

Switzerland

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Introduction

Swiss corporate law is primarily contained in the Swiss Code of Obligations (CO),¹ particularly in Articles 552 to 1186. Several types of corporations are regulated by the CO: the general partnership (*société en nom collectif* or *Kollektivgesellschaft*),² the limited partnership (*société en commandite* or *Kommanditgesellschaft*),³ the limited liability company (*société à responsabilité limitée* or *Gesellschaft mit beschränkter Haftung*),⁴ the company limited by shares (*société anonyme* or *Aktiengesellschaft*),⁵ and the cooperative (*société cooperative* or *Genossenschaft*).⁶

The company limited by shares is the only corporation with a board of directors. The term ‘corporate directors’ is therefore only applicable to a company limited by shares. The other corporations are either partnerships formed by one or more partners or hybrids between stock companies and partnerships.

In particular, the limited liability company, which has the most common features with a stock company, consists of partners, each of whom acquires a stake in the share capital of the company by contributing to the total amount of the registered share capital.

However, the limited liability company does not have directors. Therefore, this chapter will focus on liabilities of directors of a company limited by shares and will not specifically deal with liabilities of partners of a limited liability company or other corporations. This being said, the principles developed in respect of liabilities of directors of a company limited by shares are applicable, *mutatis mutandis*, to other types of corporations.⁷

1 Systematic Collection of Federal Law (*Recueil systématique du droit fédéral*, RS) 220.

2 Swiss Code of Obligations, arts 552–593.

3 Swiss Code of Obligations, arts 594–619.

4 Swiss Code of Obligations, arts 772–827.

5 Swiss Code of Obligations, arts 620–771.

6 Swiss Code of Obligations, arts 828–926.

7 For example, among the provisions regarding the limited liability company, the Swiss

Under Swiss law, a company limited by shares is a legal entity, whose liabilities are payable from the company's assets. The shareholders are required only to fulfill the duties set out by law and in the articles of association of the company (typically, to fully pay in the nominal value of the shares) and are not personally liable for the company's obligations.⁸

For this reason, corporate directors cannot be liable for the company's obligations. Their liabilities arise out of a number of duties, which they may not breach in the management of the company. Swiss law regards breach of duties of a corporate director as part of the law of civil liability (ie, a corporate director is liable to repair the damage caused by the breach of his duties).

Thus, Article 754(1) of the CO provides that the members of the board of directors and all persons engaged in the business management or liquidation of the company are liable to the company, the individual shareholders, and the creditors for any losses or damage arising from any intentional or negligent breach of their duties. In addition, corporate directors also may have a significant liability arising out of tax or social security obligations.

Corporate directors' liability also may arise under criminal law. Corporate directors may incur criminal liability for acts committed personally, which, in many instances, is the result of a breach of their civil duty of care. However, they may further incur criminal liability for having failed to prevent the endangerment or damage of the company's interests in situations where they should have intervened by virtue of a legal obligation.

In order to understand the liabilities of directors, the concept of a 'corporate director' under Swiss law is first defined in this chapter, followed by a discussion on the structure of the board of directors and the duties and liabilities of corporate directors.

Definition of Corporate Director

In the context of civil liability, the term 'corporate directors' can cover various persons. According to Article 754(1) of the CO, not only the members of the board, (ie, formal or *de jure* directors), but also 'all persons engaged in the business management or liquidation of the company'⁹ (ie, *de facto* directors) may be subject to civil liability.

Formal or *de jure* directors are persons who have been duly appointed to the board through the shareholders' general meeting. They are registered in this capacity in the commercial register. Only natural persons (individuals) can be formal or *de jure* directors.

Code of Obligations, art 827, refers to arts 752 *et seq* on the civil liability of directors of a company limited by shares.

⁸ Swiss Code of obligations, art 620.

⁹ Swiss Code of Obligations, art 754(1).

De facto directors, also called *de facto* corporate organs, are persons who, without formally being part of the board, openly or silently carry out management duties in the company and act as directors. These persons can be closely related to the company (eg, a manager, an officer, or a commercial agent) or have an important influence on the company despite being apparently independent (eg, a sole shareholder or a majority shareholder).

According to Swiss case law, a person may qualify as a *de facto* director only if he takes decisions which fall within his competence, go beyond the day-to-day activities of the company, and have an impact on the company.¹⁰ Moreover, to qualify as *de facto* directors, such persons must influence the management of the company 'in the typical capacity of a corporate organ'.¹¹

As an illustration, the Swiss Supreme Court has ruled that a bank which invested in a company and effectively took part in its decisions acted as a *de facto* organ.¹² Similarly, two sole shareholders, who managed a company behind a 'puppet' director, were held to be *de facto* corporate organs.¹³

It follows that in the context of civil liability of corporate directors, different persons can be subject to liability. Along with formal members of the board, officers, managers, and even legal entities may qualify as 'corporate organs' and be held liable.

The exact position of the person within the company and the distinction between a director, an officer, and an inside or outside director will not play an important role in the determination of liability.

In fact, there is no difference in the types of liability for a director, an officer, or an inside or outside director. The crucial point is whether the person whose liability is questioned can qualify as a corporate organ.

Board of Directors in Swiss Corporate Law

The following developments correspond to the current regulation contained in the CO. However, on 3 March 2013, the Swiss citizens and cantons voted new provisions of the Swiss Federal Constitution against excessive executive remuneration. Such provisions will be implemented by the Swiss Federal Council in an ordinance on say-on-pay and excessive executive remuneration (the draft Ordinance), which is expected to enter into force on 1 January 2014 and will apply to Swiss companies limited by shares and listed on a stock exchange.

The draft Ordinance will have an impact on the regulation regarding the board of directors, which will be subject to several important changes, in particular in respect of the remuneration of the board members. Some of these changes will be highlighted below.

