Minson, J. A., & Gino, F. (2022). Managing a Polarized Workforce. Harvard Business Review, 63.

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Conducting Business: Of Chairs and Conductors

A Personal Perspective

Prof. Dr. med. et Dr. iur. Thomas D. Szucs
Chairperson of Helsana Group,
Board member in various healthcare and life science companies and institutions,
Director of European Center of Pharmaceutical Medicine at the University of Basel, and
Co-Lead Genomic Medicine of
Hirslanden Group.

Just as an orchestra needs a conductor to guide its members and produce a harmonious symphony, a board needs a chairperson to lead, unite, and steer it towards the attainment of its objectives. Chairing a board and conducting an orchestra have more parallels than one might assume.

In the realm of music, a conductor stands as a pivotal figure, orchestrating the symphony of sounds produced by an ensemble of musicians. The conductor is not merely a guide for tempo or rhythm; they serve as a bridge connecting the musical pieces with the emotions they are meant to convey, ensuring that each instrument plays its part in harmony with the others. They bring forth the vision, interpretation, and direction, turning the notes on a page into a living, breathing performance.

Definition: A conductor is a trained and skilled individual who directs a group of musicians during performances, ensuring the ensemble plays in unity, achieves the desired sound, and follows the intended tempo. They utilize gestures, cues, and their expertise in music to communicate with the ensemble and guide them through the intricacies of the piece being played.

In the subsequent sections of this article, I will explore the parallels between the role of a conductor and that of a chairperson in leading a board of directors.

By understanding the nuances of conducting an orchestra, we can glean insights into effective leadership, teamwork, and collaboration, relevant not only in the world of music but also in corporate governance.

1. Orchestrating excellence: The parallel artistry of conductors and chairpersons

Let's delve into the challenges faced when chairing a board and discover how the role is akin to conducting a majestic symphony.

1.1 Setting the tempo: Leading but not dominating

A conductor ensures that every instrument begins and remains in synchrony. Similarly, the chairperson establishes the pace of board meetings, ensuring efficient time management. Yet, like an overzealous conductor who might overshadow the musicians, a chairperson too dominant can stifle the voices of other board members. The challenge lies in setting the rhythm without overshadowing the ensemble.

Example: In a board meeting discussing quarterly results, the chairperson allocates a set amount of time for each agenda point, ensuring everyone has time to speak. However, they resist the urge to interject frequently, letting the flow of discussion carry naturally.

1.2 Harmonizing different sections: Balancing diverse opinions

An orchestra consists of varying sections – woodwinds, strings, percussion, and brass – each with its unique sound. The conductor's challenge is ensuring they harmonize. A chairperson faces a similar challenge, with board members from diverse backgrounds and opinions. Striking a balance, while ensuring each member feels heard and valued, is essential.

Example: The HR department pushes for an enhanced employee benefits program, while the finance team raises concerns about costs. The chairperson creates a collaborative task force consisting of members from both departments to create a balanced proposal.

1.3 Perfecting the crescendo: Knowing when to intervene

In a symphony, there are moments of crescendo where the conductor must assertively guide the orchestra. Likewise, there are moments in board discussions that might require a chairperson's intervention, be it to steer the conversation back on track, resolve a dispute, or make a decisive call. Recognizing those pivotal moments is crucial.

Example: During a heated debate over a new company direction, the chairperson notices tensions rising and intervenes to summarize both sides of the argument, proposing a short break before reconvening to finalize decisions.

1.4 Sight-reading: The art of adaptability

Just as a conductor must sometimes sight-read new compositions and adapt them in real-time, a chairperson should also be ready to tackle unforeseen challenges. This requires an agile mindset, experience, know-how, being well-prepared, yet flexible enough to change course when required.

Example: Upon receiving unexpected news about a sudden market downturn during a board meeting, the chairperson quickly restructures the meeting's agenda to prioritize discussions around this new challenge, demonstrating agility in leadership.

1.5 Rehearsals and feedback: Continuous improvement

Conductors don't perfect symphonies in one rehearsal. They provide feedback, rectify mistakes, and strive for improvement. Chairpersons, similarly, should encourage board evaluations and feedback loops, always aiming for better governance and clearer communication.

Example: After a series of board meetings where some members felt their opinions were overlooked, the chairperson initiates a process for post-meeting anonymous feedback. Using this feedback, they modify the structure and flow of subsequent meetings.

1.6 Embracing solos: Allowing members to shine

A maestro recognizes when it's time for a violin or flute solo, letting the musician shine. In board settings, there are moments when individual members, due to their expertise or passion, should take the lead on certain topics. The chairperson must identify and facilitate such opportunities.

Example: When a new potential risk to the company is discussed, the chairperson turns to the risk management expert on the board, giving them the floor to provide a detailed analysis and guide the ensuing conversation.

1.7 The final bow: Shared success

At the end of a concert, while the conductor takes a bow, the applause is for the entire orchestra. In the same vein, while the chairperson might be at the forefront, the success of a board is collective. Celebrating achievements as a united group is paramount.

Example: After a successful year resulting in substantial company growth, the chairperson organizes an appreciation event for the board, emphasizing that the success was due to the collective effort of all members, not just the decisions at the top.

In conclusion, chairing a board of directors is an intricate dance of leadership, diplomacy, and strategy. It's about setting the tempo, knowing when to intervene, and ensuring that each board member, like every instrument in an orchestra, plays their part to create a harmonious outcome. The next time you find yourself at a board meeting or a symphony, take a moment to appreciate the maestro – be it with a baton or a gavel – guiding the ensemble to excellence.

2. From crescendos to conclusions: Navigating the nuances of preparation

A conductor isn't merely someone who shows up to wave a baton. Behind that baton wave are hours dedicated to deciphering the nuances of a musical score, discerning when the flutes crescendo or when the strings play sotto voce. The conductor crafts a vision for the final rendition, punctuating the score with personalized notes and annotations.

In a parallel fashion, before stepping into a board meeting, a chairperson, along with the board, delves into the agenda, predicts potential hurdles, and strategizes for possible board reactions. This act of 'decoding the agenda' prepares the chair to steer conversations, address issues before they arise, and ensure a seamless narrative.

Just as a conductor is intimate with every musical note, a chairperson should be deeply acquainted with every agenda point.

Both figures, whether in a concert hall or a boardroom, must possess a lucid understanding of the end goal. For the conductor, the goal is a flawless concert; for the chairperson, it's an effective and meaningful meeting. Being attuned to their respective ensembles allows conductors to predict and manage missteps or rhythm shifts. Likewise, chairpersons should remain vigilant about potential disputes or topics that might need deeper deliberation.

3. Maestros & chairs: The rhythms of leadership styles in music and management

Among the many styles of leadership, five typologies fit for addressing salient differences between chairs and conductors.

In essence, understanding the «score» of a board meeting and recognizing the style of leadership that best suits a given scenario can be instrumental in chairing a successful board. Both conductors and chairpersons wield significant influence in guiding their teams to create harmonious outcomes. Recognizing the parallels between the two roles offers valuable insights into effective leadership.

There is no single style of choice. People are different but need to tackle the same kind of challenges.

Using both renowned conductors and notable business leaders, we can identify prominent figures that might fit into these typologies. However, it's essential to note that human behavior and leadership styles are multifaceted, so these categorizations are based on well-known public perceptions and might not encompass the full range of their abilities or styles.

Joseph Pulitzer once said «Put it before them briefly so they will read it, clearly so they will appreciate it, picturesquely so they will remember it, and above all, accurately so they will be guided by its light.»

So let's have a look at the styles of eminent chairs and conductors

Table 1. The leadership styles of chairs and conductors

	Chair	Conductor
The Perfectionist	Detail-oriented, they ensure every aspect of the board's decision-making is precise. They value thoroughness over speed.	Obsessively focused on getting every note right, they'll rehearse a section repeatedly until it meets their expectations.
The Visionary	Big-picture thinkers, they keep the board focused on its larger mission and overarching goals, often inspiring with a compelling vision.	They see beyond the notes, focusing on the emotional journey of the music. They often emphasize the story or context behind a piece.
The Collaborator	Values the input of every board member and fosters an environment of shared decision-making.	Believes in the power of collaboration and often invites input from orchestra members during rehearsals.
The Disciplinarian	Holds board members accountable, valuing structure and order. They're firm in their expectations and ensure procedures are followed.	Runs a tight ship, demanding punctuality, discipline, and rigorous practice. They have strict expectations and aren't afraid to call out mistakes.
The Innovator	Encourages the board to think outside the box, embracing innovative solutions and novel approaches.	Willing to try unconventional interpretations of music or explore contemporary pieces that might be unfamiliar.

3.1 The Perfectionists

Herbert von Karajan – The long-time conductor of the Berlin Philharmonic was known for his relentless pursuit of perfection, both in terms of sound quality and the precision of performance.

Steve Jobs – The co-founder of Apple was famously meticulous about product design and functionality, demanding nothing less than excellence.

3.2 The Visionaries

Leonard Bernstein – Renowned for his ability to breathe fresh life into old compositions and his emphasis on the narrative and emotional journey of a musical piece.

Elon Musk – The CEO of SpaceX and Tesla, among other companies, is known for his ambitious vision of the future, from colonizing Mars to transitioning the world to sustainable energy.

3.3 The Collaborators

Gustavo Dudamel – Currently the conductor of the Los Angeles Philharmonic, Dudamel is known for his energetic style and his tendency to cultivate a collaborative relationship with his musicians.

Indra Nooyi – The former CEO of PepsiCo, Nooyi was known for her inclusive leadership style and her emphasis on getting insights from all levels of her organization.

3.4 The Disciplinarians

George Szell – The conductor of the Cleveland Orchestra from 1946 to 1970, Szell was known for his demanding rehearsals and exacting standards.

Jack Welch – The former CEO of General Electric, Welch was known for his rigorous management style, setting high standards, and expecting results.

3.5 The Innovators

Pierre Boulez – A composer and conductor, Boulez was known for his avant-garde compositions and his willingness to explore the boundaries of musical expression.

Richard Branson – The founder of the Virgin Group, Branson has always been known for his unconventional business strategies and his penchant for entering and disrupting various industries.

It's exciting to draw parallels between the worlds of music and business. Both spheres, though seemingly different, require a similar blend of vision, collaboration, discipline, and innovation to achieve greatness.

4. Discord and dynamics: Navigating mishaps in orchestras and boardrooms

In both the worlds of symphony orchestras and board meetings, unexpected challenges can arise. The parallels between the two showcase that, irrespective of the domain, effective leadership, and teamwork are essential in navigating unforeseen complications.

In the world of orchestras and corporate boards, disruptions can emerge as silent tremors or startling quakes, often testing the resilience and adaptability of their participants.

In an orchestra, imagine a musician missing an entrance or playing an offbeat note. This slight misstep can ripple through the ensemble, just as a board member overlooking a vital detail in a report might skew the collective decision-making process, anchoring it on potentially inaccurate information.

Sometimes, the friction stems from the clash of perspectives. A section leader's interpretation of a sonata might veer from the conductor's vision, much like board members locking horns over divergent views on the company's trajectory. These contrasting perspectives, if not addressed, can cloud the path ahead.

However, it's not always internal dynamics at play. An unexpected external noise, like the intrusive ring of a cellphone in a concert hall, can scatter an orchestra's focus. Similarly, unforeseen market shifts or sudden company revelations might jolt a board's agenda, leading them down unforeseen discussion alleys.

Preparation—or the lack thereof—can profoundly impact both realms. A musician's insufficient rehearsal can mar an orchestra's collective sound. In the boardroom, an unprepared member might unintentionally sidetrack discussions, seeking clarifications that slow the pace of decision-making.

Yet, the most delicate of all challenges might be rooted in interpersonal dynamics. Personal conflicts amongst musicians can ripple through rehearsals and performances, while unresolved tensions between board members might stifle open dialogue and impede decisive action.

Practical issues too, have their moment in the spotlight. A musician's malfunctioning instrument can jolt a performance, echoing the chaos a board might feel when faced with technical glitches in their virtual meeting platforms or presentation tools.

At the helm, leadership remains pivotal. A conductor's ambiguous cues can lead to a disjointed musical rendition, and in parallel, a chairperson's ineffective facilitation might see board discussions meandering into uncharted territories.

And finally, synchronization is of the essence. If an orchestra's sections lose sync, the tempo falters, mirroring the potential misalignments in a corporate board where varying departmental paces might cause strategic hiccups.

Yet, through these challenges, the beacon for both orchestras and boards remain the same: the symbiosis of clear communication, adaptive leadership, and undeterred teamwork. With a vigilant eye on potential pitfalls and a quiver full of contingency plans, both orchestras and boards can wade through adversities, crafting harmonies and strategies that resonate with their purpose.

5. Evolving in harmony: The learning curve of conductors and chairs

How does one become a successful conductor? Can one also become a successful chair? What do both have in common in getting there?

Becoming a successful conductor or board chair involves a combination of education, experience, personal growth, and the ability to inspire others. While the environments in which they operate differ, the paths to success in both roles share many similarities.

In essence, while the domains of music and business might seem worlds apart, the journey to leadership in both fields is strikingly similar. A blend of formal education, practical experience, continuous learning, and personal growth forms the cornerstone of success in both professions. Leadership, at its core, is about guiding, inspiring, and bringing out the best in others, whether in a boardroom or a concert hall. In the realm of symphonic sounds and corporate strategies, two figures stand prominently, guiding their respective ensembles: the conductor and the board chair. The concert and the board meeting may appear as contrasting events.

Yet, beneath the surface, the tasks of good conductors and chairs resonate with strikingly similar melodies. In both the concert hall and the boardroom, success rests on cohesive collaboration, steered by a vision and facilitated by effective leadership. The conductor and the chair, in their unique ways, exemplify the art of bringing individuals together to create something greater than the sum of its parts. Whether it's a symphonic masterpiece or a groundbreaking corporate strategy, their leadership orchestrates harmony amidst diversity.

Table 2 Learning on becoming a chair or a conductor

Elements	Chair	Conductor
Education and training	Formal education: A background in business, typically with a bachelor's or master's in business administration, can lay the foundation. Certification programs: Certain programs offer specialized training for corporate governance, which prospective chairs might find beneficial. Industry knowledge: An in-depth understanding of the industry in which the company operates can be vital.	Formal education: Many conductors begin with formal education in music, often earning bachelor's, master's, or even doctoral degrees in music, music theory, or musicology. Specialized programs: There are institutions and programs solely dedicated to producing the next generation of conductors, teaching them the nuances of conducting and orchestral leadership. Instrument proficiency: It's beneficial for conductors to be proficient in one or more musical instruments. This gives them an understanding of the challenges and capabilities of the musicians they lead.
Experience and mentorship	Many chairpersons serve on boards in various capacities before taking on the role of chair. They often learn the ropes from experienced chairs or through mentorship relationships.	Most conductors start in smaller roles, perhaps as an assistant conductor or leading smaller ensembles, gradually moving up to more significant orchestras. Mentorship from seasoned conductors can be invaluable.
Leadership qualities	Vision: Both need to have a clear vision and be able to communicate it effectively to their teams. Decision-making: They must make crucial decisions, often quickly, and stand by them. Empathy: Understanding the needs, strengths, and weaknesses of team members is essential. Conflict resolution: Both roles will inevitably encounter conflict and need the skills to resolve them constructively.	
Continuous learning	Staying updated with industry trends, governance best practices, and understanding global market shifts can be pivotal.	This could involve understanding new compositions, exploring different genres of music, or adopting novel conducting techniques.
Inspiration and charisma	Both roles require individuals who can inspire and motivate their teams. Charisma can be an invaluable trait, ensuring that the group trusts and follows their leadership.	
Networking	Building relationships within the industry can open up opportunities, whether it's invitations to conduct at renowned venues or being considered for a chair position at a significant organization.	

Table 3 The ten tasks of chairing and conducting

Tasks	Chair	Conductor
1. Setting the tone	Starts the meeting by setting the agenda, ensuring everyone is on the same page, and establishing the mood for a productive discussion.	Begins by ensuring the orchestra is tuned to the same pitch, setting the stage for a harmonious performance.
2. Guiding with vision	Possesses a clear vision of the company's goals and ensures that the board's discussions and decisions align with this overarching vision.	Has a clear interpretation of the music piece, guiding the orchestra towards a cohesive and compelling performance.
3. Managing dynamics	Manages the dynamics of the boardroom, ensuring all voices are heard and no single member dominates the discussion.	Controls the volume and intensity of the orchestra, ensuring some sections aren't overpowering others.
4. Responding to mistakes	If misinformation arises or there's a contentious point, the chair steers the conversation back on track, maintaining focus and decorum.	If a musician falters, the conductor uses gestures or cues to guide them back without breaking the ensemble's flow.
5. Encouraging participation	Ensures every board member has an opportunity to express their opinions or share insights, fostering inclusivity.	Invites solos or emphasizes certain sections at specific moments to shine.
6. Balancing the ensemble	Strives for a balance in discussions, ensuring diverse viewpoints are considered, leading to well-rounded decisions.	Ensures a balance between different instruments, so the orchestra sounds harmonious and not lopsided.
7. Adapting in real-time	Adapts the meeting's flow based on unfolding discussions, new information, or unexpected challenges.	Adjusts to the acoustics of different venues or the energy of the audience.
8. Recognizing and nurturing talent	Recognizes potential in board members, encouraging their growth and valuing their contributions.	Identifies promising musicians and offers them opportunities or guidance to enhance their skills.
9. Ensuring clarity	Strives for clear communication, ensuring that every board member understands decisions, action items, or the rationale behind strategies.	Uses clear gestures to ensure every musician understands cues, tempo changes, or dynamics.
10. Closing with purpose	Summarizes the meeting's outcomes and ensures clarity on action points, wrapping up with intent.	Ends the performance with a clear, decisive gesture, signaling the conclusion.

6. The aftermath: Reflective echoes beyond the stage and boardroom

The final note has been played; the last point on the agenda discussed. The audience applauds, the board members depart. Yet, for conductors and chairs, the journey doesn't end with the lowering of the baton or the adjournment of the meeting. The aftermath is a critical phase where both roles engage in reflection, feedback, and preparation for the future.

Table 4 Tasks of chairs and conductors after the sessions

Tasks	Chair	Conductor
Review and reflect	Reviews the minutes of the meeting, reflecting on the discussions' effectiveness, decisions made, and any pending issues.	Listens to recordings of the performance to evaluate the orchestra's execution, pinpointing areas of excellence and those needing improvement.
Gather feedback	Solicits feedback from board members, gauging their thoughts on the meeting's productivity and areas for better facilitation.	Seeks feedback from orchestra members, understanding their perspectives on how the concert went and areas of potential enhancement.
Recognize and appreciate	Recognizes the contributions of board members, especially those who provided critical insights or took on significant responsibilities.	Acknowledges the hard work of musicians, especially those who had challenging solos or parts, appreciating their dedication and effort.
Address concerns	Addresses any conflicts or unresolved issues from the meeting, ensuring that all board members are aligned and any tensions are diffused.	Addresses any logistical or interpersonal issues that might have arisen during rehearsals or the concert, ensuring a harmonious environment.
Plan ahead	Plans the agenda for the next board meeting, considering unresolved topics and upcoming strategic initiatives.	Looks to the next concert or series, selecting pieces, planning rehearsals, and considering the ensemble's growth areas.
Continuous learning	Stays updated with industry trends, governance best practices, and may attend seminars or workshops on effective leadership and board management.	Studies new compositions, explores different conducting techniques, and might even attend workshops or seminars.
Engage with the broader community	Engages with stakeholders, shareholders, or the media, communicating the board's decisions or the company's strategic direction.	Engages with fans, patrons, or the media, promoting upcoming concerts or discussing recent performances.
Recharge and recalibrate	Takes time to rest, ensuring they're rejuvenated for the next wave of rehearsals and performances.	Ensures a balance between professional responsibilities and personal time, recharging to lead with renewed energy. In the reflective quiet that follows the crescendos of concerts and board meetings, both conductors and chairs delve into a phase of introspection, growth, and forward planning. Their roles may seem culminating at the height of their respective events, but true leadership continues to echo long after the spotlight dims, ensuring continued harmony and success.

7. Concerted leadership: the resonance between committees and musical sections

Board committees, much like section leaders in orchestras, are foundational pillars that exhibit nuanced parallels. In the corporate realm, board committees delve into specialized areas of significance—be it audit, compensation, or governance—offering unmatched expertise. Analogously, section leaders breathe life into specific orchestral sections, be it strings, woodwinds, brass, or percussion, becoming masters of their musical realm.

In steering their ship, both these entities offer leadership and guidance. While board committees light the way with direction and recommendations, ensuring that intricate matters gain the spotlight, section leaders sculpt and finesse their ensemble's output, weaving a tapestry of harmonious sound during both rehearsals and grand performances.

These entities also emerge as vital communication conduits. Board committees bridge the gap between overarching board decisions and granular management deliberations, fostering efficient information flow. In the melodious realm of orchestras, section leaders become the voice of their ensemble, translating the conductor's vision into actionable feedback for their peers.

Responsibility is a mantle they both wear with pride. With board committees ensuring stringent compliance, best practices, and diligent execution in their sphere, section leaders uphold the sanctity of their section's performance, ensuring adherence to the conductor's baton and the symphony's overarching quality.

They both also are standard-bearers. While committees sculpt best practices, ensuring organizational harmony with regulations, section leaders set the performance benchmark, exuding unmatched technique, interpretation, and discipline.

The pursuit of excellence never ceases. Board committees immerse themselves in the ever-evolving landscape of regulations, refining practices and keeping the board in the know. Simultaneously, section leaders, in their relentless quest for musical perfection, inspire their ensemble to reach new crescendos.

Mentorship weaves its way into their roles too. New entrants into the corporate world find mentors in board committees, while budding musicians look up to their section leaders for guidance, integration tips, and inspiration.

To encapsulate, both board committees and section leaders are embodiments of specialized leadership, quality assurance, and essential communication in their respective domains. Their synergy epitomizes the beauty of specialization within a vast collaborative tapestry, whether orchestrating corporate success or a timeless symphonic piece.

8. Harmonizing notes and quotes: Leadership insights from renowned conductors

While many conductors have spoken about leadership in the context of their roles with orchestras, direct comparisons between conducting and business leadership in their quotes might be less common. However, many of the principles they discuss can be easily applied to a business context.

Herbert von Karajan:
«The art of conducting consists in knowing when to stop conducting to let the orchestra play.»

Sometimes, the best leadership move is to step back and let your team take the initiative. Trust in their abilities.

Leonard Bernstein:
«To achieve great things, two things are needed: a plan and not quite enough time.»

Often, constraints and a clear strategy can drive innovation and efficiency in business.

Arturo Toscanini:
«I rehearsed the orchestra for a week, and the first concert was fine. But the second was a catastrophe. When I got home, I found a ten-page letter from Gershwin telling me how to conduct his music. I didn't answer him.»

There will be countless voices and opinions on how to manage or lead. However, a leader must trust their judgment, even in the face of criticism.

Benjamin Zander:
«The conductor of an orchestra doesn't make a sound. He depends, for his power, on his ability to make other people powerful.»

A great leader amplifies the abilities of their team members, empowering them to achieve collective goals.

Carlos Kleiber:
«You have to live the music 24 hours a day.»

Passion and dedication to your craft, whether music or business, are essential for true success.

9. Symphonic strategies: My personal journey from leading boards to conducting orchestras

Having held the distinguished role of a chair across various boards for an extensive period, I have been privy to the nuanced art of steering leadership decisions, navigating challenging conversations, and guiding a collective towards unified goals. But when I embarked on the profoundly different journey of learning to conduct symphony orchestras, I anticipated it would be a separate realm, a fresh challenge unrelated to the boardroom dynamics.

Yet, as I delved deeper into the world of orchestras, immersing myself in their complex harmonies, I began to draw parallels between the two seemingly contrasting domains. The baton and the gavel, I realized, were not as different as they appeared on the surface.

Here's what I've gleaned from my twin experiences:

9.1 The pulse of unity

Just as every note in a symphony needs to harmonize for a cohesive performance, every decision in a board meeting requires alignment for collective success. The conductor, like the chair, must sense discord or disagreement and swiftly act to restore unity.

9.2 Fluidity in leadership

An effective chair, much like a skilled conductor, understands that leadership is not about rigid control. It's about setting a direction and then adapting based on the ensemble's feedback – whether it's the response of violin strings or board members' insights.

9.3 Listening before leading

In the boardroom, as on the podium, the art of listening is paramount. Before making decisions or guiding the ensemble, it's essential to truly hear – be it the faintest note from the flute or the subtle reservations in a board member's voice.

9.4 The delicate balance of power

Holding the baton or leading a board meeting is a position of power. But true strength lies in empowering others – enabling every musician to shine or every board member to voice their insights.

As my journey into the world of conducting continues, I find these lessons interwoven in every rehearsal, every performance, enriching my role as a board chair. In the end, it reaffirms the belief that leadership, in any form, is about orchestrating harmony amidst diversity. Whether guiding a group of talented musicians or steering a company towards its vision, the essence remains: fostering collaboration, nurturing talent, and creating a symphony of success.

Starting from Scratch: How to Build a Board during a Spin-off

Anna Mattsson
Partner with McKinsey & Company. Anna Mattsson leads the Strategy & Corporate Finance Practice for Switzerland and co-leads the separation service line around the world. She is a globally recognized merger management and carve-out advisor specializing in advising boards and management teams in designing, planning, and executing complex, cross-border integrations, separations, and alliances.

The rationale for a spin-off is that, once separate from the bigger business, the newly created entity has more strategic and operational freedom. A spin-off also brings greater transparency to the value of the assets. Getting to a win-win outcome and creating value for both, the parent company («ParentCo») and the spin off company («SpinCo»), is often easier said than done.[1] Unlike in an initial or secondary offering of company shares to raise capital, there is no cash benefit to the ParentCo. The company is essentially split and shares in the new entity (the «SpinCo») are allocated to the ParentCo's existing shareholders.

Senior leaders who have been part of a spin-off attest to how challenging it can be. There is a long inventory of critical decisions that need to be made in order to disentangle the two entities and ensure that the SpinCo can operate effectively from the day it is listed on the stock market. The ParentCo will need to decide which assets will be part of the SpinCo, for instance, and how to manage the interdependencies that still exist – the manufacturing sites that both might still be using, for example, or the allocation of pre-existing debt and liabilities. It will need to decide the organizational structure of the new company. And arguably some of its most important decisions will be those concerning the set-up of the new board.

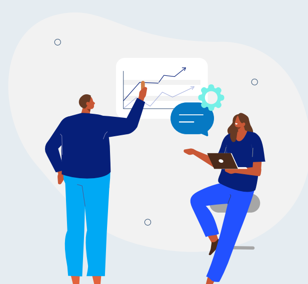
As in any company, the board will play an important role in the SpinCo's success. The difference here, however, is that a SpinCo board is set up from scratch. This can be a great opportunity. «Everyone joins on the same day,» said one interviewee. «There's no baggage, no established procedures, no cliques – a rare chance to begin with a clean slate.» But it can also be a challenging endeavour, not least because of the limited amount of time ParentCo has – on average six to nine months – to set up a full board equipped with the skills, experience, values, and ways of working that will ensure its effectiveness from the get-go.

1 «Achieving win-win spin-offs», McKinsey Quarterly article, October 2021.

Relatively little has been published regarding how to establish a SpinCo board. Hence this research. We analysed the 11 spin-offs made by companies in Switzerland between 2012 and 2023, where the SpinCo became a listed company in Switzerland. We also conducted multiple interviews with leaders of search firms, transaction experts, board directors, and other senior leaders of SpinCo's.

One clear message from the research is that companies committed to a spin-off will need to move swiftly to ensure a high-performing board is in place by the time that the SpinCo is listed. Investors and analysts will be watching. With that in mind, this article provides some suggestions on how best to proceed in a spin-off when considering the board's structure and composition, the selection process for board members, and how to start building the team (see also exhibit 1).[2]

Exhibit 1: Illustrative timeline - Building a board during a spin-off



Board structure and composition

Critical decisions:

- Board structure and level of independence
- Board size
- Number and type of board committees

Chair and board member selection

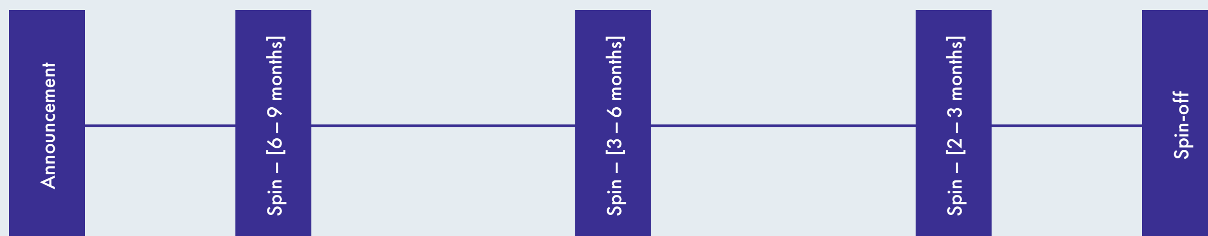
Major selections:

- Appointment of the chair
- Appointment of core board committee chairs
- Appointment of remaining board directors

Building the team

Main objectives:

- Establish trust and respect
- Give directors an opportunity to familiarize with the sector, the company, its strategy and its stakeholders
- Define the working norms
- Help ensure key decisions are made quickly
- Provide CEO and management team initial guidance and support



Note: Timings are indicative. Some activities can take place prior to spin-off announcement (source: McKinsey & Company)

2 Recognize that some of the findings may not be appropriate in other regions and jurisdictions.

1. The board structure and composition

It falls to the ParentCo to consider the structure and composition of SpinCo's board. It's tempting to replicate the ParentCo's board set-up, perhaps choosing the same number of board members, setting up the same board committees, hiring some of the same people that sit on the ParentCo's board, or selecting people with similar profiles. However, the very reason for the spin-off is to differentiate the two entities, which means that replication is unlikely the right answer. Rather, the structure and composition of SpinCo's board needs to reflect the new company's needs. Getting this right can have significant impact on new company's immediate future as well as its success over the medium to long term. Several of our interviewees who had overseen or been part of a successful spin-off stressed the value of dedicating attention to this at the outset.

Structure

Defining and agreeing upon the board's structure – its size, its committees, and its responsibilities – is a decisive step, as revisions can be time-intensive and costly given that they may have to be put to shareholders and require formal amendments. Decisions made should therefore not only reflect local legal requirements but the SpinCo's strategic objectives and the specific challenges that SpinCo might face.

The ParentCo should decide three main things:

1. Whether the board should have a one- or two-tier structure – a decision sometimes, but not always, stipulated by local legislation as well as the ideal percentage of independent board directors.

2. The size of the board. There is no right size, so a governance charter that allows for some flexibility, perhaps between seven to nine members, can prove helpful. Our interviewees expressed no clear preference for an odd or even number of board members.

3. The number and types of board committees. An audit committee is standard for any listed company, as are one or two committees focused on people-related topics – governance and nomination, and compensation, for example. Other choices will depend on the industry and core functional requirements and should add real value. Pharmaceutical companies tend to have a separate R&D committee, for example, mining companies a sustainability, health, risk, and governance-focused committee, and in most jurisdictions, financial services companies will have a separate risk (and ethics) committee.

Composition

With the structure decided, attention can turn to the board's composition in terms of knowledge, experience, skills, and capabilities. It is premature to begin identifying specific candidates for the board at this stage.

The chair – way and above the most influential board member in determining the board's success – will need a certain degree of relevant sector and functional knowledge. And every SpinCo board will need directors with in-depth finance expertise and experience handling remuneration, talent, organizational, and cultural issues in order to set up new structures and activities to govern these areas and lead the relevant committees. Digital and technology skills, risk management expertise, and governance capabilities, all ideally gained in similar sectors, are important too.

But it's not just industry or functional knowledge and experience that count. Perhaps most important for a SpinCo board is the leadership experience of the board chair and of the chairs of the core board committees. These are the people who lead and facilitate discussions, who decide what will be discussed, and who allocate time for discussions. They set the tone for the new board's work. Ideally, the chair of the board of a SpinCo will also have experience in building an effective board and determining its ways of working – drawing up a board agenda and ensuring inclusivity, for instance. So, while it's important to have people with deep industry expertise at board level, that expertise does not necessarily have to sit with the board chair or the chairs of the committees.

The chairs can acquire more knowledge over time, and experts can be drawn in to advise on specific issues when needed.

Diversity matters also when composing the board. One chair we spoke to emphasized «Don't back away from diversity even if it seems difficult at the start. Stick to it, there is fantastic diverse talent out there and you will find it and it will make a big difference to the successful composition of the board.»

The personal characteristics of board members matter too. Everyone is starting afresh, which brings a rare opportunity to build a culture of trust and collaboration. Hence the importance of recruiting those who value teamwork. The ability to listen and to ask the right questions, integrity, credibility, independence of thought, and sound judgement are all important qualities too. Our interviewees set the bar high in terms of personal qualities. «There's a «no jerks» rule,» said one interviewee bluntly. «There is too much to do from scratch, so you need people who work towards one common objective: helping the new company become successful.» Another put it like this: «Heavyweights on the board sometimes don't give others the space to express their opinions. You don't need big shots that will wow investors. You need people who will be great members of a high-performing team».

Finally, bear in mind the importance of independence when considering the board's composition and the profiles of its members, as well as the time commitments required. The majority of SpinCo board directors should, ideally, be independent from the ParentCo as well as from anyone else involved in the spin-off process in order to avoid conflicts of interest. It's wise not only to avoid directors who sit on the board of both the ParentCo and the board of the SpinCo, but also third parties who might be involved in the spin-off process. In the companies we reviewed, the median proportion of independent board directors was ~90% percent. In several instances the board was either fully independent or exclusively composed of non-executive directors.

Being a board member of a SpinCo board is often more time consuming, especially in the beginning because in addition to the normal board work there is additional set up work to be completed. The board should therefore also comprise of people who have enough time to devote to the tasks of a SpinCo board – time that directors may not have if they serve on several other boards. One interviewee said he had spent two weeks working for SpinCo's board in the two months preceding its stock market listing. In his other board positions, he wouldn't expect to work for more than two weeks over the course of six to nine months.

Adequate bandwidth is a particularly important requirement for the chair of a SpinCo, who may have to begin work as early as six months before the listing to drive the board selection, define the way the board will work, host the first board meetings, and support the CEO with major strategic decisions regarding, for example, capital allocation, service agreements, legal issues, and debt and liability commitments.

2. The selection process

The first appointment should be that of the chair, as the chair has a key role in proposing other board members and ultimately establishing the quality of the board. Moreover, the chair's reputation can influence who else agrees to join the board. Bear in mind that prospective board members are being approached to join a company for which there is limited financial information and without knowing who else will be sitting on the board. Time and again therefore, interviewees emphasized the critical role the chair plays in the selection process for other board members. «He or she can be the magnet for filling other roles», one interviewee said.

Interviewees were unanimous in expressing that the chair should be appointed soon after the intended spin-off was announced so that work could begin swiftly to assemble the full board. Ideally, the new CEO will have the opportunity to give some input on the choice of the board chair, as the two will need to work well together. But the choice is not ultimately the CEO's. Some search firms suggest the ParentCo pick two suitable candidates, then request that the CEO meet both, perhaps over dinner, with a view to getting a feel for the chemistry between them and how this might impact their working relationship.

Once the new chair is appointed, attention can turn to selecting the chairs of the core committees – in particular the audit and nomination and the remuneration committees. These appointments may prove to be among the hardest to make given the precise functional expertise required, so work needs to start soon. Thereafter, other roles can be filled. «Think board chair, audit chair, and then backfill other key committees», was the approach of one interviewee. All this happens well in advance of the spin-off, however. The majority of SpinCo board directors we interviewed were approached four to six months before the listing to sound out their interest in joining the new board.

To help with the selection process, companies often turn to search firms that scan the market and screen appropriate candidates. The search firm might also conduct initial conversations with candidates and can support the chair through all the necessary process steps – short-listing candidates, running and coordinating interviews, synthesizing feedback, and conducting background checks, for instance. But several interviewees stressed that, while it was important that the chair had confidence in the search firm, the chair should be closely involved at every step of the selection process, not hand over all responsibility. Some of the chairs interviewed even ran background checks themselves.

In Switzerland as in many other jurisdictions, the final appointment of the chair and all directors will need to be approved by the shareholders.

3. Building the team

An early start in defining SpinCo's board's structure and its composition and selecting the right candidates helps set the foundations of a successful board. But there is more to do to strengthen them. The board needs to learn to function well together – and fast.

Holding shadow board meetings before the new company is listed can help in this respect. Interviewees who had sat on the board of a SpinCo said the full board had met two or three times in advance, as had the board committees. The board will not yet have any voting rights – overall liability still sits with the ParentCo. Nonetheless, such meetings serve five important purposes:

1. Establish trust and respect amongst board directors.

2. Give new directors an opportunity to familiarize themselves with the sector, the company, its strategy, and its stakeholders. All our interviewees said that their boards had set aside time to run onboarding sessions. Some also organized site visits or invited external experts to speak on relevant topics.

3. Define the working norms. They set dates for future board meetings, for example, and indicate which topics will be discussed, when. And they ensure relevant charters, standards, and processes are clear, determining matters such as how many days in advance of a meeting reading material should be shared. Pre-launch meetings can also make clear the roles and responsibilities of the board versus those of the management team after the spin-off. Before the closure of the transaction the board sometimes even becomes involved in negotiations regarding the separation of the two businesses, be that concerning debt and liabilities or the compensation of C-level executives, for instance. The post-launch allocation of duties will therefore need to be clarified. Pre-launch meetings are also an opportune time to establish a collaborative working relationship with the management team.

That might mean requesting a monthly CEO memo to the board, or meetings between relevant parties – the chief human resources officer and the chair of the nomination and / or remuneration committee, for example. Establishing these relationships can be easier when there are no live, difficult issues to address, and may stand the company in good stead for when there are.

4. Help ensure key decisions are made quickly after the spin-off. Certain decisions that are the board's responsibility will not be possible until the new company is listed – the incentive structure for executives, for example, or the appointment of external auditors. But the board and relevant committees can do preparatory work: the audit committee can review and assess potential external auditors, for example.

5. Provide initial guidance and support for the CEO and management team when making important decisions or entering into negotiations with the ParentCo on issues that will have a long-term impact on the SpinCo.

4. Conclusion

Companies that are contemplating a spin-off, and members of the new board they create, have a unique opportunity to help shape the new entity's success from its inception. It is a privileged role to play. But setting up a SpinCo board carries challenges that, if not well managed, could hamper not only the short-term success of the new company but also have more lasting consequences. Fortunately, by studying the lessons and best practices of those who have helped lead successful spin-offs before, leaders today can be better prepared to meet a spin-off's critical challenges and build an enduringly successful board team.

The author would like to thank all interview partners for their time and invaluable insights shared.

Understanding the Auditor’s Independence and Why this is Relevant for the Board of Directors

Philipp Hallauer
Partner of KPMG Switzerland and until 30 September 2023 a member of KPMGs Executive Committee in charge of National Quality & Risk Management. In that role Philipp Hallauer was responsible for the firm’s risk assessment, overseeing client and engagement acceptance, compliance with independence rules and other laws and regulations, the firm’s system of quality management, various related internal monitoring programs and the interactions with the firm’s relevant regulators.

1. Setting the scene

Auditor independence is a complex topic in today’s regulated world. Whenever something goes wrong in our economy and the auditor was not able to prevent it, it seems the first measure that regulators take is to strengthen the independence requirements. No doubt, independence is a prerequisite for the credibility and quality of any audit. The problem is that regulatory overreaction has led to a jungle of national (e.g., Swiss, UK, US/SEC), regional (EU) and global independence rules. Depending on an audit client's public profile and direct or indirect exposure to different jurisdictions, this may render compliance a major challenge. Some argue that the easy way out is for an audit firm to only provide audit services to its audit clients and sell all its other services to its non-audit clients. But is that in the best interest of an audit client and the economy overall? Not to mention the mandatory audit firm rotation after 10 or 20 years, as adopted in the EU with related cooling-in and cooling-off requirements, and the voluntary periodical audit tenders conducted in Switzerland on the grounds of good governance, which limit the benefits of such an approach. This is because a change of a non-audit client to an audit client requires a thorough analysis of all non-audit services (NAS) world-wide and the discontinuation of prohibited services at a potentially unfavorable point in time, which will necessarily put an end to the efforts of building a longer-term «advisory-only» relationship with a client.