10 Decision of the Swiss Supreme Court (*Arrêt du Tribunal fédéral*, ATF) 128 III 29.

11 ATF 128 III 94.

12 ATF 107 II 349.

13 ATF 102 II 353.

Structure of the Board

The company's board of directors comprises of one or more members.¹⁴ Its composition will differ depending on the type and the structure of the company involved. According to the Swiss Code of Best Practice for Corporate Governance (the Best Practice Code),¹⁵ which contains a number of non-binding rules regarding corporate governance, the board should be small enough for efficient decision making and large enough for its members to contribute experience and knowledge from different fields and to allocate management and control functions between themselves. The size of the board should match the needs of the company.

Appointment and Removal of Board Members

Board members are appointed at the general shareholders' meeting. They are elected for a three-year term of office, unless the articles of association provide otherwise. Re-election is possible,¹⁶ although the term of office must not exceed six years. As from 1 January 2014, the board members (including the chairman) will be individually elected only for a one-year term, the re-election still being possible.¹⁷ The board must appoint a chairman and secretary.¹⁸ The secretary need not be a member of the board.

Board members can be revoked at any time through the general meeting.¹⁹ They also may resign. When a director has been appointed by a court (in case the company did not have a required corporate body or if the composition of one of these corporate bodies did not comply with the law),²⁰ he can be revoked by the court at the company's request.²¹

Directors' Right of Access to Corporate Information

Any board member, whether an 'inside' or 'outside' director, may request the chairman to convene a meeting without delay, by stating the reasons for the request.²² According to Article 715a of the CO, each board member also may request information on any business of the company.

Swiss law makes a distinction between the scope of information which can be obtained at board meetings and the information which can be obtained

14 Swiss Code of Obligations, art 707(1).

15 The Swiss Code of Best Practice for Corporate Governance was adopted on 25 March 2002 by the management board of *Économiesuisse*, which is the federation of Swiss businesses from all sectors of the economy (industry, financial sector, and other services). The Best Practice Code contains non-binding provisions aimed at providing some guidelines for efficient corporate governance.

16 Swiss Code of Obligations, art 710(1) and (2).

17 Draft Ordinance, art 3 (2).

18 Swiss Code of Obligations, art 712(1).

19 Swiss Code of Obligations, art 705(1).

20 Swiss Code of Obligations, art 731b(1).

21 Swiss Code of Obligations, art 731b(3).

22 Swiss Code of Obligations, art 715.

otherwise. At board meetings, all board members and all other individuals entrusted with managing the company's business are obliged to give information on any company business.²³ Outside board meetings, the request of information may only concern the company's business performance and, with the chairman's authorization, specific transactions.²⁴ The right to inspect the books of account and documents is not unfettered. It requires the chairman's authorization, which is granted only if required for future performance of the director's duties.²⁵

If the chairman refuses a request for information, a request to be heard, or an application to inspect documents, the board rules on the matter *in corpore*. In this respect, the Best Practice Code recommends that the chairman should, in mutual cooperation with the executive management, ensure that information on all aspects of the company relevant for decision-making and supervision is made available in a timely manner.

Directors' Remuneration

The CO presently does not specifically address the issue of corporate directors' remuneration. It indirectly refers to this issue by setting out some specific rules regarding payment of shares to board members from profits of the company.²⁶

The amount and the form of the remuneration are not regulated by law and may be freely decided by the company.²⁷ A number of suggestions in this respect can be found in the Best Practice Code, which specifies, in particular, that the board should set up a compensation committee, the majority of the members of which should consist of non-executive and independent members of the board.

The Code further recommends that the compensation committee should ensure that the company offers an overall package of remuneration that corresponds to performance and the market, in order to attract and retain persons with the necessary skills and character. The Code also recommends that the remuneration should be demonstrably contingent upon sustainable company success and the individual contribution by the person in question. False incentives should be avoided.

Listed companies must provide, in the notes to the balance sheet, certain information regarding corporate directors' remuneration. In particular, such companies must publish the amount of the remuneration distributed, directly or indirectly, to each board member.²⁸

23 Swiss Code of Obligations, art 715a(2).

24 Swiss Code of Obligations, art 715a(3).

25 Swiss Code of Obligations, art 715a(4).

26 According to the Swiss Code of Obligations, art 677, the shares can be paid only after the allocation to the legal reserve has been made and a dividend of 5 per cent (or a higher percentage laid down by the articles of association) has been paid to the shareholders.

27 F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), n 613.

28 Swiss Code of Obligations, art 663b *bis*.

As already indicated above, the draft Ordinance will have an impact on the directors' remuneration. In particular, as of 1 January 2014, the board will have to prepare and submit to shareholders an annual compensation report, which will include the payments directly or indirectly made to the current board members.²⁹ Moreover, the aggregate remuneration of the board members will have to be approved each year by the shareholder's meeting.³⁰ The following forms of remuneration will be prohibited:

- Severance payments;
- Advance remuneration payments;
- Payments related to the transfer or acquisition of businesses;
- Loans, credits, pension benefits or performance-related remuneration not provided for in the articles of incorporation; and
- Allocation of shares, other equity securities and conversion rights or options not provided for in the articles of incorporation.³¹

Powers of Board

In General

The board is vested with general powers. According to Article 716(1) of the CO, the board may pass resolutions on all matters not reserved to the shareholders' meeting by law or by the articles of association. The principal task of the board is to manage the affairs of the company.³²

The board has certain non-transferable and inalienable duties, which cannot be delegated or reserved to the general meeting or third persons. These duties are enumerated exhaustively in Article 716a(1) of the CO. This enumeration has an impact on the liabilities of corporate directors, as it facilitates demonstrating the breach of a duty.³³ The non-transferable and inalienable duties³⁴ enumerated in Article 716a(1) of the CO are:

- Overall management of the company and issuing of all necessary directives;
- Determining the company's management systems;
- Appointment and dismissal of persons entrusted with managing and representing the company;
- Overall supervision of the persons entrusted with managing the company;

29 Draft Ordinance, arts 13 – 16.

30 Draft Ordinance, art 18.

31 Draft Ordinance, art 20.

32 Swiss Code of Obligations, art 716(2).

33 F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), n 563.

34 F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), nn 566–594.

- Compilation of the management report, preparation for the general meeting, and implementation of its resolutions; and
- Notification to the court in the event that the company is over-indebted.

Overall Management and Issuing Directives

The overall management of the company consists in determining the strategic goals of the company, choosing the means to achieve them, and striking a balance between goals and means.³⁵ The board is obligated to give general directives to the executive management regarding the methods to be adopted to achieve the goals within the available means (*cura in instruendo*).

Determining Company's Organization

The board is obligated to provide the company with a structure and organization. It must determine the different positions within the company, the relationships between the different positions, and the activities and duties inherent to each position. Organization of the board itself is a non-transferable duty. Organization of the remaining part of the company can be delegated to the executive management.

Organization of Management Systems

The board is obligated to organize the accounting, financial control, and financial planning systems that are required for the management of the company. It must ensure that the company's books are kept in line with legal requirements and that accounting is organized rationally, in order to provide a complete overview of the company's financial situation. In fact, accounting systems should be used by the board as a means to take necessary decisions for management of the company in due time.

Appointment and Dismissal of Managers and Representatives

The board is obligated to be particularly careful in the appointment of persons entrusted with managing and representing the company (*cura in eligendo*). In particular, the board must make its decisions on the basis of several references and after having interviewed possible candidates. Furthermore, the board is obligated to dismiss persons whose activity in the management of the company's business is unsatisfactory (*cura in custodiendo*).

Overall Supervision of Persons Entrusted with Managing Company

The board exercises overall supervision of the persons entrusted with managing the company, particularly with regard to compliance with the law, the articles of association, operational regulations, and directives.

The board is not expected to exercise control over each decision taken by the persons entrusted with the management of the company, but only has to ensure,

³⁵ F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), n 566.

by the means of reports and efficient supervision, that it is informed of the activities of management. Supervision is not limited to compliance with the law, but also encompasses economic strategies (*cura in custodiendo*).

Management Report and Shareholders' Meetings

The board is responsible for compiling the management report, preparing for the general meeting, and implementing its resolutions. Several obligations are covered by the broad formulation of Article 716a(1)(6) of the CO. These obligations are specifically addressed by different provisions of the CO.

The board is obligated to draw up a management report for each financial year, comprising the annual accounts, the annual report, and (when required by law) the consolidated accounts.³⁶ The annual accounts are made up of the profit and loss account, the balance sheet, and the notes to the accounts.³⁷ The board must ensure that the information contained in these documents is accurate. False statements may give rise to criminal liability.³⁸

The board is obligated to convene the general meeting.³⁹ Notice on the convening of the general meeting must be given in the form prescribed by the articles of association no later than 20 days prior to the date on which it is scheduled to be held. The notice must include the agenda items and the motions of the board.⁴⁰ At the same time, the management report and audit report must be made available for inspection by shareholders at the seat of the company. Any shareholder may request the board to send a copy of these reports without delay.⁴¹

During the general meeting, the board is obligated to provide shareholders with the annual accounts, which, together with the audit report,⁴² must be approved by the shareholders at the general meeting.⁴³ After the general meeting, the board is responsible for implementation of the decisions taken by the shareholders.

Notification of Over-Indebtedness to Court

In the case of financial difficulties and over-indebtedness of the company, the board must comply with numerous requirements set out by Article 725 of the CO. In particular, the board has a duty to convene a general meeting and propose financial restructuring measures in case of capital loss. It also has the duty to notify the court in case of over-indebtedness.⁴⁴

³⁶ Swiss Code of Obligations, art 662(1).

³⁷ Swiss Code of Obligations, art 662(2).

³⁸ Further discussed in 'False Statements about Commercial Business', below.

³⁹ Swiss Code of Obligations, art 699(1).

⁴⁰ Swiss Code of Obligations, art 700(1) and (2).

⁴¹ Swiss Code of Obligations, art 696(1).

⁴² Swiss Code of Obligations, art 731(1).

⁴³ Swiss Code of Obligations, art 698(2)(4).

⁴⁴ In relation to the specific duties of corporate directors, these requirements are examined in detail in 'Board Members' Duties under Article 725', below.

Although Article 716a(1) of the CO only mentions the obligation to notify the court in case of over-indebtedness, it is generally admitted that measures to be taken in case of a capital loss also are part of the board's non-transferable and inalienable duties.⁴⁵

Delegation of Powers

As discussed previously, the overall management of the company is the responsibility of the board. The legislature has actually conceived the board not as a mere supervisory body, but as the sole administrative body.⁴⁶ This being said and save for the case of very small companies, it is quite rare that board members personally manage all of the company's business. Personal management may be suitable for small family companies with just a few shareholders who are simultaneously members of the board. It is hardly practicable for larger companies.

Consequently, Swiss law foresees the possibility of delegation of powers under certain conditions. Pursuant to Article 716b(1) of the CO, the articles of association may authorize the board to delegate the management of all or part of the company's business to individual members or third parties, in accordance with its organizational regulations. These regulations determine the way in which the company's business is managed, stipulate the bodies required to carry out such management, define their duties, and regulate the company's internal reporting in particular.

Accordingly, the board may delegate some of its management powers, except for its non-transferable and inalienable duties. From a formal point of view, this delegation requires authorization by the shareholders in the articles of association. It also must be specified in the organizational regulations.