The auditor is well positioned to provide additional value to an audit client and its stakeholders to the extent permissible and within a reasonable, «healthy» scope, be it in the areas of tax compliance, M&A support or operational excellence. Not making use of the auditor’s know-how and experience with respect to an audit client adds costs and complexity to that entity’s dealings with third party service providers and misses an opportunity to deepen the auditor’s understanding of the client’s business.

The majority of the large audit firms have come to the conclusion that the multidisciplinary business model is best suited to provide the firms with the talents and expertise (e.g., tax & legal, IT, forensic, valuation, due diligence, etc.) needed to understand a client’s business and perform a robust quality audit.

This model comes at a price, however, as the audit firms must be adequately equipped and prepared to effectively manage and monitor compliance with applicable independence regulations, and maintain independence in fact and in appearance at all times. Over the years, all large audit firms have developed sophisticated tools and processes to monitor independence world-wide, whether with respect to services, business relationships, or personal investments of those directly or indirectly involved in an audit engagement.

As it is the auditor's responsibility to secure independence and include a respective confirmation in the audit opinion, why should the Board care? At least when it comes to a «Public Interest Entity» (PIE)[1], the Board of Directors is expected to evaluate the auditor's performance.[2] The assessment of the auditor's independence is an important aspect of that and includes a determination of the additional services that a company can, and is prepared to, procure from its auditor. Effective from financial years beginning on or after 15 December 2022, IESBA[3] standards require that the auditor communicate with «Those Charged With Governance» (TCWG; usually the Board or the Audit Committee) about a proposed NAS and obtain their pre-approval, i.e., before an engagement is accepted. As this requirement extends to all NAS offered by the audit firm's network to the PIE audit client on a world-wide basis, the audit firm needs to agree with the client on a defined process to manage these approvals as efficiently and effectively as possible. This is why it is important that a Board or an Audit Committee understand the basic principles embedded in the applicable regulations.

1 For purposes in Switzerland, PIE is defined in Art. 2(c) of the Swiss Auditor Oversight Act (AOA) to include publicly traded companies in accordance with Art. 727 para. 1(1) of the Swiss Code of Obligations (CO), as well as supervised persons and entities within the meaning of Art. 3 of the Swiss Financial Market Supervision Act (FINMASA), which in accordance with Article 9a AOA must mandate a licensed audit company for a regulatory audit in accordance with Article 24 FINMASA.

2 The Directive on Information relating to Corporate Governance issued by SIX Exchange Regulation AG, 29 June 2022, Annex, 8.4 requires disclosure of the «Instruments pertaining to the external audit: A description of the instruments available to the board of directors that assist its members in obtaining information on the activities of external auditors. This includes, in particular, the means by which the auditing body reports to the board of directors, as well as the number of meetings the board of directors as a whole or audit committee has held with the external auditors.»

3 International Ethics Standards Board for Accountants.

While the following is written in the context of a PIE, the basic principles are equally or similarly applicable to privately held companies (except for the requirement to have all NAS pre-approved, which is limited to PIEs). However, when it comes down to the details, IESBA standards are often less strict with regards to the application of the basic principles to privately held companies.

2. Mutual dependencies inherent in the Swiss legal framework

Swiss law assigns responsibilities to the Board of Directors that extend beyond a pure oversight role, and imposes duties on the statutory auditor that extend beyond a pure audit role. These conditions affect the relationship between the two statutory bodies:

- The Board has the ultimate management responsibility, which includes, among others, the preparation of the annual report, including the financial reporting and management commentary to the shareholders.[4] The Board is required to provide the auditor with all documents and information needed by the auditor to perform the audit.[5] This leads to the special situation that the auditor expects a member of the Board (preferably the Chair of the Board and the Chair of the Audit Committee) to sign the representation letter, together with the CFO and possibly the CEO, while the Board usually waits for the auditor's green light (or draft audit report) before signing off on the financial statements.

- The auditor has a duty to notify the court in case of an obvious over-indebtedness if the Board does not proceed accordingly.[6] The Board, on the other hand, has a duty to oversee the performance of the auditor and propose (re-) election of the auditor to the shareholders.

4 Art. 716a CO.

5 Art. 730b para. 1 CO.

6 Art. 728c para. 3 CO.

Furthermore, considering that the auditor draws a conclusion over the quality of financial reporting prepared by the Board, while the Board is responsible for determining the fees the company is prepared to pay for the audit, it becomes evident that the Swiss legislation bears potential for conflicts of interests regardless of all the other independence rules that need to be adhered to. Therefore, a professional mindset, integrity and transparency about circumstances that bear on the auditor's independence are critically important to protect the quality of the audit.

3. The basic principles of independence

So what should a Board look out for when evaluating a non-audit service? While this article can merely scratch at the surface of independence regulations, it is important to be aware of the basic threats that independence rules generally try to address:

- Self-interest, i.e., the threat to independence when the auditor holds a financial interest or has another interest (e.g., when the audit firm has outstanding fees receivable from its prior year audit) that could inappropriately influence the auditor's judgment or conduct.

- Self-review, i.e., the threat that an auditor will not appropriately evaluate the results of a previous judgment made, or activity or service performed by the auditor or another individual within the same audit firm or network, on which the auditor will rely when forming a judgment as part of the audit (e.g., when the auditor or the audit firm has been involved in designing a process supporting financial reporting, or has been providing input to the calculation of an impairment loss or a provision included in the financial statements).

- Advocacy, i.e., the threat to independence when an auditor becomes involved in promoting or defending an audit client to the extent that it may impair the auditor's objectivity.

- Familiarity, i.e., the threat that due to a long or close relationship with a client, an auditor may not apply the required professional skepticism when forming a judgement about a client's position (e.g., when the CFO is a relative or close friend of the auditor in-charge).

- Intimidation, i.e., the threat that an auditor will be deterred from acting objectively because of actual or perceived pressures, including attempts to exercise undue influence over the auditor (e.g., when an audit client threatens to change auditors in the context of a disagreement over a financial reporting matter).

It is up to the audit firm to identify, evaluate and, by introducing safeguards, reduce such threats to an acceptable level, and explain the considerations to TCWG. If this is not possible in a specific circumstance, the audit firm may not proceed with the respective service. The various independence frameworks provide guidance on how to apply this «threats and safeguards» model. While international independence standards follow a more principles-based approach[7], SEC and EU independence provisions are more rules-based. All frameworks, however, stipulate that the auditor shall not assume any management responsibility for an audit client, as this may give rise to different threats that cannot be overcome. In addition, the revised IESBA standards effective 15 December 2022 recognized the need to strengthen the provisions on certain NAS in order to enhance stakeholder confidence in the auditor's independence. Specifically, the IESBA acknowledged that a self-review threat created by the provision of a NAS to a PIE audit client cannot be eliminated or reduced to an acceptable level by way of safeguards.

With respect to Swiss law, Art. 728 CO lists a number of explicit prohibitions, such as being part of a management function, holding a financial interest (self-interest), accepting special advantages (self-interest, intimidation), accepting an engagement that leads to a financial dependency (self-interest), having a close relationship to a member of management or the Board (familiarity), or contributing to the preparation of the accounting records (self-review).

7 Section 120 of the Handbook of the International Code of Ethics for Professional Accountants issued by the IESBA provides general guidance on the application of its framework.

The more detailed independence rules issued by EXPERTsuisse follow the guidance of the IESBA standards.

The Swiss Auditor Oversight Act (AOA) adds a few additional independence requirements.[8] For example, when a person in a management function or senior accounting position at a PIE audit client joins the audit firm, that person shall not be involved, for the following two years, in any audit services provided to the same client. And more importantly, a PIE is prohibited (!) from hiring an individual who during the preceding two years either was leading statutory audit services provided to the PIE or had a management role in the respective audit firm.[9] The Swiss Federal Audit Oversight Authority (FAOA) also imposes a reporting obligation on an audit firm under state oversight when fees for additional services earned from a PIE audit client for a specific year exceed the statutory and regulatory audit fees.[10]

4. Evaluation of NAS by the Board or the Audit Committee of a PIE

The auditor has to provide to TCWG information to enable them to make an informed assessment about the permissibility of a NAS. This includes:

- Nature and scope of the service;
- Basis (hours, flat fee or success fee) and amount of the proposed fee;
- Any identified threats and the audit firm's assessment that they are at an acceptable level or will be after introduction of appropriate safeguards; and
- Whether the combined effect of providing multiple services creates or changes any threats.

While US SEC registrants (in Switzerland and elsewhere) have applied the pre-approval process in line with SEC regulations for many years, other PIEs in Switzerland have been confronted by these new regulations for the first time this year and are still gaining experience and building expertise. It has been advisable for a Board or an Audit Committee to:

- Appoint a member that takes a technical lead on the topic of auditor independence;
- Clarify the company's policy and expectations regarding NAS that can be procured from the audit firm, as well as the respective interaction between management and the Board or the Audit Committee; and
- Agree on a documented pre-approval policy with the audit firm, which defines:
  - (i) the type of services that are unlikely to pose any threat and are approved by inclusion in the pre-approval policy, (ii) the type of services that require approval on a case-by-case basis, and (iii) the type of services that shall not be provided by the statutory auditor;
  - a process that ensures the timely performance of the pre-approvals requested by the audit firm, including the identification of services, for which the approval will be delegated to members of management, such as the CFO; and
  - the entities to which the process would apply, including any other PIEs in the same corporate structure.

8 Art. 11 AOA.

9 Such a prohibition is not quite enforceable, but a violation of this rule immediately leads to an independence breach on behalf of the audit firm, which would have to withdraw from the audit engagement under such circumstances.

10 Section 22b of the FAOA Circular 1/2010

At least on an annual basis and earlier if there are significant changes, the auditor is required to report fees earned for audit and other services provided to the client, including a discussion of any threats created by the level and proportion of such fees and any actions taken to reduce such threats to an acceptable level. The FAOA considers a threat where the annual fees for NAS exceed the annual audit fees. In such case, the audit firm of a PIE is required to provide the FAOA with a respective independence assessment. Furthermore, a fee dependency exists where total fees earned from an individual client represent more than 10% (Swiss law)[11] or 15% (IESBA standards) of the audit firm's total annual fees earned and this situation is likely to continue.

The auditor also has a duty to report independence breaches to the Board, including an assessment to what extent the objectivity, integrity, impartiality of judgment and professional skepticism may be affected by the breach, as well as the measures undertaken to protect the quality of the audit. The auditor also needs to obtain approval from the Board to continue the audit engagement on that basis. If this is not possible, steps to discontinue the audit engagement need to be initiated.

5. Closing remarks

Independence needs to be looked at from different angles, such as NAS and related fees, financial arrangements and close business and other relationships. Independence rules are designed to address independence both in fact and in appearance, both needed to ensure the integrity of the audit in the eyes of the stakeholders and the public interest. The new IESBA provisions on independence applicable to PIE audit clients focus on enhanced transparency and oversight. Without imposing direct obligations to the Board, they imply that the Board and especially the Audit Committee need to develop an appropriate understanding of the applicable independence framework and enhance the cooperation and discussion of related matters with the auditor.

A formal pre-approval policy aligned with the needs of the company and its management, combined with a lean process regarding the performance of the approvals and the reporting of services provided and fees earned, will ensure an efficient and effective discharge of respective responsibilities. Last but not least, trust in the quality of the audit and the Board's oversight is created by a transparent disclosure and explanation of the services obtained from the auditor and the fees paid in the PIE's corporate governance report.

11 Art. 11 para. 1(a) AOA.

The Adaptive Borders of the Compensation Committee

Gabe Shawn Varges
Chairman of the GECN Group,
Senior Partner HCM International,
Senior Lecturer University of St. Gallen.

In earlier decades, the common understanding of the central role of the Compensation Committee was straightforward: «deliberation about and the determination of top management pay».[1] Over time a considerable widening of this understanding has taken place, creating new challenges for Compensation Committees across industries.

The expansion has been essentially around the «why», «who», and «what» of the Committee's responsibilities. This trend is escalating the Committee's workload and the kind of competencies its members require. Looking ahead, newer topics—such as the next phase of digitalization, ESG, and evolving societal attitudes toward work—will further stretch Compensation Committees, intensifying their need to focus on their own skillsets, performance, and succession planning.

1. The Why

The original raison d'être for a Compensation Committee was to bring objectivity to executive pay decisions.[2] This was meant to address the inherent conflict when executives determine, shape for approval, or otherwise unduly influence their own pay.[3]

In the course of the years other principles have come to be accepted as equally fundamental. This includes the notions of «pay transparency»[4] and, in some jurisdictions, shareholder «say-on-pay». Each of these has added significantly to the workload of the Compensation Committee.

For example, transparency means that the Compensation Committee must review and sign off on disclosures relating to the Committee's work, including the various pay figures it has approved.

1 M. J. Conyon and S.I. Peck «Board Control, Remuneration Committees, and Top Management Compensation», The Academy of Management Journal , Apr. 1998, Vol. 41, No. 2.

2 Typically, unless otherwise required by local regulations, the Compensation Committee is also tasked with the pay of Board members.

3 Even when the Board ultimately approves the CEO's pay, it can be problematic if the CEO, for example, takes the lead in shaping his / her pay package or the means for measuring the appropriateness of the proposed pay, or the selection of peers for comparison.

4 The reference here is to pay transparency on executive compensation, which has been the historical focus. For more general pay transparency developments, see footnote 24 and the article "Pay Transparency: Status Quo and Competitiveness in Switzerland" at page 38 of this booklet.

The volume of these disclosures can be significant, with compensation reports in some industries well exceeding 30 pages. Some jurisdictions may require or recommend further disclosures, such as the ratio of CEO pay to the median employee.[5]

Say-on-pay regimes, whether consultative or otherwise, are also resulting in increased labor for Compensation Committees and, like disclosures, leading to higher scrutiny of their work.[6] These regimes in effect add «stakeholder management» to the Compensation Committee's job description.[7]

2. The Who

There is no dispute that the Compensation Committee's mandate is to provide oversight of pay at the company. But whose pay? Where not specifically prescribed by regulation, market practice shows considerable variance.

In earlier decades it had been generally accepted that the key concern was the CEO's remuneration.[8] If the Compensation Committee dealt with the CEO's pay, it was thought, the CEO in turn would take care of the pay of his / her executive team members. After all, is not the CEO—as their direct manager—in the best position to know how much each should be paid?

Today, the clear view is that the Compensation Committee's realm goes beyond the CEO's pay. Some codes and regulations are specific as to which persons exactly, but others use less precise terms.

For example, they may say that the Committee approves the pay of the CEO and of «senior management» or «top management.[9] In practice, there is no consensus on whether the latter means only the Executive Committee, Executive Board, or similar, or whether it means one, two, or more managerial levels below.

In financial services additional demands are made on the Compensation Committee by those regulators who work with the concept of «key risk takers», «material risk takers», or similar. Under these notions, an institution is to apply a rigorous process to identify those employees—irrespective of title or hierarchy—who make important risk decisions or who otherwise have material impact on the company's risk profile. Once these employees are identified, the institution is to give them focused attention, including on how they are compensated. Thus, the Compensation Committee in such institutions typically also has to review the nature and level of remuneration for these employees, being particularly watchful for any incentives creating potential risks.

Even more far reaching is when the Compensation Committee takes the view that within its purview is also the company's overall approach to pay. Here the Committee's goal is not to set or supervise the pay of employees at all levels, but to be involved in formulating and approving the company's overall pay strategy, sometimes referred to as the pay philosophy.[10]

Since a company must choose how it will position itself in the market on remuneration the idea is that this too should benefit from the input and oversight of the Compensation Committee.[11]

5 For an example of data on CEO pay ratios in the U.S, see GECN firm Farient Pay Ratio Tracker https://farient.com/trackers/pay-ratio-tracker.

6 Some earlier commentators pointed to the paradoxes involved when shareholders or proxy advisors, having less information, nonetheless form a strong view on what the right pay should be, compared to the process that a well-working Compensation Committee typically goes through which takes into account «varying and often conflicting factors...and the company's overall risk profile.». J. Fisher, et. al. «Say-on-Pay: Less Maybe More» in New York Law Journal, 30.11.2009. Today Compensation Committees must simply accept these cross-pressures as part of the course.

7 In jurisdictions with some form of «say-on-pay», this means the Compensation Committee must also take a position on shareholder proposals relating to pay and deal with other shareholder and proxy advisor demands.

8 See, e.g., M. C. Jensen and K. J. Murphy, «CEO Incentives—It's Not How Much You Pay, But How» in Harvard Business Review May-June 1990.

9 See, e.g., the 2002 edition of Swiss Code of Best Practice for Corporate Governance that specified that Compensation Committee «should draw up the principles for remuneration of members of the Board of Directors and the Executive Management». The 2021 Malaysian Code on Corporate Governance refers to the «remuneration of the board and senior management». For a general discussion on the work of the Compensation Committee, see e.g., «Role of the Compensation Committee», in Society for Human Resource Management, Oct. 2022.

10 In effect, the pay philosophy is a logical starting point of the Committee's responsibilities. The work includes coming to a shared view with management on whether and how the company will use incentives to help steer the organization and motivate and reward talent. Pay philosophies should be reviewed periodically.

11 The Compensation Committee's involvement in developing the company's pay philosophy also sends an important cultural signal. It communicates that the Committee is not just interested in the «critical few» but in the «critical many» at the company, acknowledging the importance of each employee, not just those occupying the top of the hierarchy.

While desirable, the above results in more time demands on the Committee. Getting the pay philosophy right and keeping it right is a complex and continuous task. It requires reflection on how to translate it into the right pay architecture and how to connect it to topics such as company purpose, company culture, employee engagement, desired performance ambitions (like innovativeness), risk appetite, and competitive landscape. The pay philosophy may also require calibrations or exceptions as market circumstances change, calling in certain cases for Compensation Committee approval. For example, given the high demand for cyber risk specialists in recent years, some companies have had to depart from normal pay scales to attract or retain high performing talent in this area.

3. The What

«Compensation» or «Remuneration» Committees can evoke by their very name the impression that pay is their primary concern, while those who receive the pay are only of secondary concern.

In the market various efforts can be observed aiming to counter this impression. This includes re-branding efforts from «Compensation Committee» to names such as the «Personnel Committee», the «Compensation and Human Capital Committee», and «the Compensation and HR Committee».[12] Each of these names broadens the perspective and conveys more recognition of the human factor underneath salaries and bonus figures.

But this type of appellation has other implications. It amounts to an amplification of the Compensation Committee's responsibilities to include talent and related matters. In fact, some committees have explicitly incorporated this in their name as in the example of the «the Compensation and Talent Management Committee» of an industrial technologies player and «the Compensation and Leadership Development Committee» of a major consumer products multinational.[13] New names such as these of course translate into an expectation that the Compensation Committee will provide sustained oversight of the company's talent strategy and the means for attracting, developing, and retaining talent.[14]

12 The examples are from Allianz, Bank of America, and United Health Group.

13 The examples are from Wabtec Corporation and Procter & Gamble.

14 A recent U.S. study suggests that the following percentage of Boards provide some oversight of talent management at the company below the C-Suite level: senior managers (78%), mid-level managers (66%), other employees (58%). M. Nolen, "Turnover at the Top" (CBM Research), Corporate Board Member, Fourth Quarter 2023.

Another significant development, particularly over the last decade, is also contributing to the growth of the Compensation Committee's agenda: higher market interest in how the company assesses the performance of executives, not just in how it pays them.[15] This intensifies the imperative for the Compensation Committee, before approving remuneration, to look «underneath» to gain a deeper understanding of how the performance was assessed in the first place.