It has to be noted that, as from 1 January 2014, the management powers may be delegated only to individuals and not to corporations or other legal entities.⁴⁷

In practice, delegation of powers is a way to mitigate the risks of corporate directors' personal liability. Indeed, provided that the members of the board can prove that they acted with all due diligence when selecting (*cura in eligendo*), instructing (*cura in instruendo*), and supervising (*cura in custodiendo*) the persons to which duties have been delegated, they should not be held liable under Swiss law.⁴⁸

Cura in eligendo implies that the board is obligated to ensure that it carefully chooses the persons to which some powers are delegated. In particular, the board must ensure that the potential candidates have the necessary background, skills,

45 F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), n 594.

46 M. Bauen and R. Bernet, *Swiss Company Limited by Shares*, Schulthess Juristische Medien AG (Zürich, Basel, Genf, 2007), n 457.

47 Draft Ordinance, art 6.

48 Swiss Code of Obligations, art 716b(2); ATF 122 III 195.

and moral qualities corresponding to the requirements of the position to be held in the company. For this purpose, the board may interview each candidate.⁴⁹ Moreover, according to the Swiss Supreme Court, *cura in eligendo* encompasses a duty to remove a person to whom powers have been delegated if he shows a serious lack of competence.⁵⁰

Cura in instruendo calls for the board to carefully instruct the person entrusted with delegated powers. Depending on the circumstances of each case, the board also may be required to assist such a person.⁵¹ Finally, *cura in custodiendo* requires the board to exercise due care in supervision. This follows from the non-transferable and inalienable duty of the board to supervise persons entrusted with managing the company, as set out by Article 716a(1)(5) of the CO.

Corporate Directors' Duties

In General

When conducting the business of the company, corporate directors are bound by several duties. These duties can arise from the articles of association or from the internal regulations of the company. They also may arise from the decisions taken at a shareholders' meeting or from statutory provisions.

One of the provisions defining the duties of corporate directors is contained in Article 717(1) of the CO. According to this provision, the board and third parties engaged in managing the company's business must perform their tasks with all required diligence and must safeguard the interests of the company in good faith.

They must afford shareholders equal treatment in like circumstances.⁵² Three principal duties are covered by Article 717 of the CO: the duty of care, the duty of loyalty, and the duty to treat all shareholders equally. Each of these duties is examined in turn.

Duty of Care

It follows from Article 717(1) of the CO that corporate directors must perform all tasks, howsoever arising, with due care.

According to case law of the Swiss Supreme Court, a corporate director is obligated to exercise the level of due care that is necessary for management of the company.⁵³ The level of due care is to be determined objectively in each

49 M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), p. 53.

50 ATF 122 III 195; also discussed in 'Appointment and Dismissal of Managers and Representatives', above.

51 M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), p. 54.

52 Swiss Code of Obligations, art 717(2).

53 ATF 122 III 195.

case. The behavior of the corporate director must be compared to the behavior that would have been adopted by a ‘good’ director (*bonus administrator*) — that is, a reasonable and conscientious person acting in a comparable situation.⁵⁴ It also is established under Swiss case law that a corporate director may not limit himself to exercising the *diligentia quam in suis* principle by applying the same standard of care as in his own business.⁵⁵

Moreover, if a corporate director has some above-average skills and knowledge in a particular field, a higher standard of due care will be applicable to him.⁵⁶ For example, if the corporate director is a management expert holding a PhD in economics, the standard of care applicable will be based on the average skill and knowledge of a management expert with the same education.⁵⁷

Being a mere ‘straw man’ without effective management powers is not a ground for exoneration of liability. Any person who accepts the function of a corporate director, despite knowing that he cannot properly discharge his obligations as such, breaches his duty of care.⁵⁸ Moreover, corporate directors may not invoke subjective grounds, such as lack of professional skills and knowledge or lack of time, to escape from potential liability.⁵⁹

In particular, the duty of care requires a corporate director to regularly check and keep himself abreast of the financial situation of the company.⁶⁰ A corporate director is obligated to ensure that he is regularly informed of the developments in the company’s business.⁶¹ He must seek the assistance of qualified persons, if necessary.⁶²

The duty of care is actually more than an ordinary duty. It sets the standard of care required for performance of an obligation. In other words, it indicates the manner in which an obligation is to be performed.⁶³

In order to ensure compliance with the duty of care, corporate directors may take inspiration from the non-binding recommendations of the Best Practice Code. For example, clause 14 of the Best Practice Code provides that the board should review regulations it has issued at regular intervals and amend them as required. The board also is obligated to annually discuss its own and its members’ performance.

54 ATF 4C.201/2001 of 19 June 2002; M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), at p. 115.

55 ATF 122 III 195.

56 ATF 4C.201/2001 of 19 June 2002.

57 ATF 4C.201/2001 of 19 June 2002.

58 ATF 122 III 195.

59 ATF 4C.192/2003 of 13 October 2003.

60 ATF 132 III 564.

61 ATF 122 III 195.

62 ATF 4C.192/2003 of 13 October 2003.

63 M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), at p. 114.

Duty of Loyalty

In General

Board members must safeguard the interests of the company in good faith.⁶⁴ Most Swiss scholars infer from this provision that the corporate directors should refrain from acting in any way that could be harmful for the company.⁶⁵ Several more specific duties result from this general duty of loyalty.

Prohibition on Acting Detrimentally to Corporate Interests

The duty of loyalty requires corporate directors to act in the interests of the company and put their own interests after the interests of the company.⁶⁶ In particular, a corporate director may not enter into agreements detrimental to the company.

In this context, situations in which a member of the board personally enters into an agreement with the company (the so-called ‘agreement with oneself’) or signs an agreement in the capacity of a corporate organ of another company (the so-called ‘double representation’) deserve particular attention, as these situations raise complex issues of conflict of interests. According to settled case law of the Swiss Supreme Court and as a matter of principle, agreements with oneself and double representation are not admissible.⁶⁷

A corporate director personally entering into an agreement with the company that he is representing or executing an agreement on behalf of two different companies gives rise to a potential conflict of interests between the corporate director and the company.⁶⁸ Consequently, agreements with oneself and agreements entered into under a double representation will be generally deemed null and void.