For example, in the case of banks, the Basel Committee on Bank Supervision expects the Board of a company not just to set remuneration standards but the underlying performance standards.[16] In furtherance of this, the Financial Stability Board conducted in 2021 a study where the key theme was increasing compensation practices effectiveness by giving more focus to how institutions manage and measure performance.[17]

The above trend is requiring Compensation Committee members to intensify their acquaintance with the many options a company has today for tracking and measuring the performance of talent. This includes choices on performance management metrics, systems, and tools, including which assessment scale to use or whether to use one at all.[18]

Equally important to what systems and tools to use in performance assessments is the question of who determines an employee's ultimate performance assessment or rating. Since this will directly influence the pay to award the employee, many questions arise on which the Compensation Committee will need to have clarity:

- How is objectivity and consistency assured in performance assessments?

- Are there effective checks-and-balances or does the assessment of an employee's performance reflect the view of only one manager?

- How is calibration carried out to prevent members of a team with a particularly generous manager receiving higher ratings than those of a team whose manager is more rigorous in the assessments?

15 See, Swiss Board Forum and Network for Innovative Corporate Governance, «Handbuch für den Verwaltungsrat», 2024, chapter 5.2.6 [3rd edition, forthcoming publication by G. S. Varges].

16 BCBS Corporate Governance Principles for Banks, July 2015.

17 FSB Progress Report, November 2021.

18 See, e.g., «Why More and More Companies Are Ditching Performance Ratings», Harvard Business Review, Sept. 2015.

- Can the CEO or other senior executive overrule the performance assessments conducted through the system?

Today a further «what» is landing on the Compensation Committees' agenda. It relates to how the compensation system can serve the goal of holding managers and employees accountable for insufficient performance or outright failures, also in the personal conduct area.

Known, particularly in financial services circles as «consequence management», the effort involves devising the range of tools—besides at one end simply «talking to the employee» or at the other end firing him or her—that can be used to deal with outcomes not matching the expected performance or representing some breach in company policy or values.[19]

Since some of these tools can include the reduction or cancelling of a bonus, or the forfeiting of a scheduled base salary increase or promotion, the topic is directly pertinent to the work of the Compensation Committee. As such, the Committee has to become well versed in how the accountability system works, what kind of governance applies to it, and what severity levels are set to trigger certain pay consequences.

Of particular challenge for the Compensation Committee in this regard is another market development. In multiple jurisdictions—by virtue of corporate, stock exchange, or financial or securities regulations—companies are increasingly being expected to have mechanisms to recoup or «clawback» compensation that already has been paid out to an executive. This is to protect against erroneously awarded compensation, such as for a sales figure that in retrospect turns out to have been inflated or for other achievement tainted by newly discovered fraud or misrepresentation.

Clawback mechanisms represent for the Compensation Committee a sizeable task. To start, the Committee needs to review and approve the exact wording of the clawback clause that management proposes to use.

19 The higher interest in consequence management and disciplinary processes relates as well to the growing expectation that compensation be aligned with expected conduct and thus with the compliance program of the institution. While regulatorily driven in some cases, this area represents an additional dimension of Compensation Committee responsibility. For example, at Deutsche Bank, the Committee is called the «Compensation Control Committee» whose mandate includes ensuring alignment of compensation to the bank's internal controls and compliance system.

This is a primordial task that nonetheless some Compensation Committees take up only after the fact, i.e., after such clause has already been made part of executive contracts.

Here the biggest risk is that management may attempt to draw the clause as narrowly as possible (such as to be triggered only when a wrongful act leads to the need to restate the company's financials), whereas the Committee, wearing its governance hat, may wish the clause to have wider application, such as for the clause to apply also when a violation of a material part of the company's code of conduct has taken place.

But the most work comes in the monitoring and application of the clawback clause. Clawback clauses are controversial as their enforceability is surrounded by considerable legal uncertainty in many jurisdictions.

Financial regulators nonetheless may require institutions to have such clauses and may push them to apply them anytime the trigger criteria have been met, despite the uncertain outcome should the executive in question choose to challenge the matter in court. Newer developments are creating further incentives for companies to have and make use of such clauses when undesired conduct arises.[20]

Another new task falling upon the Compensation Committee (sometimes jointly with the Audit or Risk Committee) relates to the so-called «control functions». It involves ensuring that the compensation arrangements for these functions (Risk, Compliance, and Internal Audit) do not create any inappropriate incentives, while at the same time not making the remuneration for their occupants unattractive.

4. The Future Compensation Committee Agenda

In light of the augmentation over the years of what is expected of Board of Directors in general, it is not surprising that Compensation Committee responsibilities have also grown.

20 Authorities in the U.S., for example, are creating more incentives for companies to have and apply clawbacks as part of what constitutes an effective compliance program. If a company, among other things, can demonstrate having clawbacks, this will be taken positively into account in prosecutorial decisions on whether to formally investigate or charge a company in the face of a suspected violation. See Department of Justice Evaluation of Corporate Compliance Programs (revised), March 2023.

Already in the early 2000's some commentators conjectured that greater public interest in corporate governance would impact human resource functions, which in turn would affect what Compensation Committees had to supervise. One former HR director and subsequent Board member speculated at that time that the new environment «will make things tougher for HR» as «Board directors will be asking more questions and requiring more-detailed explanations about HR programs and the data HR collect».[21]

As one looks ahead, the ambit and strategic importance of the Compensation Committee will go far beyond what one could have imagined 20 years ago. At one level the challenge will be about coping with the sheer volume of topics. This may explain why Compensation Committee meetings have tended to become longer and more numerous.

In the past five years in Switzerland, for example, there has been an increase in the number of Board and Board Committee meetings in general. As far as the Compensation Committee itself, the increase in the number of meetings has been of some 18% in companies having a distinct committee on the subject.[22]

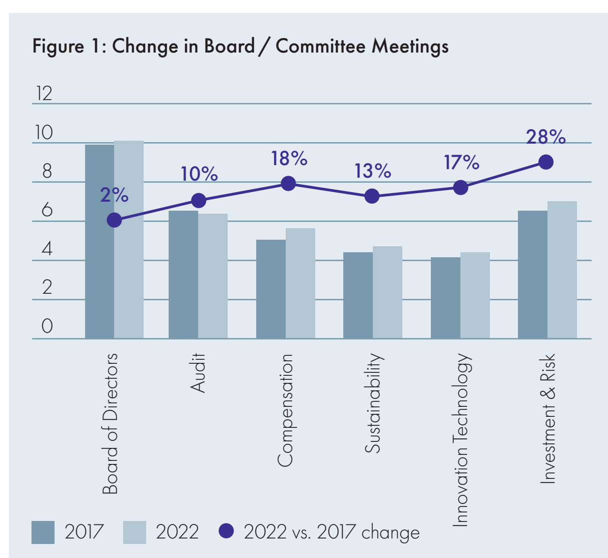


Figure 1: Change in Board / Committee Meetings

21 Quote of Jill Kanin-Lovers, a former HR executive at Avon (now serves as a director on several corporate boards), in R. Grossman, «HR & the Board», HR Magazine, January 1, 2007.

22 Analysis based on data of HCM International with regard to Swiss-quoted companies. The graphic does not show all committees found in these companies and it combines certain committees for convenience into given categories. The Compensation Committee figures are only of the companies having a distinct Compensation Committee, not combined with another subject. For companies having a combination of Compensation and Nominations Committee, the observed increases are lower.

Since Compensation Committee members attend all Board meetings, it is relevant to also look at the total meeting burden. The average number of Compensation Committee meetings in 2022 was 5.7. When combined with average number of Board meetings in 2022 (10.1), this means that the average Compensation Committee member attended 15.8 meetings in such year.

An additional phenomenon has to be taken into account. It is an emerging best practice for the Compensation Committee to have periodic joint meetings with other Board committees so as to delve deeper into subjects overlapping among committees. In the market one observes, for example, periodic meetings of the Compensation Committee with the Risk Committee or the Sustainability Committee.

But beyond increased volume and meetings, the future will bring further complexity to the Compensation Committee's sphere of work. Three areas will bring particular challenge:

- Digi+: The latest phase of digitalization is being characterized by wider use of artificial intelligence and by the «democratization» of AI through generative artificial intelligence. The latter is embodied in a number of platforms that, in effect, give the average person (and thus also the average employee) ready access to an AI tool that not only learns but generates new content.[23] One may refer to this new phase as «Digi+» and it will bring to Compensation Committees—particularly those dealing with employee and HR topics—additional challenges. It will raise a myriad of risks (e.g., relating to privacy and intellectual property protection) as well as ethical tensions (may one exclude a job applicant solely on the basis of an algorithm or a «robot» interview?). But it will also create new opportunities for rendering the compensation and performance management processes more efficient.

- ESG: With concerns about climate and social issues climbing on corporate agendas, this too will have more direct impact on the work of the Compensation Committee. Already one of the most pressing questions is whether and to what degree the company should incentivize ESG performance through the remuneration system.

23 Among others, Chat GPT, Google Bard, Pi, and Bing Chat.

This will require the Compensation Committee to become more fluent in the language of sustainability and more prepared to make judgements as to whether, for example, a particular emissions target is the right metric to use as part of the short-term or long-term incentive plan of the company. Other topics will relate to issues such as diversity and inclusion (also at the Board level), pay equity, and new forms of pay transparency. [24]

- Evolving Societal Views on Work: Covid gave prominence to topics such as employee wellbeing and adaptation for virtual work. The years ahead will bring thorny challenges to the Compensation Committee such as how to cope with mutating societal views on the workplace, work, and careers. Compensation, reward, and performance management systems will require adjustments as larger number of employees demand more flexibility on the nature, quantum, timing, and location of work. In these efforts, the Compensation Committee may need to intensify its oversight of the HR and other functions and address notions such as psychological safety, workplace equity, and the multiple forms of the «burn-out» syndrome.[25]

5. Conclusion

The enlargement overtime of Compensation Committee responsibilities could be interpreted as a classic example of «mission creep». But this would be the wrong conclusion. Compensation Committees are undertaking more today not due to a desire to encroach upon management but to be responsive to larger societal developments impacting what is expected of companies and of those who provide their oversight.

What cannot be denied is that the taking on of new tasks, and the deeper handling of existing tasks, can strain the Compensation Committee. To cope, Compensation Committees will need to work on four priorities:

- Planning: This involves sharpening the Committee's yearly and multi-year work plans as well as optimizing its work methods (potentially with the use of digital tools) for higher efficiency. This can also help the Committee with prioritization.

- Own-assessments: This involves carrying out more effective and frequent assessments of the Committee's performance to identify improvement areas, skill-set gaps, and topics on which the Committee needs external help. Well-executed assessments can also inform training and succession planning.[26, 27]

- Training: This involves more than occasional «briefings» but meaningful capability-enhancement sessions where Committee members elevate their know-how and decision-making abilities in emerging areas.

- Succession planning: This involves having a well-designed process to facilitate internal Board succession planning (i.e., the rotation of existing Board members among committees) and external succession planning (i.e., the recruitment of new Board members as the term of existing members expires).

All the foregoing will be instrumental in increasing the readiness of the Compensation Committee, and of the entire Board, for the inevitable further market changes ahead.

24 «Pay transparency» has taken on a further dimension in recent years as more jurisdictions encourage or require companies to disclose matters such as their pay scales to prospective applicants, statistics on pay differences across categories of employees, and other pay data. These initiatives, which take various forms, usually are part of a larger effort to reduce unjustified pay disparities based on gender, race, or other such criteria. In the EU companies of over 100 employees will need to make a number of disclosures as of 2027. EU Directive 2023/970, European Parliament and Council, May 10, 2023.

25 Some studies and polls are providing insights suggesting, for example, that burn-out is not always related to excess work and that it may be becoming more prevalent among younger employees. See, for example, L. Wiseman «Is Your Burnout From Too Much Work or Too Little Impact?», Harvard Business Review, December 10, 2021. The Future Forum's February 2023 survey suggests higher burnout rates among Generation Z. Future Forum Pulse February 2023, https://futureforum.com/research/future-forum-pulse-winter-2022-2023-snapshot/.

26 See, G. S. Varges, «Board Assessments: Von «Compliance-Übung» zu Leistungsbeurteilung» in Schulthess, Recht Relevant für Verwaltungsräte», 3.2020, and G.S. Varges «Leadership des Vergütungsausschusses bei Performance Management von Führungskräften und Verwaltungsräten», op. cit. at footnote 15.

27 In the past decade, the best practice has become for the Compensation Committee to have an independent advisor selected and appointed by the Committee. In addition, the Committee may wish to consult additional experts on specific subjects. What can help in this regard is for the Board of Directors to have its own budget. This enhances independence in securing external advice. See, G.S. Varges, «Do Boards Need Their Own Resources and Budgets?» in L. Staub, Beiträge zu aktuellen Themen an der Schnittstelle zwischen Recht und Betriebswirtschaft, Schulthess, 2017.

«Say on Strategy without Responsibility»?

Dr. Petra Ginter
Attorney-at-law,
Judge, Commercial Court Canton of Zurich
Head Legal Capital Markets Finance, Swiss Re

Rebecca Paumgartner-Schori
Attorney-at-law,
CAS in Law & Management HSG
Legal Counsel, Swiss Re

1. Introduction of recent developments[1]

With increased business attention to climate change, investors being more aware of the significant economic effects of climate change and the rise of climate change litigation against companies, members of the board of directors[2] today face challenges which go beyond their previous duties and obligations. As of 1 January 2022, the new provisions in the Swiss Code of Obligations (CO, art. 964a to 964c CO) stemming directly from the Responsible Business Initiative's indirect counterproposal entered into force, making the non-financial reporting for the business year 2023 mandatory for large companies of public interest.[3] The respective Swiss ordinance on climate disclosures will come into effect as of 1 January 2024, giving further guidance to companies on their non-financial reporting.[4] Additionally, the Swiss Criminal Code (CC) has been amended to include the new provision art. 325ter CC, pursuant to which also board members may be held criminally liable in case the non-financial report contains incorrect facts or statements or omits information that is subject to disclosure.

While the respective Swiss legal framework has so far been rather limited in scope (which can lead to uncertainty rather than freedom of choice for companies), standards in the EU and other foreign jurisdictions are much stricter. Depending on their operations in foreign countries, many Swiss companies will be required to also comply with foreign laws (e.g. EU directives). Furthermore, as various stakeholders (such as investors and NGOs) demand comparable disclosure on non-financial information, Swiss companies are well advised to consider international best practices to address such investors and NGOs expectations.

1 For this publication, references up to mid-November 2023 were considered.
2 The terms board and board of directors are used interchangeably.
3 <https://www.bj.admin.ch/bj/de/home/aktuell/mm.msg-id-86226.html> (13 November 2023).
4 <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-91859.html> (13 November 2023).

Whether a company ultimately meets the shareholders' expectations, will also be seen at the companies' annual general meetings in 2024 when the shareholders will vote on the non-financial report in accordance with art. 964c CO for the first time on a mandatory basis. Regardless of the legal or practical consequences a vote against such report may have, such vote will send a clear message to the board and may bear a significant reputational risk for the company as well as for individual board members, and in particular the chairperson.

This article gives a short overview of the ultimate responsibility for the non-financial reporting, the board's challenges in case the report is not approved by the shareholders' meeting as well as touch on potential personal liability the board members need to be aware of.

2. Responsibility for non-financial reporting

According to art. 964c CO, the non-financial report must be approved and signed by the supreme governing or administrative body, i.e. for Swiss stock corporations the board of directors, and approved by the «body that is responsible for the approval of annual financial statements», i.e. for Swiss stock corporations the shareholders' meeting.[5] While Swiss law does not explicitly state which corporate body ultimately carries the responsibility for the non-financial reporting, we are of the view that this responsibility sits with the board as the sustainability strategy of a company forms part of the board's general responsibility for the company's overall strategy. In practice, the sustainability strategy is regularly sub-delegated to a specific board committee, which may either be exclusively tasked with the sustainability strategy or in combination with other tasks such as governance and/or remuneration. However, such sub-delegation does not alter the board's ultimate responsibility. By separately mentioning the signature requirement of the board in art. 964c para. 1 CO, its personal responsibility is further emphasized. The signatory requirement is, however, rather of a declaratory nature and does not have any further legal effect.[6]

5 Art. 698 para. 2 ciph. 4 CO.

6 See eg.g. BÜHLER CHRISTOPH B., Nichtfinanzielle Berichterstattung nach dem Gegenvorschlag zur Konzernverantwortungsinitiative und ihre Bedeutung für den Finanzsektor, SZW / RSDA 6/2021, p. 723.

The new rules did not introduce a vicarious liability of the Swiss holding company for misstatements of its subsidiaries and controlled suppliers as envisaged with the Responsible Business Initiative.[7] This initially proposed concept was successfully challenged by the people.

An independent review and assessment of the non-financial report by an external auditor is currently not required by Swiss law. The Federal Department of Justice found such review, if limited to the existence of the report, of minimal value and a material assessment as too burdensome and expensive.[8] However, in September 2023, the Swiss Federal Council announced its intention to introduce such audit requirement in line with its general ambitions to harmonize Swiss sustainability rules with international benchmarks.[9] The European CSRD for example already incorporates such requirement.[10]

This development is also in line with some proxy advisors' guidance that shareholders should vote against the non-financial report in case the report was not verified by an independent third party.[11]

3. Shareholders' vote on the non-financial report

3.1 Legal nature of the vote

Art. 964c CO leaves it open whether the shareholder approval on the non-financial report is of binding or of consultative nature.

The separation of powers and duties of the board and the shareholders' meeting are, however, an essential element of a Swiss stock corporation. It finds its basis in the so-called principle of parity (Paritätsprinzip).[12]

7 Bundesbeschluss über die Volksinitiative «Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt», BBl 2017 6379.

8 Explanatory report of the Federal Office of Justice on "Transparenz bezüglich nichtfinanzieller Belange und Sorgfaltspflichten und Transparenz bezüglich Mineralien und Metallen aus Konfliktgebieten und Kinderarbeit" of 19 November 2019, p. 17.

9 <https://www.admin.ch/gov/de/start/dokumentation/.medienmitteilungen.msg-id-97782.html> (13 November 2023)

10 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022.

11 Cf. for example Ethos 2023 Proxy Voting Guidelines <https://www.ethosfund.ch/sites/default/files/2022-12/221212_lignes_directrices_de__vote_2023_EN_FINAL.pdf> (13 November 2023).

12 BÖCKLI PETER, Schweizer Aktienrecht, 5. A., Zurich/Geneva 2022, § 8 para. 6.

The respective non-transferable and inalienable duties of both bodies are, therefore, explicitly stated in the CO.[13] As a consequence, tasks that form part of the non-transferable and inalienable duties of the board must not be delegated to the shareholders' meeting (Kompetenzdelegation), and vice versa, and are with the sole responsibility of the respective corporate body. On the one hand, the board cannot shift its responsibility for those duties to the shareholders' meeting, neither through a decision by the meeting nor through a mere approval (Beschlussdelegation). On the other hand, it is also not possible for the shareholders' meeting to attract such responsibility via a change to the company's articles of association (Kompetenzattraktion) or in a single instance (Kompetenzusurpation).[14] In case the shareholders' meeting votes on a matter that does not fall within its authority, such approval can only be of consultative nature. This also holds true in case the law explicitly requires the shareholders' approval for a certain matter, e.g. art. 964c CO.[15]

A shareholder has only one single (financial) obligation which is to pay in the full amount of its share(s) in the company.[16] Conversely, its rights are also limited to the appointment of the corporate bodies, approval of the annual report and resolutions concerning allocation of the profit, which it can vote on at the annual shareholders' meeting (Art. 698 para. 2 CO).[17] Beyond the mentioned obligation and rights, the shareholder should not be further involved in the strategy and management of the company. A shareholder also has no fiduciary duties vis-a-vis the company. Board members, to the contrary, have a list of duties as set out in art. 716a CO; they have a fiduciary duty of care vis-a-vis the company and in case such duty is violated they may become personally liable vis-a-vis shareholders or creditors.[18]

Based on the above, deciding on the company's strategy, including the sustainability strategy documented in the non-financial report, belongs in our view to the non-transferable and inalienable duties of the board of directors and cannot be delegated to the shareholders' meeting. It should not result in a limitation of liability for the board. Even an engaged shareholder – specifically of a publicly listed company – would be too remote from the company's actual business activities to be able to properly assess the highly complex content of the non-financial report, and the sustainably strategy of the company in general.