There are, however, two exceptions to this rule. First, such agreements will be valid if, due to the nature of the particular transaction, any risk of harm to the represented company or companies can be excluded.⁶⁹ Second, such agreements will be valid if the corporate director has received special authorization from the represented company to execute the agreement or if the represented company subsequently ratifies the agreement.⁷⁰

The conclusion of an agreement with oneself is subject to a formal statutory requirement. Pursuant to Article 718b(1) of the CO, if the company is represented in the execution of a contract by the person with whom it is entering

64 Swiss Code of Obligations, art 717(1).

65 M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), at p. 135.

66 ATF 130 III 214.

67 ATF 127 III 332.

68 ATF 127 III 332.

69 ATF 126 III 363.

70 ATF 126 III 363.

into such contract, the contract must be made in writing. However, this requirement does not apply to contracts relating to everyday business when the value of the company's goods or services does not exceed CHF 1,000.⁷¹ Apart from acting in the interests of the company, which is the core principle of the duty of loyalty, corporate directors must act in line with several other requirements imposed by the duty of loyalty.

Prohibition on Competing with the Company

Most Swiss scholars agree that the duty of loyalty prohibits corporate directors from competing with the company.⁷² In case of an infringement of this provision, the company should be able to claim the profit unlawfully obtained by the corporate director who has breached his duty of loyalty.

This claim derives from Article 423(1) of the CO, which provides that when agency activities are not carried out in the best interests of the principal, the latter is entitled to appropriate any resulting benefits. As a result, the restitution of profits would be the consequence of an activity that has not been carried out in the interests of the company.

The prohibition on competition also includes the particular case of usurpation of corporate opportunities — that is, business transactions not yet formally entered into, but that are expected to be concluded by the company. According to the Swiss Supreme Court, if a corporate director frustrates the opportunities of the company he represents, he commits a breach of his duty of loyalty.⁷³ Such an act also can trigger the corporate director's criminal liability.⁷⁴

Prohibition on Use of Inside Information

The duty of loyalty also prohibits a corporate director to use inside confidential information which is available to him because of the position he holds within the company.⁷⁵ A similar prohibition is foreseen by Article 161 of the Swiss Criminal Code.⁷⁶

Notably, the prohibition resulting from the duty of loyalty goes beyond the prohibition resulting from Article 161 of the Criminal Code, in particular with regard to confidential information.⁷⁷ Article 161 of the Criminal Code only applies to listed companies.

⁷¹ Swiss Code of Obligations, art 718b.

⁷² M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), p. 143.

⁷³ ATF 109 IV 111.

⁷⁴ As discussed in 'Disloyal Management' under 'Personal Criminal Liability', below.

⁷⁵ F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), n 643.

⁷⁶ RS 311. The Criminal Code, art 161, is further discussed in 'Insider Trading', below.

⁷⁷ M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), at p. 145.

The Best Practice Code contains several recommendations aimed at preventing insider-trading offenses. In particular, the board should consider whether appropriate action (such as blackout periods) should be taken with regard to purchasing and selling securities of the company or other sensitive assets during critical periods, such as in connection with takeover projects, before media conferences, or prior to announcing corporate results.⁷⁸

Prohibition on Following Third-Party Instructions

A corporate director further breaches his duty of loyalty if he commits himself to following the instructions of a third party when discharging his non-transferable and inalienable duties.⁷⁹

According to Swiss case law, a member of the board who acts as a fiduciary for a third party must, in case of a conflict of interests, put the interests of the third party after the interests of the company.⁸⁰

Duty of Recusal

A corporate director must refrain from taking part in board decisions that may give rise to a conflict of interests between him and the company.⁸¹ For example, if the company is about to enter into an agreement with a relative of a corporate director, that director is not allowed to vote.⁸²

Duty of Discretion

The duty of loyalty also encompasses a duty of discretion, particularly in relation to manufacturing or trade secrets.⁸³

A corporate director is obligated to comply with this duty even after termination of his mandate, when this is in the interests of the company.⁸⁴ The duty of discretion also results from Article 162 of the Criminal Code.⁸⁵

Duty to Treat All Shareholders Equally

Board members must afford the shareholders equal treatment in like circumstances.⁸⁶ The duty of equal treatment is not absolute. Different treatment

78 Best Practice Code, art 17.

79 F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), n 645.

80 ATF 4C.143/2003 of 14 October 2003.

81 M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), p. 139.

82 F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), n 646.

83 F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), n 649.

84 M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), p. 147.

85 Further discussed in 'Breach of Manufacturing Secret or Trade Secret', below.

is acceptable, provided that it is not arbitrary and is an appropriate means to achieve a justified goal.⁸⁷ Different treatment is thus lawful when it is in the predominant interests of the company.⁸⁸

The duty of equal treatment is of particular significance in the context of sale of the company's own shares or conclusion of an agreement with a shareholder, such as a loan agreement, under preferential conditions.

In order to comply with the duty of equal treatment, a highly recommended practice is to deal at arm's length or to make the same offer to all shareholders who are in the same situation.⁸⁹

Board Members' Duties under Article 725

In General

Numerous enterprises are, at some point, confronted with financial troubles.⁹⁰ The development of an enterprise depends on several factors, including the global economic situation. In particular, the profitability of a company can be severely affected by economic fluctuations, as has been the case during the recent economic crisis.

Corporate directors should be able to cope with any difficult situation. In particular, they are obligated to be proactive in order to detect, as soon as possible, any serious threat to the economic health of their company.

They should promptly take all necessary measures before a financial tsunami engulfs their enterprise. Accordingly, when a company faces a period of crisis, the board must pay close attention to financial control, which is a non-transferable and inalienable duty.⁹¹ In this context, Article 725 of the CO imposes strict obligations on the board of a Swiss share company in case of capital loss and/or over-indebtedness.