In that sense the vote on the non-financial report is fundamentally different from e.g. the election of board members or the renumeration of the board or the executive management as the latter can be better assessed without detailed information available. It can be argued that these votes are aimed at steering the company in a certain direction.[19] The binding nature of the shareholders' approval of the annual financial report according to art. 698 para. 2 CO is a logical consequence of the shareholders' financial interest in the company. This is by nature not the case for the non-financial report.

Finally, we would like to compare the nature of the vote on the non-financial report with the vote on the compensation report. According to art. 735 para. 3 ciph. 4 of the CO, the remuneration report must be submitted to the general meeting for an advisory (consultative) vote if the variable remuneration is voted on prospectively. Such vote does not directly interfere with the non-transferable and inalienable duties of the board of directors but may give the board a broad hint on the future direction with a view to its upcoming annual re-election.

13 Art. 716a para. 1 CO for the board of directors and art. 698 para. 2 CO for the shareholders' meeting.

14 BÖCKLI (loc.cit.), § 8 para. 46, 48; ISLER MARTINA, Konsultativabstimmung und Genehmigungsvorbehalt zugunsten der Generalversammlung, Diss. Zurich 2010 (= SSHW 297), p. 27.

15 ISLER (loc.cit.), p. 157.

16 Art. 680 para. 1 CO.

17 And for listed companies, to vote on the compensation of the board, advisory board and executive management (art. 698 para. 3 CO).

18 Art. 717 CO.

19 However, the mandatory and binding shareholder vote on the remuneration of the executive management was also highly criticized as the board is in most cases better placed to assess an adequate compensation that meets the expectations of the competitive international labor market and ensures to attract and retain the talents for the success of the company.

Based on the above, we strongly believe that the vote on the non-financial report has to be of consultative nature. The statutorily required vote of the shareholders' meeting should not interfere with the board's non-transferable and inalienable duties and consequently should also not undermine its liability for them.[20] To create «a say on strategy without responsibility» cannot be in anyone's interest.

3.2 Consequences in case the shareholders' meeting votes against the non-financial report

Even though we are of the view that the shareholders' vote on the non-financial report is of consultative nature, and therefore the vote is not legally binding for the board[21], the question remains what the factual consequences / impact are if the shareholders do not approve the non-financial report. Should the company only take note of the shareholders' vote against it or would the company be better advised to bring a revised version of the report to a vote at the next ordinary shareholders' meeting?

The board might be caught between its duties vis-a-vis the shareholders to respect their vote and the legal reporting requirements pursuant to which the board is obliged to inform the public of the company's sustainability efforts and achievements. Since Swiss law does not require an independent audit to date, proxy advisors and investors may deem a vote against the non-financial report as an opportunity to provide feedback on the company's overall sustainability strategy (Signalwirkung).[22]

As mentioned above, the board has fiduciary duties vis-a-vis the company, i.e. it has to ensure that the purpose of the company as well as its long-term interests to generate financial profit are respected.

These interests are not necessarily aligned with the interests of the shareholders who do not have any obligations vis-a-vis the company, other than to pay in the full amount of their shares. It may be that shareholders have only short-term interests in the company and therefore want to maximize profits in the near future, to the detriment of a more sustainable strategy and profit.

Consequently, while the board should take criticism of the shareholders on the non-financial report seriously (be it for the company's sustainability strategy or future non-financial reports), we think it would only make sense for the board to bring a more polished version (taking shareholders' criticism into account) of the report to the next ordinary shareholders' meeting in case the board agrees with the shareholders and considers changes necessary or appropriate based on its own assessment. This should especially hold true in cases where the non-financial report was audited. A publication of the non-financial report without taking into consideration any criticism of the shareholders despite the shareholders' vote against it, may bear the risk that the board member(s) will not be re-elected at the next shareholders' meeting or that they will not be discharged.

4. Potential civil and criminal liability of the board members

4.1 Legal basis

Board members of a Swiss stock corporation may become personally liable for the negative consequences of their acts and omissions if certain conditions are fulfilled.[23] The company, its shareholders as well as creditors may have standing to claim damage against board members; the latter however only in case of bankruptcy of the company.[24]

20 BÖCKLI (loc.cit.), § 8 para. 54.
21 ISLER (loc.cit.), p. 92.
22 Cf. also ISLER (loc.cit.), p. 95.

23 According to art. 754 CO such requirements are: Damage (primarily the damage of the company), violation of duties (in particular the duty of care according to art. 717 CO), adequate causation between damage and the violation of duties, as well as fault (whereby simple negligence is sufficient).
24 Art. 756 and 757 CO.

In case of a bad decision making, the liability of a board member is, however, limited due to the so-called "business judgement" rule: The Swiss Supreme Court acknowledged that a board member has a certain discretion and even if a decision turns out to be wrong at a later point in time it does not lead to a liability if, at the time of the resolution, the board member was not conflicted and had carefully assessed the relevant facts that led to the decision (i.e. ex-ante view).[25]

Under the newly introduced art. 325ter CC, a board member may also be held criminally liable in case of non-compliance with the new reporting obligations.[26] Any violation of the reporting obligations will be prosecuted ex officio.

In addition, board members may be subject to criminal liability in accordance with the provisions that are generally applicable in a business context, such as e.g. mismanagement according to art. 158 CC.

4.2 Potential impact of shareholders' vote on board liability

What consequences may a positive or negative shareholders' vote on the non-financial report have for the board's liability? Does it matter whether the vote is of binding or of consultative nature? In line with our view that the shareholders' approval on the non-financial report is of consultative nature, we focus on what impact such vote may have on the potential board liability.

In case the shareholders approve the non-financial report, the board ultimately receives feedback that it is (according to the majority of shareholders) on the right track with its sustainability strategy which provides a certain level of comfort, in particular, if the approval is paired with shareholders discharging the board for the preceding business year.

25 Initial decision BGer 4A_74/2012 of 18 June 2012, para. 5.1; further references BÖCKLI (loc.cit.) § 16 para. 257 et seqq.

26 Under this provision, a person shall be liable to a fine not exceeding 100,000 francs if he or she willfully provides false information in the reports in accordance with art. 964a, 964b and 964l CO or fails to make the required reports (including the non-disclosure of information that is subject to disclosure), or if he or she fails to comply with the statutory obligation to retain and document the reports in accordance with art. 964c and 964l CO. A person who acts negligently shall be liable to a fine not exceeding 50,000 francs.

However, this does not mean that the board can fully rely on the shareholders' approval as décharge is only provided to the extent shareholders know or can reasonably know about the facts that form the basis of the non-financial report, the sustainability strategy and the actions of the board in general.[27] Further, should shareholders become aware of a fact that happened in the previous, and for the vote relevant, business year after the shareholders' approval, they would still be entitled to hold the board members responsible under art. 754 CO, or press charges under the relevant criminal provisions. In addition, as mentioned earlier, the board is not only confronted with the demands and expectations of shareholders but also regulators, NGOs, and other interested parties and thus needs to take their interests into account as well.

In case the shareholders disapprove the non-financial report in the declaratory vote, it puts the board of directors into a difficult situation. It may well be that the board does not know the reasons for the negative vote, or it may know about the reasons but not agree with the opinion of the shareholders as either the shareholders lack the necessary insights to come to the «in the view of the board» right decision or they don't take all interests of the company into account. By simply following the criticism of the shareholders' meeting, the board could be exposed to liability claims by creditors, regulators or shareholders who agreed with the board in the first place.

To summarize the above, irrespective of a positive or negative vote by the shareholders, the board needs to make an independent assessment as it ultimately remains responsible for the content and completeness of the non-financial report.[28]

Would the situation be different if the view was taken that the shareholders' vote is binding? We would think so, as a binding vote by shareholders would ultimately result in a certain limitation of liability of the board. In both scenarios, the ex officio prosecution of the criminal sanctions would however not be touched.

27 Art. 758 para. 1 CO.

28 Cf. also BÖCKLI (loc.cit.), § 8 para. 54.

4.3 Mitigants to be considered for board liability

Potential negative side effects for the board in case of a shareholders' vote against the non-financial report may be that the board member(s) may not be re-elected at the next general meeting in case shareholders disagree with the board's sustainability strategy or their efforts towards sustainability ambitions, or shareholders may as well refuse the décharge to the board for this reason. The bigger issues are, however, the reputational damage and the communication efforts (including managing the media) that will be needed to restore the good standing of the company. Finally, a negative vote may also set a trigger point and thus increase the likelihood of litigation by third parties, such as NGOs.

The board thus must think of potential mitigants which should help to strengthen its position vis-a-vis the shareholders and build a line of defense for the board to confront potential reputational or liability risks. One of such potential mitigants – as outlined above – could be the (limited) assurance for the non-financial report by an external auditor on a voluntary basis. Such third-party (limited) assurance from an audit firm can clearly improve the reliability of sustainability information as well as the overall credibility of the disclosure. Further, it is crucial to have an adequate and fit for purpose governance and related processes around sustainability in place. The governance framework should support sound decision-making and allocate clear responsibilities (also to monitor emerging ESG risks) and accountabilities on board level, but also on the levels below the board. It should ensure that sustainability is being considered appropriately at all levels and closely monitored and considered in the same manner as financial topics. Further, ESG expertise and experience on board level is key and can e.g. be gained or improved through regular adequate training of board members.

Ultimately, the board needs to have all tools at hand to take informed decisions (keyword business judgment rule) and to exercise the business judgement and effective oversight in relation to ESG-related commitments throughout the company. With the current pace of ever-changing sustainability regulations and requirements globally, the board needs to be able to count on sound management processes and clear reporting lines.

5. Concluding Remarks

The expansion of board responsibilities to include ESG-topics is currently seen globally and reflected in international standards and domestic regulations. Given the growing consensus around ESG-performance tied to company value, boards have a lot more to consider. As ESG is clearly an important focus area in the boardroom, the board is now challenged to address ESG-related (and potentially diverging) expectations of different stakeholders in a balanced manner.

With the increased pressure of a company's successful implementation and governance of ESG, boards will benefit greatly from continuing education as they carry out their oversight responsibilities. Boards should also consider good ESG-governance as an element of strategic importance to attract customers, investors, and employees or as an opportunity for the company's growth. The boards are therefore challenged to integrate ESG in the structure of the company's organization in a convincing manner. Going way beyond the company's corporate purpose, shareholders expect companies to answer how Corporate Social Responsibility is being considered and what measures are being taken to implement it.[29]

The shareholder meetings 2024 will give a good indication on how well the board will manage these additional responsibilities and challenges and whether the board has successfully met the shareholders' expectations.

29 SUTTER-RÜDISSER MICHÈLE / HORBER FELIX, Die Nachhaltigkeit als neues Standbein der Corporate Governance, in: Board Dynamics | Coping with Uncertainty. Actions for the Now and the Future, NICG 2021/1, St. Gallen 2021, p. 45.

Pay Transparency: Status Quo and Competitiveness in Switzerland

Davide Paliaga
Ph.D. Student at the University of St.Gallen and Consultant at HCM International

Linda Kohri
Senior Manager at HCM International

Dr. Hanna Hummel
Partner at HCM International

Prof. Dr. Michèle Sutter-Rüdisser
Director Institute for Law and Economics, University of St. Gallen

Dr. Cornel Germann
Vice-Director Institute for Law and Economics, University of St. Gallen

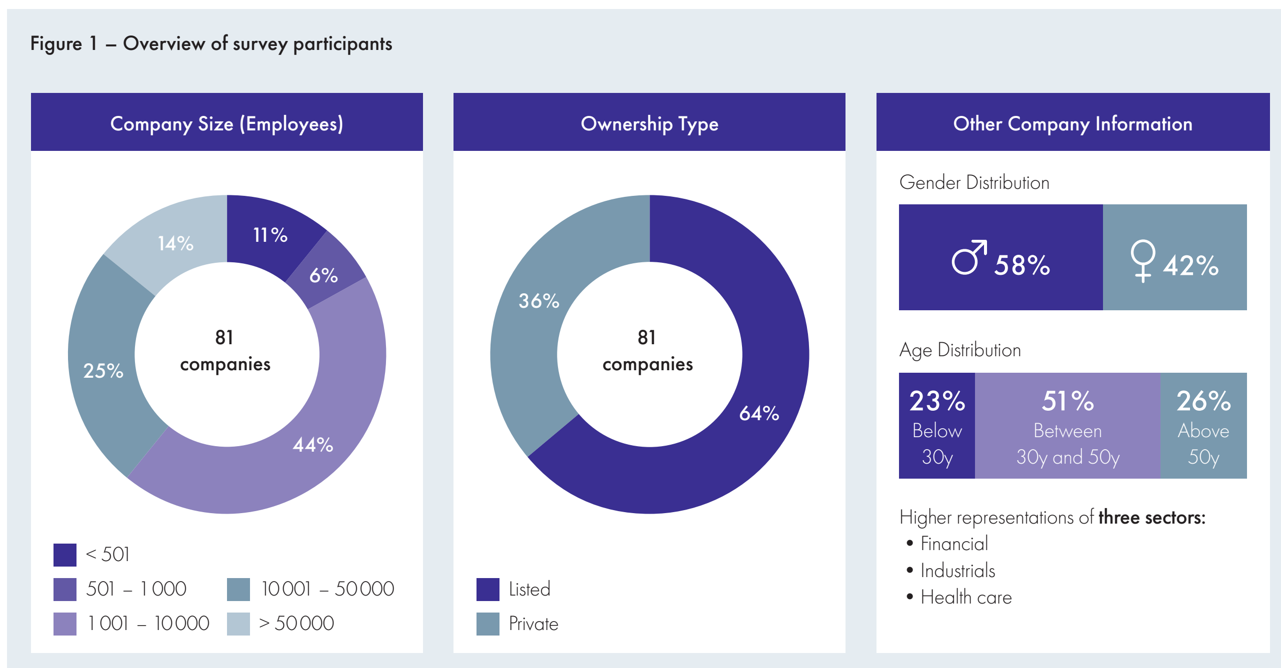
1. Introduction

Pay transparency, once a sensitive «taboo topic» among employers, is now a central issue in labor discussions. This shift in focus is a response to evolving regulatory pressures, especially in the European Union and the United States, and a strategic move by companies aiming to position themselves in a competitive job market. As a result, more and more companies are focusing on pay levels, processes, and communication. However, uncertainties remain on what pay transparency means in practice and how corporations can address it in an effective way that benefits both the company as well as its employees.

To take the pulse of companies' status quo and competitiveness around pay transparency in Switzerland, HCM International and the Institute for Law and Economics of the University of St. Gallen – two partner organizations of the Network for Innovative Corporate Governance (NICG) – conducted a survey between the end of summer and fall 2023. The survey gathered a total of 81 answers from companies characterized by different size, sector, and demographic imprint (see Figure 1). 93% of respondents work in the human resources (HR) function, others are members of executive boards.

One of the most important findings of the study is that companies see, assess, and act pay transparency differently depending on the type of ownership. By separating between listed (64% of respondents) and private companies (36% of respondents), the results of our survey allow HR professionals and corporate decision-makers to derive key insights matching their individual situations and set ups.

Figure 1 – Overview of survey participants



For example, the reasons why pay transparency is considered important are different: 81% of respondents from listed firms report that regulatory pressure is the main driving factor adding pay transparency to their priority list. In Switzerland regulatory developments are led by the Swiss Federal Office for Gender Equality (FOGE), which acts on the basis of the constitutional principle of «equal pay for work of equal value». To address the existing gender pay gap, the Gender Equality Act was revised in 2020 obliging all employers to pay their employees equally for work of equal value (Art. 3 GEA).[1] This resulted in mandated equal pay analyses that are progressively getting more demanding. Notably, the average gender pay gap decreased in recent years, nevertheless, still in 2023 women in Switzerland earn 18% less than men – which translates, on average, in around 1'500 Swiss francs less per month.[2]

More recently, also various US states and the European Union have updated their regulatory regimes around pay transparency – which will to a certain extend also directly affect Swiss businesses through their foreign subsidiaries.

For instance, the EU pay transparency directive will raise the bar for companies operating in the EU.[3] More in detail, the directive requires advertised positions to disclose details on starting salary in the recruitment process, employees to have an information right on pay levels, and the possibility to impose fines for employers that allow for pay discrimination.

Regulatory developments are less relevant for private firms when it comes to the reasons for addressing pay transparency. In fact, private companies most frequently name employer branding as the main driver. While employer branding and reputation are ranked as a material factor for both, listed and private companies, internal pressure is actually much more marked at private companies rather than listed ones, with 59% and 17% answers from respondents, respectively. Many companies realize that in the current labour market environment, employees' demands and job market expectations have increased, leading to intense competition for attracting talent and significant efforts to lower attrition rates. One promising measure in this regard seems to be in-depth reviews to identify existing pay disparity and / or inconsistencies in current pay systems and to provide for transparency around pay frameworks.

1 Federal Act on Gender Equality (Gender Equality Act, GEA), 2020.
2 Federal Office for Gender Equality. (2023). Promoting equal pay with Logib.

3 Council of the EU. (2023). Gender pay gap: Council adopts new rules on pay transparency.

Taken together, both regulatory developments and employer strategy considerations led to pay transparency gaining momentum over the last five years: the survey reveals that today, more than four out of five companies confirm that the subject is «moderately important» or more.

In the following paragraphs, we address three core questions based on our our survey around pay transparency:

1. What is driving company action towards more pay transparency?
2. Which are the expected benefits and risks of a higher pay transparency?
3. How does pay transparency vary among different elements of pay?

2. Three core results from the survey

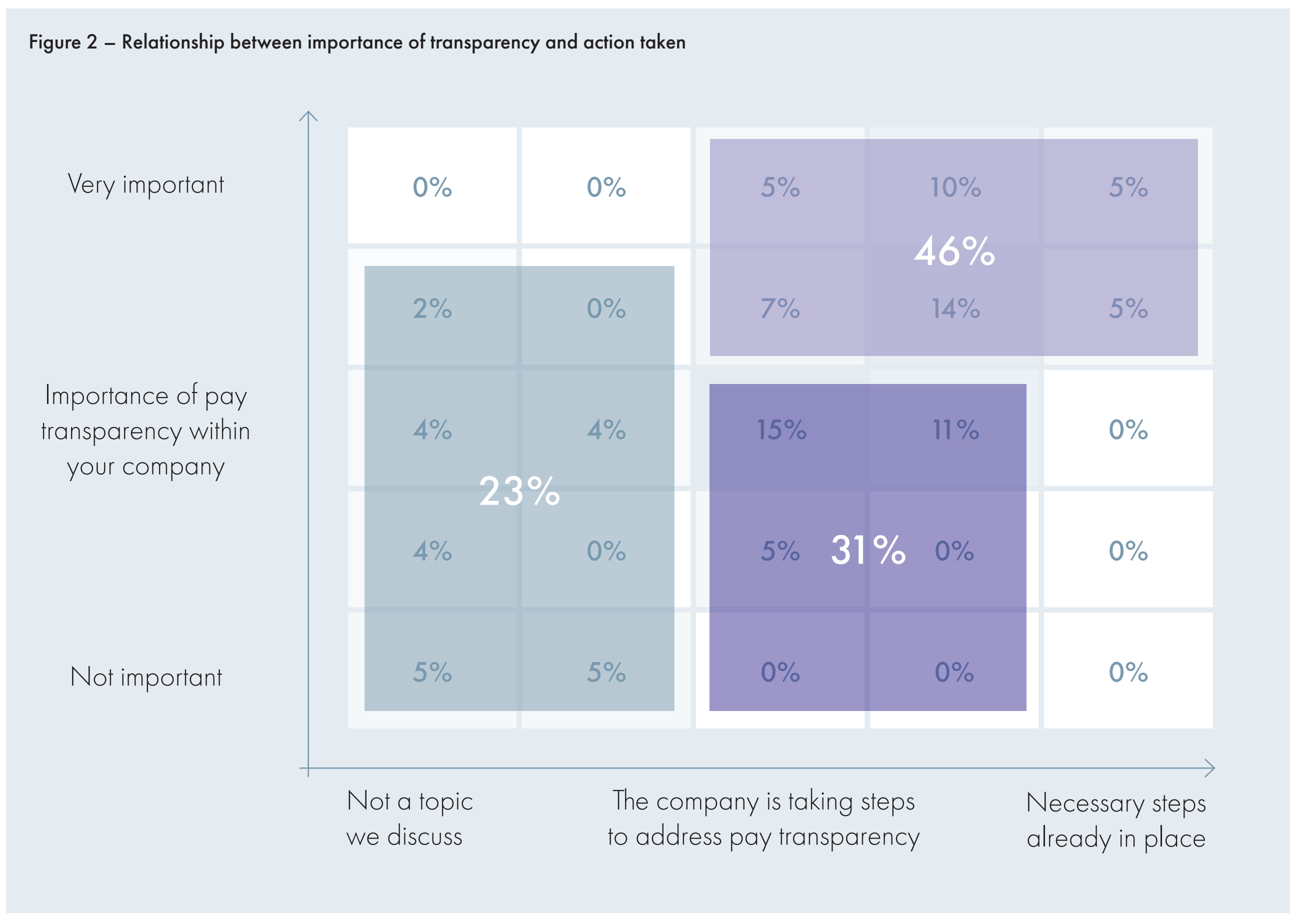
2.1 Awareness drives action

Regardless of the concrete underlying driver, companies rating pay transparency at least «moderately important» are more likely to take steps to address it, compared to firms that view the issue as «less important». Figure 2 shows that 46% of companies in the sample are taking steps to address pay transparency and that such a move is associated with a high degree of awareness. At the same time, 31% of firms take action despite below average levels of awareness, and 23% of them – regardless of the level of awareness – are not taking any action.

A similar positive association is also found between importance and pay reviews aimed at identifying existing pay disparity. The study finds that 50% of listed firms conducted internal reviews leveraging on in-house resources, while 52% of private companies performed external reviews with the support of third-party advisors.

Most survey participants see the HR function being in the driver seat in addressing pay transparency. Given the survey finding that high awareness translates into

Figure 2 – Relationship between importance of transparency and action taken



action, HR leaders as a first step may want to increase awareness on the topic, including top management and the Board of Directors.

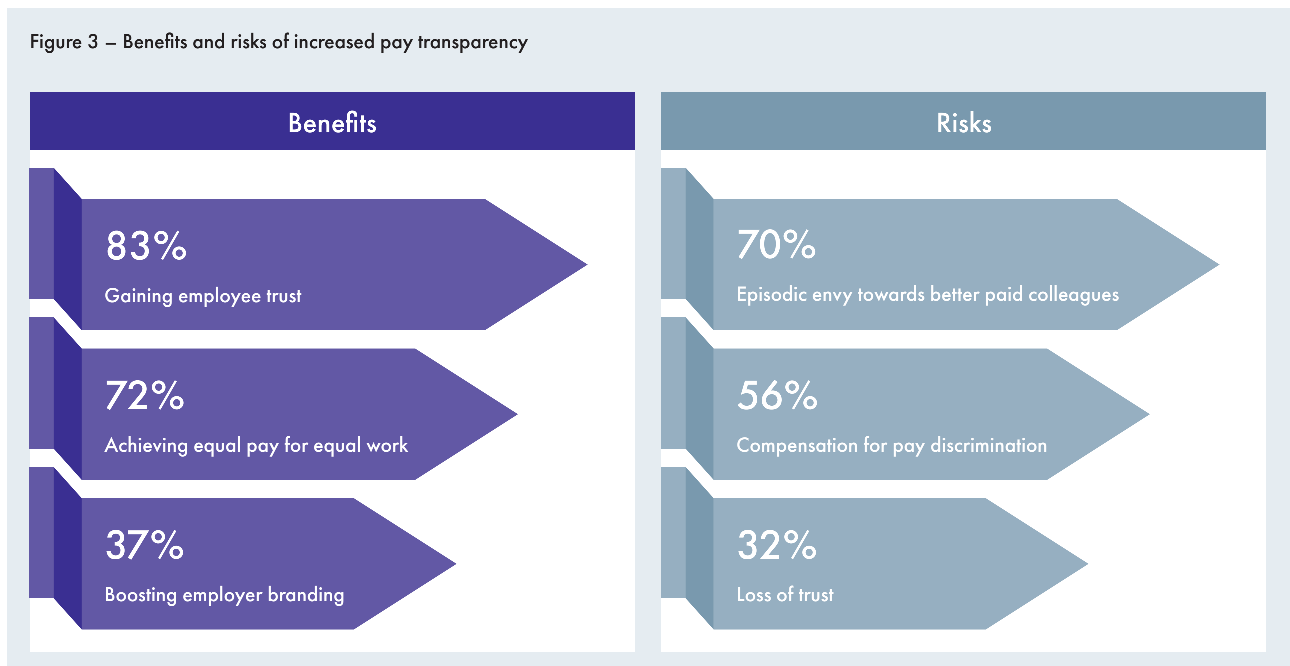
2.2 Employees will benefit but risks shall be actively managed

77% of survey participants expect that employees are the main beneficiaries of an increased level of transparency around pay. But while there are a lot of benefits envisioned for employees that come along with higher pay transparency, there are also certain risks that need to be carefully addressed and managed for those benefits to materialize. Figure 3 ranks the three main benefits and risks of high pay transparency that survey participants expect.

On the one hand, 83% of participants expect gains in employee trust and 72% mention the ultimate goal of achieving pay equality. Also the objective to boost employer branding, one of the main drivers to engage in the discussion around pay transparency in the first place, is mentioned again by 37% of respondents. On the other hand, episodic envy towards better paid colleagues and loss of trust are identified as key risks to manage. In particular, concerns related to episodic envy reflect prior research on the mediating effect on the relationship between under-met pay standing expectations and job satisfaction.[4] It seems the HR functions are walking a tightrope between upsides and downsides of a higher degree of pay transparency.

Concerns around the reaction of employees are also justified given that nowadays compensation matters are still considered very sensitive in most settings. In fact, a significant fraction of companies demand that employees refrain from communicating compensation details internally and externally. While 23% of companies informally discourage employees from communicating pay related information, a solid 21% formally forbids it – whether through a clause in the working agreement or with a provision in the code of conduct.

Figure 3 – Benefits and risks of increased pay transparency



4 Schnaufer, K., Christandl, F., Berger, S., Meynhardt, T., & Gollwitzer, M. (2022). The shift to pay transparency: Under met pay standing expectations and consequences. Journal of organizational behavior, 43(1), 69-90.

For firms to maximize benefits and minimize risks, clear communication is key. This could be promoted by providing guidance on what criteria are used to determine salaries, how salary bands are set or how the link between performance and compensation works. As a consequence, employees may feel more at ease to talk about compensation if a framework is developed and understood.

2.3 The level of pay transparency varies for different elements of pay

Pay transparency has a multi-dimensional nature. For 77% of respondents, pay transparency means that employees are informed about the process on how pay is determined. Another very common interpretation of the definition of pay transparency, that is shared by most of the survey participants, focuses more on the level of pay. Hence the outcome of pay discussions around pay gaps, salary bands, and external disclosure of pay ranges in job posting. Noticeably, for most companies it is easier to improve the robustness of processes while adjusting company-wide pay outcomes could require significant negotiation efforts and might have material impact on profitability: 36% of companies assume that average pay will grow, only 2% expect average pay to fall.

With regards to the expected impact on different elements of compensation, our analysis shows that a higher degree of transparency is generally expected for all compensation elements – but with different levels magnitude, as shown in Figure 4.

For base salary, which is nowadays the least transparent (on average «a little»), firms expect an overall 23% increase in transparency, with almost half of companies envisioning to be «a lot» or «a great deal» transparent in the future. While this marks the highest absolute expected increase in pay transparency across all pay elements, the envisioned transparency on base salary determination is not even able to catch up with the current levels of transparency of variable pay elements. Looking closer at the difference between individual- and company-based variable pay, survey participants expect that variable pay mainly based on individual performance (e.g., individual bonus) will not become as transparent as variable pay mainly based on company performance: we note a 7% increase in transparency for individual-based against a 10% for company-based. Variable pay mainly based on company performance is and will be the pay element with the highest level of transparency with three quarter of respondents expecting it to become «a lot» or «a great deal» transparent.

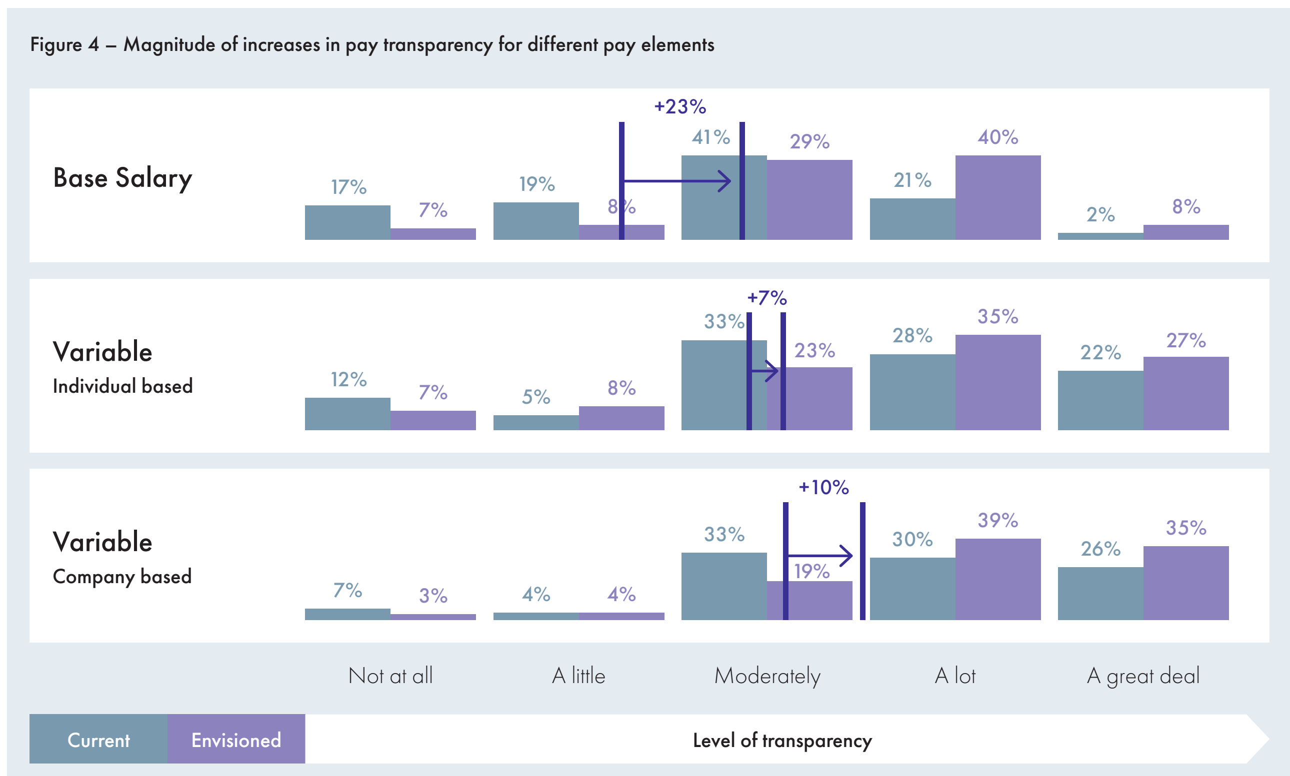


Figure 4 – Magnitude of increases in pay transparency for different pay elements

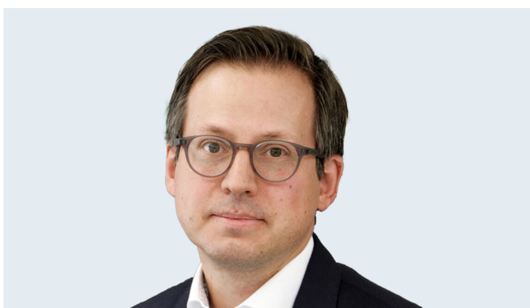
One of the reasons for the higher level of transparency of company-based variable pay is that line managers and HR professionals might find it challenging to defend pay divergencies due to individual performance. While this sounds intuitively and rationally the right thing to do and the anticipated logical consequences of individual-based variable pay, our experience shows that in fact rather little pay differentiation can be observed within individual systems. Variable pay which is driven by company performance often follows more fact-based and comprehensive rules, which are easier to communicate and to follow.

The consideration around the ability to communicate pay differences is especially relevant since respondents signaled strong concerns around communication skills of leaders: 55% of participants disagreed with the statement «our Leaders (managers) are equipped with the needed skills to implement pay transparency (e.g., communication skills if required to explain 'justifiable' pay gaps)». This specific challenge might be mitigated by a shift towards variable pay mostly based on company performance. As a matter of fact, this study shows that 78% of listed companies already tend to measure performance of long-term variable pay using predominantly company performance metrics.

3. Governance considerations around pay transparency

The survey results demonstrate how regulatory developments and employer strategy considerations contribute to raise the interest in pay transparency. The internal and external scrutiny on such a sensitive topic is set to have broader implications, with potential profound impact for employees' morale, trust, and commitment. In addition, pay transparency discussions will stretch beyond HR functions and involve executives and Board of Directors. Employees' expectation for pay transparency makes it a strategic topic for employers and requires directional views and guidance from the top. Companies are embracing pay transparency not just as a legal requirement but as a tool to attract top talent, foster trust, and build a more equitable workplace culture.

Who Really Owns the State-owned Companies?



Prof. Dr. Peter Hettich
Peter Hettich is Professor of Trade Regulation and Antitrust Law at the University of St.Gallen and a Director of the Institute for Law & Economics. His research focuses on regulatory law and includes the governance of state-owned companies as well as regulated economic sectors such as telecommunications, media, energy and financial markets. Peter Hettich is a member of the bar and serves as Of Counsel with VISCHER AG, a major law firm in Zurich; he advises federal, cantonal and municipal authorities as well as regulated state-owned and private companies.

According to conventional wisdom, the public administration serves as «role model»: The central administration and state-owned enterprises (SOE) should be social employers, conclude collective labor agreements where possible, achieve climate neutrality sooner rather than later, establish services in peripheral regions, reliably deliver dividends, pay their taxes, and pay their management a good – but please not too high – salary in the process.

This is not so much different from privately owned companies nowadays: In business schools, the faculty advocates management approaches that focus more strongly on the social or ecological dimension of entrepreneurial activity; they use labels such as the «stakeholder approach», or more recently: «CSR», «ESG» and «inclusive capitalism». Since the beginning of 2022, the law has set some basic requirements asking for more transparency on non-financial matters (Art. 964a et seq. CO). Still, there are no action items in that regard: Thus, in Swiss company law, activities that do not serve to maximize profits, at least in the short term, will continue to be «filtered» via the general assembly and the board of directors: Private limited companies therefore largely decide according to their own values and standards how they want to balance differing corporate interests that are potentially in conflict with each other.

In the case of SOEs, on the other hand, social and environmental issues are made a concern of the company from all kind of nonstate and state actors, as the strategy of these companies is constantly being renegotiated in public fora and in the political process. As a direct consequence for SOEs, stakeholder interests become blurred with shareholder interests. On the other hand, SOEs must also ascertain which authorities are actually legitimized to act as «owners», i.e. which authorities, in their role as shareholders, may legitimately ask for responses from the company regarding socio-ecological concerns.

Ensuring good governance in SOEs is therefore a complex undertaking. In legal terms, the increasing complexity manifests itself in four dimensions that the management of such companies must keep in mind:
1. requirements arising from the legal form; 2. requirements arising from different statuses of board members; 3. requirements arising from the legal organization of the ownership interests; and 4. requirements arising from the general regulatory setting.

1. Requirements arising from the legal form

Legislators may set their own governance structures for SOEs, thereby deviating from federal corporate law. SOE often have similar governance structures as private limited companies, but sometimes deviate from these in important respects. Major Swiss companies such as the public utility of the city of Zurich are legally mere offices within the city administration: anyone who concludes contracts with ewz deals directly with the city of Zurich itself. At the municipal and cantonal level, there are still many autonomous public bodies («Anstalten») that are strongly shaped by municipal and cantonal law – these bodies can also be reshaped at the discretion of the legislator: A prominent example here is Zürcher Kantonalbank. As one of the systemically important banks designated by the Swiss Central Bank, the ZKB is legally nothing more than an autonomous asset of the canton – the cantonal legislator's rights of intervention are correspondingly extensive.

Within the Confederation, the private limited company («Aktiengesellschaft») is the legal default form for federal enterprises. However, companies such as the Swiss Postal Service, Swisscom and the Swiss Federal Railways are primarily governed by special legislation and only subsidiarily by private company law («Spezialgesetzliche Aktiengesellschaft»). In addition, the confederation has established some enterprises that are entirely governed by private law. The far-reaching autonomy granted by establishing private law companies rarely remains unchallenged.

2. Requirements arising from different statuses of board members

The Board of Directors, whose election is the responsibility of the general assembly, is primarily responsible to the owners for the good management of the company. However, if there is a public interest in a private limited company, the company can also allow the state to directly appoint persons to the Board of Directors («gemischtwirtschaftliche Aktiengesellschaft», Art. 762 CO). If the shares of the company are also held by the state, it is often not clear to the members of the board whether they were elected by the general assembly or whether they were delegated by the state. However, only the delegated members of the Board of Directors are allowed to reveal the inner workings of the company to the state – to the very last detail including business secrets.

The competent state authority can directly instruct delegated board members to bring, e.g., social and ecological issues to the attention of the board of directors. To compensate for this privilege, the state will be held liable for all actions of the delegated board member. In contrast, the elected members of the Board of Directors are primarily obliged to the company, in particular if conflicts with the state arise. For elected board members, therefore, the politicians' wishes merely supplement the decision-making process within the board by a further – admittedly significant – parameter.

3. Requirements arising from the organization of ownership interests

In many cases, the relationship between the company and the state is no different to that with major shareholders or with the parent company of a larger group. In most cases, the executive branch of the government exercises the rights to which the state is entitled from its position as a shareholder of a private company: the company then has a single point of contact. From a governance perspective, however, the relationship with the state is more complex.

Legislators have a wide range of instruments at their disposal to influence the activities of the executive branch of the government. In recent years, many legislative bodies have secured rights of participation in the definition of strategic objectives for SOEs; these steering instruments now contain far more guidelines than at the time when the creation of autonomous state corporations was primarily aimed at achieving greater efficiency in the fulfillment of essential services. Legislators also provide the government with impetus through motions and questions. Such parliamentary motions and questions are, formally, often addressed to the government, but are passed on to the SOE if its activities are affected. This means that the SOE is constantly stimulated with issues that may have nothing to do with its core business. Those who are not very familiar with political processes are sometimes amazed at how effectively business associations, unions, NGOs and other interest groups can use parliamentary processes to influence SOEs.

Where a SOE is governed by sector-specific legislation, its structures are always in danger of being changed in the political process. Politically, it may make sense for legislators to make far-reaching demands of public companies: In case of success, the specific member of parliament enjoys considerable publicity. For the SOE, however, changes to its founding legislation are accompanied by deep interventions in its operational structures and processes. Usually, such parliamentary motions have a low probability of implementation, but also a high cost or damage potential for the SOE when they succeed. Consequently, the SOE needs to engage itself in the political process, which ties up resources; the risk of legislative motions becoming binding law will often appear unacceptable from a risk management perspective.

For SOEs in the legal form of a private limited company, it should be noted that cantonal and communal legislators can only regulate the way in which the state will exercise its shareholder rights. Specifically, this includes:

- To empower an authority within the state that is to exercise the shareholder rights.
- To empower an authority that appoints and instructs the delegated member of the board of directors.
- To define a procedure, by which the policy objectives to be achieved by the SOE are set.
- To bind the authority that exercises shareholder rights to certain public policy goals, that should be brought to the attention of the general assembly and the board of directors.