Capital Loss

When the last annual balance sheet shows that half of the combined share capital and legal reserves are no longer covered, the board must, without delay, convene a general meeting and propose financial restructuring measures.⁹²

86 Swiss Code of Obligations, art 717(2).

87 ATF 117 II 290.

88 ATF 4C.242/2001 of 5 March 2003.

89 M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), at p. 155.

90 M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), at p. 158.

91 Discussed in 'Directors' Powers', above.

92 Swiss Code of Obligations, art 725(1).

This provision is aimed at protecting the interests of shareholders in the event of a ‘capital loss’⁹³ — that is, when, according to the company’s last annual balance sheet, half of the combined share capital and legal statutory reserves are no longer covered by net assets.⁹⁴ In such a case, the board must call a general shareholders’ meeting without delay and inform shareholders of the critical financial situation. Shareholders may then deliberate upon proposed restructuring remedies and vote on adopting required measures.⁹⁵

Financial restructuring measures are not defined by law. According to Swiss scholars, the purpose of such measures is to improve the profitability of a company and to overcome losses.⁹⁶ For example, financial restructuring measures can consist in a decrease of capital with simultaneous capital increase, a merger, or an asset re-evaluation.⁹⁷

Over-Indebtedness

Corporate directors also have specific duties in relation to the possible over-indebtedness of the company. Pursuant to the first sentence of Article 725(2) of the CO, when there is good cause to suspect over-indebtedness, an interim balance sheet must be drawn up and submitted to a licensed auditor for examination. A good cause to suspect over-indebtedness can consist of systematic and serious losses in the monthly profit and loss statements, of cash drain, or of a decrease in liquid assets.⁹⁸

While the first sentence of Article 725(2) of the CO addresses suspicion regarding a possible over-indebtedness, the second sentence regulates the consequences of established over-indebtedness. Pursuant to this provision, if the interim balance sheet shows that the claims of the company’s creditors are not covered (irrespective of whether the assets are appraised at going-concern or liquidation values), the board must notify the court, unless certain company creditors subordinate their claims to those of other company creditors to the extent of the capital deficit.⁹⁹

Accordingly, corporate directors have the duty to notify the court in case of over-indebtedness of the company (ie, when the liabilities of the company exceed its assets). This is a non-transferable and inalienable duty of the board.¹⁰⁰

93 ATF 121 III 420.

94 ATF 121 III 420.

95 M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006) p. 162.

96 M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006) p. 163.

97 F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), n 660.

98 F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), n 666; ATF 132 III 564.

99 Swiss Code of Obligations, art 725(2), second sentence.

100 Discussed in ‘Notification of Over-Indebtedness to the Court’, above.

However, notification to the court can be avoided if a company's debts can be subordinated. Such subordination is subject to several legal requirements. In particular, the subordinated creditors must undertake to the company that they will not claim repayment of the subordinated amount before all unsubordinated claims are satisfied in the context of a possible bankruptcy of the company.¹⁰¹ Furthermore, such subordination must remain in force until the elimination of the over-indebtedness.¹⁰²

Finally, subordination must be financially viable for the creditor, because if the creditor is declared to be bankrupt, its creditors would be able to revoke the subordination, according to the Swiss bankruptcy law.¹⁰³ Notification to the court also may be avoided if there is a real prospect of financial reorganization, provided that creditors are not threatened by further deterioration of the company's financial health.¹⁰⁴

The failure to take timely action when facing (or failing to notice) a company's over-indebtedness is a potential ground for civil liability.¹⁰⁵ The damage consists in the increase in the company's losses occurring between the time the board knew, or should have known, of the company's financial situation and the date on which the company is declared bankrupt.¹⁰⁶ Finally, breach of the duties provided in Article 725 of the CO also may trigger criminal liability of a corporate director.¹⁰⁷

Corporate Directors' Civil Liability

Civil Liability for Breach of Duties under Article 754

General tort liability is regulated by Article 41 of the CO, which provides that any person who unlawfully causes loss or damage to another, whether willfully or negligently, is obliged to provide compensation. Although similar to general tort liability, civil liability of corporate directors is subject to a special provision of the CO: Article 754(1) of the CO, which is *lex specialis* to Article 41 of the CO.

Pursuant to Article 754(1) of the CO, board members and all persons engaged in the management or liquidation of a company are liable both to the company and to

101 M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), at p.179.

102 M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), at p. 181.

103 M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), at p. 181.

104 ATF 4C.366/2000 of 19 June 2001.

105 ATF 132 III 564.

106 F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), n 871.

107 Discussed in 'Criminal Liability in Case of Bankruptcy', below.

the individual shareholders and creditors for any losses or damage arising from any intentional or negligent breach of their duties. Along with formal members of the board, officers, and managers, *de facto* directors and even legal entities can be qualified as corporate organs and be held liable under this provision.¹⁰⁸

The claim for damages against any person held liable becomes time-barred five years after the date on which the injured party learned of the damage and of the person liable, but in any event 10 years after the date of the act which caused the damage.¹⁰⁹ When the action stems from a criminal act for which criminal law provides for a longer time limit, the latter also applies to the civil claim.¹¹⁰ Before presenting the general conditions of liability resulting from Article 754(1) of the CO, some explanation is provided as to the persons entitled to act against corporate directors on the basis of this provision.

Capacity to Act as Claimant under Article 754

In General

The capacity to act as claimant on the basis of Article 754 of the CO is subject to several requirements. These requirements do not clearly arise from the statutory provisions, but have been developed by Swiss courts. As a rule, three different categories of persons can act as claimants under Article 754 of the CO: the company, shareholders, and creditors. Different regulations apply to each of these categories.

The Company

Irrespective of being declared bankrupt, a company may act against corporate directors or other corporate organs if it has suffered damage. This action is called a ‘corporate action’. As a rule and in the absence of bankruptcy proceedings, the decision to initiate such an action will be taken by the board, as this decision relates to the management of the company.¹¹¹ However, if all members of the board or a major part of them are prospective targets of such action, the decision may be taken at the general meeting.