Therefore, such kind of legislation is concerned with defining the internal organization of the state vis-à-vis the company as an autonomous legal entity. The interface between the state and the company, however, is governed exclusively by private corporate law. The definition of strategic objectives, the formulation of an ambition regarding climate neutrality, the philosophy behind the management of human resources as well as caps for executive compensation remain the prerogative of the company's self-administration. If the board of directors of a SOE wants to be taken seriously, it must defend the company's autonomous entrepreneurial space. This is particularly the case if other public bodies and private individuals are also shareholders of such a company.

4. Requirements arising from the general regulatory setting

A strict distinction must be made between communication with the state in its function as shareholder and the state in its function as regulator. Common rules of public governance require that the roles of the owner and the regulator are strictly separated within the state. However, the same distinction must be made on the part of the SOE as to whether the company faces the state as a shareholder or as its supervisory authority. The former relationship is basically cooperative and takes place on an equal footing; the latter relationship is sovereign and takes place according to patterns of «command» and «control».

Public choice and bureaucracy theory suggest that SOEs with market power should work towards an implementation of social and environmental objectives within the general legal framework; in their own self-interest, SOEs should see public policy goals not only as an issue of good public governance. The reason is simple: The costs of new regulatory requirements are, at least in the short term, often fixed costs – these costs are easier to bear by large companies than by new market entrants or by smaller competitors.

5. Conclusions

At the end of the last century, many state-owned companies were outsourced from the central administration and transferred into formally private companies. The aim was to create scope for entrepreneurship and to increase efficiency in the provision of essential services. The far-reaching autonomy granted to state-owned companies has recently been called into question again: Politicians are reasserting their primacy. The resulting conflicts are not easy to manage and require a constant and costly use of precious management time. However, if the various players are made aware of their roles and competences, unnecessary frictions and disputes can be avoided.

Conflicts of Competencies between Ownership and Company Strategy, respectively between Owners and Board of Directors

Dr. Sonja Kissling
Attorney-at-Law, LL.M., Mediator
Sonja Kissling is Governance Advisor for Family Firms (Family Business Matters) and Lecturer in Law and Economics at the University of St.Gallen

1. Summary

This essay will delve into the definitions and shaping of ownership strategy and company strategy with a focus on family firms, and explore the conflicts that can arise between them, including the tension in competencies between the owner shareholders and the board of directors.

2. Who are the Owners?

Contrary to popular belief, concentration of ownership within the company is common and most companies around the world are under the control of individual shareholders. Generally, it is assumed that 60-90 percent of all the companies in the world are family firms. The exact number of family businesses is difficult to determine because definitions vary in terms of ownership level, generation and degree of family business involvement. Among privately held companies, the number of family-owned companies is higher than among listed companies. Owners of listed companies are according to the OECD institutional investors (41% of the global market capitalization), the public sector (14%), private corporations (11%), and strategic individuals (7%). The rest is free-float (27%).

3. What is an Ownership Strategy?

Shareholders of concentrated ownership often have an ownership strategy, which is distinct from the investment strategy of minority shareholders. Minority shareholders invest their financial means in different (mostly listed) companies with a certain risk profile, such is called the investment strategy. Generally, they pursue a diversification investment strategy in order to spread the risks. Hence, minority shareholders must not care too much about the individual stock. In contrast, for anchor shareholders the company is regularly by far their greatest asset, and they keep it for the long term. Accordingly, they feel responsible for the success of the company. Often – especially with growing complexity on shareholder or company level – these anchor shareholders define precise goals for the company and establish rules for their influence.

Such is called the ownership strategy. The ownership strategy defines on the one hand financial goals regarding levels of participation, long-term growth, dividend distribution or risk tolerance. On the other hand, the ownership strategy also entails non-financial goals, such as location ties, the careful use of natural resources or the caring treatment of employees. Therewith, the ownership strategy also reflects ethical concerns and the value set of the owners. Moreover, the owner strategy says something about the ownership structure and the involvement of the owners in the company. It e.g. stipulates that ownership is held through a holding company and states how the owners are represented in the board of directors.

In family businesses, for example, the ownership strategy often defines that the family owners have the goal to pass on the family firm to the next generation and to keep it private. In state-owned companies, the ownership strategy elaborates what public utility mandate the company has and what departments are responsible to supervise this activity. Owners of start-ups may determine what percentage of the shares they want to keep and the preferred exit scenario. These are examples of the content of an ownership strategy.

With increasing complexity at the ownership or company level, for example, if there is an increasing amount of shareholders or business activities, the shareholders tend to explicitly formulate their ownership strategy. So do later generation family firms, state owned companies or start-up companies with a group of founders as shareholders.

4. Conflicts between Ownership and Company Strategy

The company strategy, on the other hand, is the plan developed by the board of directors and the executive management team to achieve the company's objectives. It encompasses decisions related to product development, market expansion, financial management, and the corporate structures. A well-defined company strategy serves as a roadmap to ensure the long-term success and sustainability of the business. The ownership strategy and company strategy can conflict: Here are two examples that family businesses have encountered frequently in the last years:

1. Sale of the original business unit: Family businesses often grow into conglomerates over time. A conglomerate is on the one hand the result of opportunity acquisitions. Family firms regularly work with other entrepreneur-managed companies or family firms and, due to the shared catalog of values, acquisitions often occur between families when the opportunity arises, for example along the vertical value chain. On the other hand conglomerations are the result of the further development of the company's products and services. Over generations, the range of the products and services of the family business deepens and broadens. Family firms in later generations therefore have often a mature corporate structure that is divided into different business areas. Over the years, it then may happen that the family's original business is no longer profitable and new business units become more attractive from a financial perspective.

   In many family businesses this leads to the controversial question of whether the original business should be divested. There are usually differing opinions among family members. Some want to hold on to the business unit because they feel a special connection to it and identify with it or because they want to preserve it due to a feeling of obligation to their ancestors. Other family members would like to sell the business unit so that family wealth is not endangered and can be passed on to the next generation. They argue that it could not have been in the spirit of the ancestors to run unprofitable businesses.

   You will rightly point out that the sale of a business unit lies in the responsibility of the board of directors and is not a decision to be taken by the owner. And this is correct. It is in the responsibility of the board of directors and executive management to consider how a sale aligns with the long-term goals and overall company strategy. They may decide to opt for a sale to focus on core competencies or acquire a new unit.

From a purely legal perspective, the family members do not have to agree to a sale of a business unit, since it is not the shareholders who are selling part of their stock, but rather the company as a legal entity is selling part of its assets. Although the initial situation is legally clear, ownership strategy and business strategy overlap here. In such a situation, there is a need for owners and company to coordinate their strategies. If this alignment does not take place, there is a great potential for conflict, which in the worst-case results in an open conflict between family, respectively their representatives on the board of directors and the non-family board members. Such a conflict is neither in the interest of the family nor the company.

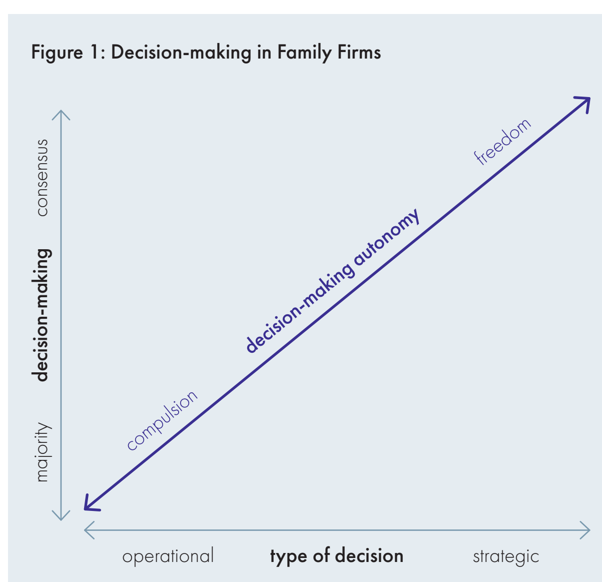
2. Definition of sustainability goals: A second issue that has repeatedly led to conflict in recent years is the definition of the sustainability strategy. Family businesses are praised for the fact that their management is strongly value oriented. This value orientation supports intra-family succession because it gives the next generation the opportunity to use their human and financial resources meaningful. The values are the glue between the generations. In succession processes a value discussion hence regularly takes place. Family members talk about what values their ancestors followed in their entrepreneurial activities and what values should guide the family members into the future. The results of this discussion can be found in the ownership strategy which families formulate in their family constitutions. Mostly this part of the constitution is the part family members cheer the most.

   In our time, this discussion of values within a generational change happens to coincide with the zeitgeist of sustainability. In many family firms, we can therefore observe that the next generation has specific environmental concerns and demands that the company strategy aligns with these values, even if it entails added costs. The board, however, refers to the division of competences and rejects such demands because of broader financial considerations.

5. Decision Making and Solution Finding

How should family members and board members react to such conflicting strategies? In these cases, decisions by the board of directors referring to the division of competences as well as majority decisions in the board of directors are neither useful nor sustainable. Strategic decisions are questions of identity – one cannot disagree and move on. Strategic decisions therefore require the support of all involved parties and the alignment of ownership and company strategy.

Figure 1: Decision-making in Family Firms



In the first example, the sale of the original unit, the family representative and the chairperson on the board of directors as well as the family chair, if available, play a key role. It is up to them to ensure that, on the one hand, the family members come to a common opinion and, on the other hand, that communication between the family and the company is fruitful. That means first, that the family knows about the entrepreneurial challenges and understands them. So that the family is not surprised when important decisions come up. Second, that also the company knows about the concerns and interests of the different family members.

Such communication is not established overnight but needs constant engagement by the parties. Ideally, a constant, regular, and timely communication ensures that the question of a sale of a business unit, is then not a disruptive one. Governance structures, such as a family council or a family speaker, a thoughtful representation of the family in the board of directors support the establishment of a fruitful communication.

In the second case – the definition of sustainability goals – boards should see the engagement of the next generation as opportunity to pass the company on to a next generation of committed, long-term thinking family members. But in order that the blessing does not become a curse, the board of directors should first educate the next generation about their role as owners and then set clear guidelines as to how the next generation, or the whole family, will be involved in the topic of sustainability. Whether they are simply informed, whether they are listened to or whether they are even allowed to have a say on certain issues.

6. Conclusion

In conclusion, the conflict between ownership strategy and company strategy is an inherent challenge in family firms or other companies with an anchor shareholder. Finding an alignment between these strategies is crucial to ensure the long-term success of the company. Effective communication, education and discussion of roles and responsibilities can help mitigate conflicts and enable shareholders and the board of directors to work in harmony.

Navigating the Evolving Shareholder Landscape

Thomas Bohun
Head of Investor Relations at Swiss Re,
Master of Science in International Management, University of St. Gallen,
Bachelor of Arts in Economics, University of California-Irvine

1. The classical Investor Relations role

The primary goal of an Investor Relations (IR) team has focused on providing consistent, transparent and accurate information to investors to enable them to assess the value of a listed firm. IR teams are important in shaping and maintaining a firm's investor proposition and aim to ensure that this is understood and to the extent possible, appreciated by participants in the financial markets. Traditionally, this meant focusing on a firm's financial proposition, i.e. market outlook, margins, growth and / or dividend yield. In terms of focus audience, sell side research analysts and actual investors, often personified by institutional portfolio managers, represented the main groups of interests. Why? With respect to sell side research analysts, the answer is obvious: because this group produces the outside-in research that assesses a given firm's fair stock valuation. The main users of this information are the institutional portfolio managers: they are the individuals that ultimately take the investment decision on whether to purchase a particular stock.

A considerable amount of many firms' shareholder base constitutes of retail investors, which must not be left out of the equation. Their expectations and concerns can differ from institutional investors. Retail investors' touch points with IR teams are often more concentrated around themes related to the Annual General Meeting (AGM) and / or when dividends are declared. Ensuring that retail investors' inquiries are addressed represents a key additional task for IR teams.

2. Connecting management to investors

Listed firms communicate their performance via regular external results disclosures, usually on a quarterly or semi-annual basis. Apart from coordinating these events, IR teams engage in additional activities to support this undertaking. Examples include post-results disclosure management meetings, which provide investors with access to senior management. IR teams also ensure regular attendances of investor conferences hosted by third parties either with senior management or on an IR-only basis. IR-organized Investor Days represent a public opportunity for Senior Management teams to communicate their firm's equity story and thereby respond to existing perceptions in the financial markets. These events generate significant interest as they often focus on new financial targets set by firms and provide a platform for extended Q&A sessions with Senior Management.

The increasing importance of non-financial disclosure amidst an evolving shareholder landscape in a period where themes such as geopolitical tensions, climate change and / or economic turbulence are viewed as global in nature, financial market participants increasingly seek to bolster their confidence in companies' resilience not just from a pure financial perspective, but also in terms of reputation and overall stakeholder management.

The most significant trend in listed firms' communications with investors is represented by the continued growth in interest and requirements around non-financial matters. While these traditionally focused around more technical management and board governance and compensation topics, this has recently expanded significantly to broader non-financial / ESG themes. Firms have no choice but to respond this. As an example of this, Swiss Re, one of the world's leading providers of reinsurance and insurance, and an early voluntary adopter of sustainability reporting, includes more than 200 pages focusing on corporate governance, compensation and broader sustainability-related disclosure in its most recent annual reporting package. These address increasing stakeholder interest, but are also increasingly required from a regulatory perspective. AGM voting turbulences can often revolve around investor dissatisfaction around sustainability topics. This is not surprising as compared to just some years ago, shareholders today are provided voting rights on both say-on-pay and say-on-non-financial disclosure items. The most profound consequence of this is that company boards have to cover much broader topics today compared to previously. Industry expertise is no longer sufficient, generalist knowledge on diverse non-financial topics has become a must.

3. The increasing importance of proxy advisors

Proxy advisors increasing represent the gatekeepers of non-financial disclosure and overall corporate governance evaluation. Their recommendations are critical ahead of AGM seasons, especially in times where passive institutional investors have gained significant weight and often rely heavily on proxy advisors to fulfill voting obligations. As a result, proxy advisors develop best practice recommendations at an increasing pace. Companies that do not fulfill key expectations, e.g. around board gender representation, in a given year, can quickly fall behind. Maintaining a balance between corporate governance stability and rapidly evolving expectations is becoming increasingly challenging.

To address this, in the lead-up to AGM season, IR teams with support of additional internal stakeholders often interact with proxy advisors, allowing for practical exchanges that are important to provide context to a company's chosen approach to non-financial matters. The main purpose is to avoid negative surprises around proxy advisors' ultimate recommendations.

4. Connecting the Board of Directors to investors

At Swiss Re, regular engagement on non-financial / ESG matters with relevant stakeholders is key for top management and the Board of Directors. In addition to regular exchanges with proxy advisors, for more than a decade, Swiss Re IR has been orchestrating a Chairman Roadshow. This annual engagement gives the firm's large investors, often represented by their respective ESG and / or Stewardship teams, an opportunity to address and discuss any key concerns about the firm's financials, corporate governance, and other sustainability-related topic including compensation directly with the Chairman of the Board of Directors. The timing of such roadshows is generally chosen ahead of the AGM season to ensure that external views are captured and potentially addressed ahead of critical voting procedures. With the continued growth of non-financial / ESG reporting requirements, it can be expected that Chairman Roadshows will continue to see a shift in focus towards ESG-related matters.

5. Conclusion

Gone are the times where companies' interactions with shareholders were almost purely driven by financial performance considerations. In today's world, facilitating a regular dialogue on non-financial matters between company management teams and boards and shareholders and proxy advisors is a key prerequisite to maintaining resilient corporate governance.

«Do Good and Talk about it.»: Communication as a Key Contributor to Success in Hospital Management

Swiss hospitals are confronted with significant challenges, many grappling with a stark struggle for survival. These challenges require not only accurate strategic decisions from management but also timely and precisely executed communication measures. Boards of directors should recognise that only hospitals which not only fulfil their responsibilities adeptly but also communicate effectively, both internally and externally, will achieve success.

Dr. Daniel Heller
Partner at Farner Consulting AG. In 2000, Daniel Heller became Chairman of the Board of Directors of the specialist clinic Barmelweid, which he transformed into the first hospital in the Canton of Aargau to become a non-profit public limited company. He also became Chairman of the Board of Directors of Kantonsspital Baden AG in 2014. In addition, he is the Chairman of the Board of Directors of Reuss Private Group AG and Member of the Board of Directors of Clientis AG. He also holds various board positions in the startup sector.

Daniel Heller studied history, economic history, and political science in Zurich.

The challenges facing hospital management continue to escalate. The relentless political pressure on tariffs, coupled with increasing costs, the shortage of specialists, the rapid evolution of medical technology, and numerous other factors, are rendering it increasingly difficult, if not impossible, for many hospitals to attain the necessary EBITDA margins. Inadequate infrastructure, lack of collaboration, subpar quality at high costs, and political determinations such as attempts to introduce global budgets reveal that many hospitals are struggling to survive.

1. Responsibilities of the Board of Directors

Amidst this backdrop, the significance of professional corporate communications is steadily increasing. The board of directors is responsible for shaping the overall strategy and orientation of the company, ensuring communication is in alignment with these strategic goals. Strategic communication encompasses the manner in which the company interacts with internal and external stakeholders, encompassing investors, customers, employees, suppliers, regulators, and the general public. This extends to communicating corporate objectives, values, performance, changes, and other relevant information.

The board of directors can directly or indirectly fulfil this duty by ensuring that management devises and implements appropriate communication strategies. Frequently, the board of directors establishes specialised committees, such as the communications committee, specifically addressing corporate communication matters. If the board delegates communication implementation, its role transitions to oversight, ensuring the correct trajectory is upheld.

2. Communication as a Catalyst for Success

The contribution of effective corporate communications can be pivotal to the success and continuance of individual companies in numerous aspects. This is because impactful corporate communications can yield the following outcomes:

- Strengthen the institution's public image;
- Ensure financial health by optimising patient admissions;
- Provide transparency on the quality of treatment and stay: patients increasingly develop into consumers with rising demands;
- Overcome the «war on talent» – skills shortages and challenging working conditions – by increasing recruitment success through strong employer branding;
- In terms of politics and policy decisions, it supports the political backing of performance contracts, construction projects, legislative revisions and other crucial projects.

The stakeholders and target groups for hospital communication are diverse and can be split into internal groups, such as employees across various categories (nurses, technicians, physicians, administrative staff, housekeepers, IT personnel, and others), as well as external groups, including (potential) patients, suppliers, politicians, authorities at all levels, other service providers, the media, and the (interested) public.

Effective communication plays a vital role in both preventing and resolving conflicts of interest within an organisation. A strong corporate communication strategy ensures that the organisation's interests are communicated openly and transparently. Thanks to effective communication efforts, successful hospitals have been able to complete new construction projects without objections, resulting in significant time and cost savings – a rare achievement for projects of this scale. Successful hospital communication also takes into account the conflict of interest in order to attract patients and, at the same time, avoid incurring higher healthcare costs as a result of unnecessary treatment.

3. «Do Good and Talk About It»

However, a targeted communication concept must stem from a robust corporate strategy: The adage «Do good and talk about it» holds true for a reason. If a service provider lacks effective management practices, a forward-looking strategy, or a stable organisational structure, even the most polished communication cannot mask the situation.

The objectives of successful external hospital communication are to strengthen the hospital's perception in the long term, heighten its visibility—particularly in relation to competitors—and firmly embed the brand both internally and externally, rendering it visible, palpable, and recognisable. This approach contributes to the success of bed occupancy, staff recruitment, and political endorsement.

A consistent communication strategy intertwines and unifies internal and external communications. This is done by linking the objectives and values set out in the brand strategy with specific internal and external communication endeavours.

4. Foundation: Anchored Brand Values and Stylistic Traits

Brand values and their stylistic characteristics play an incredibly significant role in corporate communications. They aid in forming and steering a company's image and perception.