In the context of bankruptcy proceedings, the decision to initiate an action for liability of corporate directors will be taken at the second creditors’ meeting according to the specific procedural rules of the Debt Collection and Bankruptcy Act.¹¹²

Shareholders and Creditors

The situation of shareholders and creditors is more complex in respect of their capacity to act as claimants against (current or former) corporate directors and

108 Discussed in ‘Definition of Corporate Director’, above.

109 Swiss Code of Obligations, art 760(1).

110 Swiss Code of Obligations, art 760(2).

111 F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), n 826.

112 Debt Collection and Bankruptcy Act (RS 281.1), art 253(2).

depends upon the nature of the damage invoked.¹¹³ A wrongful act of a corporate director may directly or indirectly affect a shareholder and/or a creditor. Consequently, the damage suffered can be either direct or indirect.

Damage is deemed to be direct if the shareholder or creditor is individually and specifically affected in his personal assets, independent of any damage suffered by the company.¹¹⁴ For example, a shareholder who has been deceived by a corporate director and has consequently made an important investment in the company which would not have been made otherwise will be considered to have suffered direct damage.¹¹⁵

On the other hand, damage is deemed to be indirect if it results from a loss to the company due to an act of the corporate director which causes, for example, a decrease in the value of the company's shares.¹¹⁶

Under settled Swiss case law, a shareholder or a creditor can individually claim damages from a corporate director in case of direct damage.¹¹⁷ However, in case of indirect damage, only the company is entitled to act against the corporate director who caused harm to the company.¹¹⁸ A shareholder and/or a creditor indirectly affected by the damage caused to the company will not be able to individually claim damages. Such a shareholder or creditor will only be able to initiate a corporate action seeking relief aimed at the payment of damages to the company.¹¹⁹

General Conditions of Liability

In General

The general conditions for liability of corporate directors are quite similar to the general conditions set out by Article 41 of the CO in the context of liability for torts.

The conditions that must be fulfilled are the existence of damage; an unlawful breach of duty; a natural (or factual) and adequate causality between violation of the duty and the occurrence of damage; and fault.

Damage

According to the general principles of Swiss tort law, damage consists of the non-voluntary decrease of a person's assets. Assessment of damage involves

113 ATF 4A.174/2007 of 13 September 2007.

114 ATF 4A.174/2007 of 13 September 2007.

115 F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), n 832.

116 F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), n 833.

117 ATF 4A.174/2007 of 13 September 2007; ATF 132 III 564.

118 ATF 4A.174/2007 of 13 September 2007.

119 F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), n 862.

evaluation of the difference between the actual value of the assets and the hypothetical value of the same assets had the damage not occurred.¹²⁰

Unlawful Breach of Duty

There are several statutory duties, the violation of which may give rise to a liability claim. For example, infringements of the duty of care, duty of loyalty, duty of equal treatment, duties related to specific information and action in case of capital loss and/or over-indebtedness, as well as non-transferable and inalienable duties may give rise to a claim.¹²¹ Additional duties may be set forth by the company's articles of association and in a possible mandate/employment agreement between the company and the members of its board.

Causality

The behavior imputed to the corporate director should have resulted in the damage being invoked. In other words, there must be a causal relation between the violation of duty committed by the corporate director and the occurrence of damage.

A mere natural (or factual) causality is necessary, but is not sufficient under Swiss law;¹²² adequate causality also is required. An act will be considered an adequate cause only if, in the ordinary course of events and the 'general experience of life', such an act is likely to have an effect similar to the act that has occurred.¹²³

Fault

A corporate director can be held liable only if he has committed a fault — that is, if he has breached his duty intentionally or by negligence.¹²⁴ Negligence, however, presupposes that the corporate director could have reasonably foreseen the damage.¹²⁵

According to the Swiss Supreme Court, requirement of fault is always met when the respondent has not acted in the way in which a corporate organ with the necessary competences would have acted in the same circumstances.¹²⁶

Liability for Issue Prospectuses

Swiss corporate law provides for a specific liability for issue prospectuses which contain financial information and which may be relied upon by third persons when acquiring securities of a company.

120 F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), n 870.

121 These duties have been discussed in 'Duties of Corporate Directors', above.

122 F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), n 872.

123 ATF 113 II 57.

124 ATF 4A.174/2007 of 13 September 2007.

125 M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), at p. 195.

126 ATF 4A.174/2007 of 13 September 2007.

When information that is inaccurate, misleading, or in breach of statutory requirements is given in issue prospectuses or in similar statements disseminated when the company is established or is about to issue shares, bonds, or other securities, any person involved, whether willfully or negligently, is liable to acquirers of the securities for resulting losses.¹²⁷ Inaccurate and misleading information giving rise to a civil liability is similar to liability for false or incomplete statements, which may give rise to a criminal liability.¹²⁸

Release from Liability

Only the company's shareholders' meeting can release the corporate directors from liability.¹²⁹ The release is effective only for disclosed facts and only as against the company and those shareholders who approved the resolution or who have since acquired their shares in full knowledge of the resolution.¹³⁰ The right of action of the other shareholders lapses six months after the resolution of the relevant release.¹³¹

Corporate Directors' Liability Insurance

Insurance and indemnification of corporate directors are not specifically addressed by Swiss law. However, it is generally admitted that corporate directors can cover their liability risk in several ways. This is primarily done in two ways.¹³²

First, a company may undertake to pay the legal expenses of a liability claim filed against its corporate directors.¹³³ Corporate directors may encounter a significant expense burden for many years until proceedings are closed. However, pursuant to Article 100(1) of the CO, any advance agreement purporting to exclude liability for unlawful intent or gross negligence is void. Accordingly, the validity of such an agreement would be doubtful if it also is intended to cover the consequences of gross negligence.¹³⁴

Second, an insurer may contractually undertake to release a corporate director from any obligation to pay damages.¹³⁵ Each member of the board can contract such an insurance policy, which will typically cover liabilities

127 Swiss Code of Obligations, art 752.

128 Discussed in 'False Statements about Commercial Business', below.

129 Swiss Code of Obligations, art 698(2)(5).

130 Swiss Code of Obligations, art 758(1).

131 Swiss Code of Obligations, art 758(2).

132 M. Bauen, R. Bernet, and N. Rouiller, *La société anonyme suisse*, Schulthess Juristische Medien AG (Zürich, Basel, Genf, 2007), n 593.