- Unified Identity: Brand values articulate a company's ethos, guiding principles, and objectives. These values foster a harmonious and unified identity that permeates all aspects of corporate communication.
- Differentiation: Amidst a competitive market landscape, well-defined brand values and a distinctive style can differentiate a company from its rivals, enabling a unique market positioning.
- Trust Building: Consistent brand values conveyed through communication enhance the trust of customers, investors, and stakeholders. Genuine communication of values enables customers to identify more closely with the brand.

- Long-term Relationships: Conveying brand values establishes the foundation for enduring relationships with partners and customers. When customers share a company's values and aspirations, they are more likely to remain loyal over the long term.

- Clear Messaging: Stylistic characteristics reflecting brand values facilitate distinct and consistent messaging, making it simpler for customers to understand the company's intentions and connect with its vision.

- Internal Alignment: Brand values resonate not solely in external communication but also influence a company's internal culture. They assist employees in identifying with the company and actively participating in its success.

- Innovation and Decision-making: Brand values can serve as guideposts for innovation and decision-making. Companies can align their operations and output based on whether they resonate with their core values.

- Crisis Management: Clearly defined brand values also serve as guideposts during crises. They facilitate an appropriate and authentic response to challenges without deviating from the company's identity.

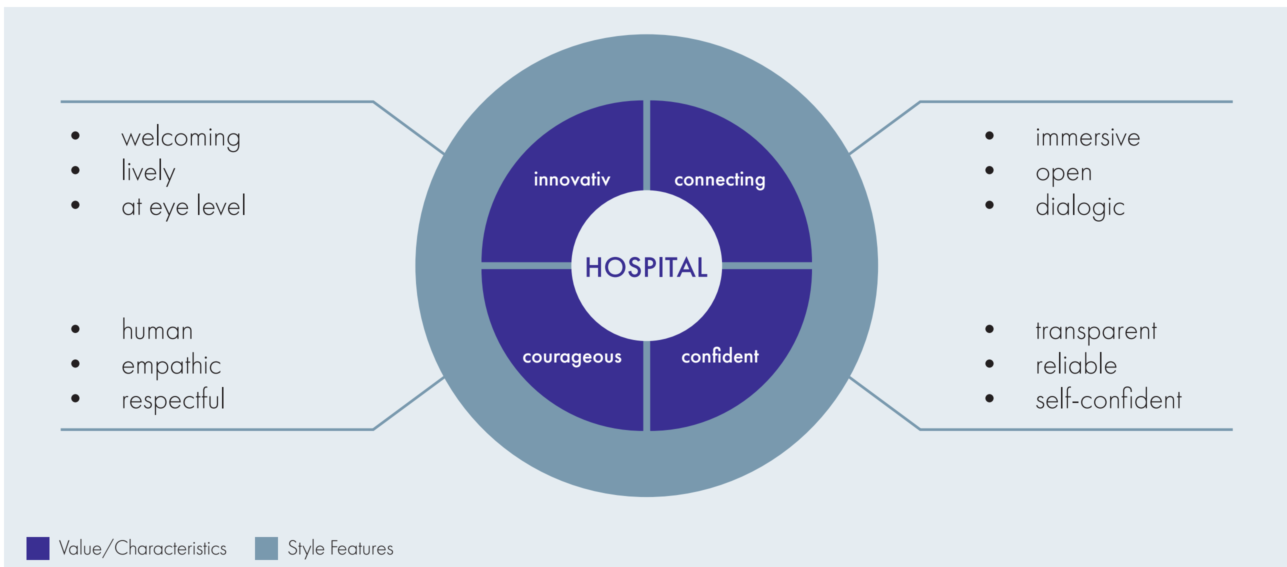
To summarise, brand values and stylistic traits contribute to fostering a robust and authentic brand identity that underpins the sustained success of a company.

5. Management's Duties

The board of directors and executive management of a hospital would do well to consistently factor in communication within their leadership endeavours. Beyond grasping the fundamentals of internal and external communication, these entities are also accountable for ensuring that adequate resources are allocated to this area. The era of relying on part-time communication managers untrained for the role has long passed.

For the board of directors, it is crucial to gain influence on an effective communication strategy with the key stakeholders: patients, health care partners, tax and insurance bill payers, politicians, and shareholders. Long-term success relies on maintaining a consistent and respectful dialogue with these vital partners. The relationship and, thus, the communication should be mutually beneficial. Infrequent communication driven by personal interests alone is unlikely to succeed.

Farsighted hospital management must encourage communication managers to explore new communication channels, professionalise internal communication platforms and channels, and continually generate communicable content. They play an integral role in shaping foundational values, emphases, and the content of corporate communication. Ultimately, successful companies do not merely communicate aspirations and intentions but rather report on what has been achieved. In other words: «Do good and talk about it.»



Information Barriers in Financial Services

Jakob Kungler
B.A. HSG in Law and Economics,
University of St. Gallen

1. Introduction

This article deals with the problem of conflicts of interest in the banking sector and their management through the implementation of information barriers as a possible instrument to ensure good corporate governance and compliance of a bank. Financial service providers, and in particular traditional universal banks, offer different services to their clientele. Inevitably, conflicts of interest arise that can have potentially serious effects on the clientele, investors and the (overall) market. The requirements imposed on banks by both the legislator and FINMA include, for example, the identification, monitoring and prevention of conflicts of interest, which are an integral part of a bank's compliance.

One possible instrument for preventing conflicts of interest is the establishment of so-called information barriers. Information barriers within the bank are intended to create separate areas. The aim is, on the one hand, to control information and limit the flow of information and, on the other hand, to create areas of confidentiality.

This article discusses the reasons for establishing information barriers, their design, and their potential impact. It also examines the impact of information barriers on a bank's corporate governance and the role of the board of directors, including their limitations.

2. Conflicts of interest in the banking sector

Conflicts of interest are unavoidable in the banking sector due to the role of banks as fiduciaries of their clientele, as a bank also pursues its own interests in addition to a large number of clients. The bank's fiduciary duty to its clientele derives primarily from private law and requires it to place the interests of its clientele above its own.[1] In the past, and increasingly after the financial crisis of 2007/2008, there have been calls for tighter supervision and control of banks.[2] In recent decades, the legal and regulatory framework has increased considerably as a result (e.g. with Basel III).[3]

1 Pursuant to Art. 398 para. 2 CO, the bank shall be liable for faithful and diligent performance under the contractual relationship.
2 Hopt K. J. (2017). Corporate Governance von Finanzinstituten. Zeitschrift für Unternehmens- und Gesellschaftsrecht, p. 438 et. sqq.
3 Basel III includes global regulations for the regulation of credit institutions.

Banks are subject to far-reaching statutory or regulatory reporting obligations that require a coordinated flow of information throughout the company. For this purpose, they must install a well-functioning overall organization. The organization is set up by the management respectively the board of directors, which bears the (overall) responsibility.[4] The provision, acquisition and evaluation of information are at the heart of a bank's activities, and information management is therefore an important task for banks. By processing information, it pursues a «knowledge-based» business model.[5] Due to the problem of conflicts of interest, it is crucial, especially for banks, how information may circulate within the company, since, among other things, the legal consequences (e.g., the question of liability) are linked to this.[6] Generally, a «conflict of interest» is assumed when one interest is placed above another. This can lead to a classic principal-agent dilemma, in which the representation of interests cannot be the servant of two masters at the same time.[7] In the present case, the principal-agent dilemma occurs in the relationship between bank employees (agents) and the clientele (principals).

Here, conflicts of interest can arise due to information asymmetries. Measures such as information barriers are required to reduce the information asymmetries and at the same time exploit the advantages of the division of labor between experts and laypersons.

Conflicts of interest affect not only individual bank clients, but also the market as a whole. If investors withdraw their trust in the capital market and its ability to function due to systematic conflicts of interest, this can lead in extreme cases to a shortage of capital and ultimately to market failure.[8]

The first step in identifying conflicts of interest is taken by the bank's compliance department. In order to prevent conflicts, the board of directors is responsible for various organizational measures, including the establishment of information barriers that prevent information from being exchanged between departments of the bank.

3. The instrument of the information barrier

Measures to prevent or mitigate conflicts of interest can come in different forms: At the institutional level, there is the restriction of business activities to certain areas. Here, under the so-called separation banking system, banks are prohibited from simultaneously providing all transactions or services to their clientele.[9] Second, there are specific prohibitions directed at bank employees. Certain practices such as «churning», «front / parallel / after running» and the so-called «price cutting» are prohibited in any case.[10] A measure aimed at preventing conflicts of interest is the information barrier.

Information barriers aim to limit the flow of information within the bank and prevent communication. They serve to ensure that sensitive information is not exchanged between different departments.[11] In other words, information barriers can be defined as measures that prevent potential conflicts of interest between the bank and its clients as a result of the flow of compliance-relevant information.

4 Pursuant to Art. 716a para. 1. cipher. 1 CO.

5 Abegglen S. (2004). Wissenszurechnung bei der juristischen Person und im Konzern, bei Banken und Versicherungen: Interessenkonflikte und Chinese Walls bei Banken und Wertpapierhäusern, Privatrecht und Finanzmarktrecht (Habil. Universität Bern 2003), p. 308.

6 Vischer M. & Galli D. (2022). Wissen, Nichtwissen und Wissenmüssen von natürlichen und juristischen Personen. Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht, p. 361 et. sqq.

7 Peters A. (2012). Conflict of Interest in Global, Public and Corporate Governance. Cambridge, p. 3 et. sqq.

8 Fischer D. A. (2018). Interessenkonflikte im Schweizer Privat- und Wirtschaftsrecht: Ein Beitrag zur dogmatischen Erfassung eines omnipräsenten Governance-Problems (Habil. Universität Zürich 2018, Zürich/St. Gallen 2019), p. 82.

9 Watter R. (1991). Chinese Walls bei Universalbanken?. Schweizerische Juristen-Zeitung, p. 109 et. sqq.

10 «Churning» is understood to mean the «switching of customer securities accounts without an economic reason in the customer's interest». The bank earns commissions on these additional and non-economic transactions at the expense of the clientele. «Front / parallel / after running» means that the bank buys the recommended securities itself before, during or after issuing (buy) recommendations, i.e. engages in proprietary trading. Finally, «price cutting» means that the customer is charged a lower price when buying securities than the bank achieves when executing the transaction. The difference remains with the bank as profit. For the whole see: FINMA-Circular 2009/01 N 14; Waygood-Weiner A. T. (2014). Rückvergütungen und Interessenkonflikte in der Finanzbranche (Diss. Universität St. Gallen 2013, Zürich/St. Gallen 2014), p. 47.

11 Hopt K. J. (2004). Prävention und Repression von Interessenkonflikten im Aktien-, Bank- und Berufsrecht, p. 214.

In Switzerland, the legislator does not conclusively regulate how a separation must take place. However, in practice, there is regular talk of organizational, hierarchical, functional and spatial separation.[12] This means that certain functions or departments within the bank are specifically separated from one another. In this way, the bank prevents employees who are involved in the provision of various financial services from performing tasks that do not allow for the proper handling of conflicts of interest.[13]

In this context, the separation of employees in particular comes into play. The following separation options have become established accordingly: In the case of spatial separation, separate buildings, floors or rooms lend themselves as measures. Task-related separation, on the other hand, tends to involve different legal units, departments and project groups that are to work independently of one another. Procedural separation can involve, for example, using selective distribution lists and agenda items that are only sent to a small group of employees on a need-to-know basis. Finally, mental separation is achieved with in-house education and training, which are also the cornerstones of the confidentiality areas.[14]

4. Sanctions

Violations of the establishment of information barriers can have consequences under private law as well as under criminal and supervisory law. This can range from claims for damages by clients[15] to criminal prosecution[16] and sanctions by FINMA. In particular, FINMA has the (sanction) remedy of restoring the proper state of affairs.[17] In this context, FINMA can reprimand the bank in a supervisory procedure and issue mandatory measures for supervised banks. These can range from organizational requirements to professional bans for errant executives.[18]

It is worth noting that there are discussions at the political level about strengthening FINMA's sanctioning powers (e.g., fine powers) in order to further improve the effectiveness of supervision and enforcement of conflict of interest rules and to strengthen transparency vis-à-vis the public.[19]

5. Corporate Governance

Compliance and corporate governance have a special position in the banking sector in the context of preventing conflicts of interest. Compliance, as part of corporate governance, is of crucial importance to banks and significantly influences their organization and risk management.

The compliance organization has a protective function for the bank, its clientele and the market as a whole. It aims to prevent knowledge-based conflicts of interest and maintain trust in the market. A functioning compliance organization can thus increase the bank's trustworthiness in the market, which means stability for the national and global financial system. The recently completed acquisition of Credit Suisse by UBS should be mentioned here. The takeover was announced to restore confidence in the bank as well as «to protect depositors and the financial markets.»[20] The function of protecting confidence thus applies not only to bank customers but also to the capital market.

Corporate governance, especially in the banking sector, has evolved over time, particularly as a result of various scandals and corporate failures of global significance in the 1970s.[21] But there have also been more recent calls for tighter regulation of banking institutions in Switzerland. One example is the Raiffeisen case, where serious deficiencies in the bank's corporate governance were identified in 2017/2018. On the one hand, the bank was reprimanded for the inadequate composition of its board of directors. FINMA stated that the bank had to ensure that «at least two members, have the required banking experience for the size of the institution».

12 Sethe R., Bösch R., Favre O., Kramer S. & Schott A. (2021). Schulthess Kommentar zum Finanzdienstleistungsgesetz FIDLEG (Zürich/Basel/Genf), Art. 25 N 59. .

13 Art. 25 lit. d FIDLEV, cf. Herzel L. & Colling D. E. (1978). The Chinese Wall and Conflict of Interest in Banks. The Business Lawyer, p. 90.

14 On the whole, see: Hofstetter B. (2002). Das Compliance-Konzept zur Verhinderung von Interessenkonflikten innerhalb von Universalbanken, p. 34.

15 Art. 398 CO.

16 Art. 158 SCC.

17 According to Art. 31 FINMASA.

18 Art. 33 FINMASA.

19 Postulate Birrer-Heimo P. (2021) retrieved from https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20214628.

20 FINMA, media release dated March 19, 2023.

21 Böckli P. (2022). Schweizer Aktienrecht, § 12 N 37; Bröker K. F. (2002). Compliance für Finanzdienstleister, Beratungs- und Verhaltensregeln für das Wertpapiergeschäft, p. 1.

On the other hand, FINMA criticized the lack of experience of the Board of Directors in the compliance area and required Raiffeisen to make profound and structural changes in the composition of the Board of Directors and the entire organization. Furthermore, gross violations were found in connection with the handling of potential and actual conflicts of interest, which were due on the one hand to an inadequate organizational structure and on the other hand to the overall corporate culture of Raiffeisen Switzerland.[22]

The Board of Directors is responsible for dealing with conflicts of interest and, in this context, also for monitoring compliance with organizational arrangements, establishing an effective internal control system (ICS) and implementing regulations, guidelines and processes to prevent improper market conduct.[23]

Finally, it is also the Board of Directors that shapes and is responsible for the strategic direction, the anchoring of compliance measures, and the bank's culture.

6. Limits of information barriers

FINMA and the Federal Supreme Court recognize in principle that information barriers are an appropriate means of preventing conflicts of interest.[24] Nevertheless, there are some important limitations. The Federal Supreme Court emphasizes that all material information must be brought together at the level of a bank's top management. Only in this way can the bank respond appropriately to conflicts of interest that affect the entire institution. This means that there is no perfect information barrier that works in all respects. Instead, information barriers are one part of an overall system that supports a bank's compliance.

Efficiency considerations represent another frontier for information barriers. In a competitive market such as the banking sector, business management factors play an important role. The pursuit of economic efficiency often leads to the merging of banking departments, which in turn can create conflicts of interest.[25]

In addition, stringent regulatory requirements can interfere with banks' entrepreneurial freedom and make it difficult for them to adapt to changing market conditions. Information barriers can also hinder cooperation and limit the ability of bank employees to act. The principle of proportionality must be observed, as different sized banks face different risks and implementation options.

It is emphasized that, after all, there are always people behind the compliance measures who have to follow and monitor them. It is also pointed out that if precautions are taken to prevent certain scenarios, there are always ways to circumvent them. Therefore, it is critical to make the implementation of information barriers flexible and company-specific, while exercising the necessary caution.

7. Conclusion

In this article, the information barrier instrument was examined with regard to its suitability for managing conflicts of interest in the banking sector.

It is emphasized that conflicts of interest in the banking sector can be detrimental not only to individual clients, but also to the financial market as a whole. In response, legislators and supervisory authorities have enacted rules of conduct to regulate conflicts of interest in order to strengthen the protection of clients and maintain the attractiveness of the Swiss financial center. One of the measures to prevent conflicts of interest is the establishment of information barriers. These include both functional and personnel separations that manage and control communication and the flow of information within the bank. Implementation also includes the creation of internal guidelines and training to raise employees' awareness of correct behavior.

22 On the whole, FINMA, media release dated June 14, 2018; Raiffeisen report N 59, N 64.

23 Strasser O. (2004). Aspekte von Compliance als Teil von Corporate Governance aus Sicht einer Bank, in: von der Crone H., Forstmoser P., Weber R. H. & Zäch R. (Hrsg.). Festschrift für Dieter Zobl zum 60. Geburtstag (Zürich/Basel/Genf), p. 537 et. sqq.

24 BGer 2A_230/1999 of February 02, 2000 E. 5; FINMA-RS 2013/08 N 51.

25 See fn. 8, p. 82 et. seq.

Implementing the information barriers can be challenging in practice, especially for small banks that offer (universal) services under one roof. Therefore, the implementation of these measures should be adapted to the specific circumstances of each bank. Finally, it is noted that even the best information barriers can be circumvented. Therefore, it is important not only to take formal measures, but also to create an understanding and positive culture regarding these measures. This requires continuous communication, role modeling by management and the board of directors, and finally, consistent monitoring of compliance.

This article suggests that banks and their governing bodies must work more actively to promote understanding of internal measures and regulations in order to create a banking culture free of conflicts of interest. This requires not only constant, targeted communication but also consistent sanctioning of misconduct. In addition, FINMA's sanctioning options could also be reviewed and expanded to more effectively punish misconduct by employees and managers.

Overall, this work shows that information barriers are an effective tool to manage conflicts of interest in the banking sector, but are not sufficient by themselves to ensure a functioning compliance organization. Corporate governance and the active role of the board of directors are critical to managing conflicts of interest and fostering a compliance culture. Finding an appropriate balance between information barriers and the need to share important information in the banking sector remains a challenge.

Schweizerisches Gesellschaftsrecht

von Arthur Meier-Hayoz, Peter Forstmoser

Seit der letzten Auflage dieses Buches ist eine Reihe von wichtigen Gesetzesänderungen beschlossen worden, allen voran die umfassende Erneuerung des Aktienrechts mit über 160 geänderten oder neuen Artikeln, die grösstenteils 2023 in Kraft treten sollen. Vollständig revidiert wurde auch das Handelsregisterrecht. Änderungen unterschiedlichen Umfangs finden sich sodann etwa bei der GmbH und der Genossenschaft, beim Verein und bei der Stiftung sowie im Rechnungslegungsrecht.Dies und die Entwicklungen in Lehre und Praxis machten eine Neubearbeitung des längst zum Standardwerk gewordenen Lehr- und Handbuchs erforderlich.

Mit der Neuauflage liegt eine umfassende Darstellung des Schweizer Gesellschaftsrechts und seiner Nebengebiete auf dem neuesten Stand vor. Dabei blieb die Zielsetzung trotz zahlreicher Änderungen und Ergänzungen unverändert: Das Buch soll Grundlage für das Studium, zugleich aber auch erste Auskunftsstelle für den Praktiker sein. Um diese doppelte Nutzung zu erleichtern, werden die Grundlagen einerseits und die weiterführenden Hinweise zu Einzelfragen sowie zu Literatur und Judikatur andererseits drucktechnisch unterschieden.

NICG
Network for Innovative Corporate Governance
Varnbüelstrasse 19
CH-9000 St. Gallen

Website: www.nicg.net
E-Mail: info@nicg.net
Telephone: +41 71 224 76 36

University of St.Gallen
Institute for Law and Economics

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