133 M. Bauen, R. Bernet, and N. Rouiller, *La société anonyme suisse*, Schulthess Juristische Medien AG (Zürich, Basel, Genf, 2007), n 594.

134 M. Bauen, R. Bernet, and N. Rouiller, *La société anonyme suisse*, Schulthess Juristische Medien AG (Zürich, Basel, Genf, 2007), n 594.

135 M. Bauen, R. Bernet, and N. Rouiller, *La société anonyme suisse*, Schulthess Juristische Medien AG (Zürich, Basel, Genf, 2007), n 597.

between CHF 1,000,000 and CHF 5,000,000.¹³⁶ Such an insurance agreement also may be entered into by the company for the benefit of the board members.¹³⁷

Tax Liability

The corporate organs of a company may be held liable for payment of the company's taxes, at both the federal and cantonal levels. In particular, in case of federal withholding taxes and federal corporate income taxes, corporate directors of a company are jointly liable for the payment of the taxes owed by the company if the company has transferred its domicile abroad.¹³⁸

Corporate directors will, however, not be held liable if they can prove that they have taken all the measures which could be required from them in order to enable the company to pay the outstanding taxes.

It may constitute a criminal offense if the company fails to deliver certain information or delivers false information pertaining to withholding tax and corporate income tax collection to federal authorities.¹³⁹

Social Security Liability

Corporate directors also have significant liability in respect of social security obligations. Under the Swiss social security system, the employer is obligated to deduct part of the social security dues directly from the employees' salary.

In this context, Article 52 of the Old-Age and Survivors' Insurance Law¹⁴⁰ provides for an employer's liability for non-payment of social security. The Swiss Supreme Court has extended this liability to corporate organs, including corporate directors, in case of insolvency of the company.¹⁴¹

Moreover, it also may constitute a criminal offense if social security payments are not paid to the social security administration. Therefore, corporate directors must ensure that the company complies with its duties related to social security obligations.¹⁴²

136 M. Bauen, R. Bernet, and N. Rouiller, *La société anonyme suisse*, Schulthess Juristische Medien AG (Zürich, Basel, Genf, 2007), n 597.

137 M. Bauen, R. Bernet, and N. Rouiller, *La société anonyme suisse*, Schulthess Juristische Medien AG (Zürich, Basel, Genf, 2007), n 597.

138 Federal Direct Tax Act (RS 642.11), art 55(1); Federal Withholding Tax Act (RS 642.21), art 15(1).

139 Federal Direct Tax Act, arts 174 *et seq*; Federal Withholding Tax Act, arts 61 *et seq*.

140 RS 831.10.

141 ATF 123 V 12.

142 I. Cherpillod, 'La responsabilité des dirigeants sociaux', in *Droit et Affaires*, No. 578 (January 1998), at p. 12.

Corporate Directors' Criminal Liability

In General

There are no criminal provisions specifically targeting corporate directors. However, the status of corporate directors within the company confers upon them a position of guarantor with respect to the company's assets. This prompts the application of several criminal provisions.

There are two aspects of corporate directors' criminal liability. First, a corporate director can be criminally liable for his own behavior. Second, a corporate director also may be liable for criminal acts in which he did not participate directly but that were committed within the company. In the latter case, the corporate director is liable as head of the enterprise. In other words, a corporate director may be held liable for having omitted to prevent endangerment or damage of a company's interest when he should have intervened by virtue of a legal obligation.¹⁴³

Swiss criminal law does not provide for offenses related specifically to business transactions. However, certain offenses tend to appear frequently in the framework of business transactions. This section discusses offenses provided by Swiss criminal law which, in practice, are most relevant with respect to the possible liability of corporate directors.

However, one should keep in mind that a corporate director may use the corporate structure to commit fraud, prepare false certificates, handle stolen goods, or for money laundering, and similar offenses which are beyond the scope of this chapter.

Personal Criminal Liability

Disloyal Management

In General. The most generic offense relating to business is 'disloyal management'. Any person entrusted by law, by an official mandate, or by a legal transaction to manage assets of another or to supervise such asset management will be criminally liable if he violates his duties or causes or permits damage to the assets.¹⁴⁴ The intention of unjust enrichment is merely an aggravating factor. Therefore, under Swiss law, disloyal management does not require an intention to unduly enrich oneself.

Duty to Manage and Safeguard Company Assets. The duty to manage and safeguard implies that the offender has power over property of a third party and a duty to watch over the pecuniary interests of a third party.¹⁴⁵ He further has to have sufficient independence in the management of such pecuniary interests.¹⁴⁶

143 M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), at p. 271.

144 Criminal Code, art 158(1).

145 B. Corboz, *Les infractions en droit suisse*, Volume I, (Berne, 2002), art 158, N 2, at p. 396.

146 ATF 123 IV 17.

As a matter of principle, it can be said that in a company limited by shares, the persons falling within the scope of Article 754(2) of the CO (ie, members of the board and all persons engaged in the business management or liquidation of the company) have a duty to manage and safeguard the company's assets.¹⁴⁷ In several cases, the Swiss Supreme Court has considered that the corporate director has a duty to supervise the company's assets.¹⁴⁸

Violation of the Management Duty. The management duty may be infringed by the mere completion of an act which tends to violate the entrusted obligation to act in the interest of the company.¹⁴⁹ The violation of the management duty may consist of an act or an omission. For example, a manager who is bound to increase the assets of the enterprise violates his fiduciary duty when he fails to enter, for the benefit of his employer, into contracts which would have brought profits to the employer, and instead executes the contracts on his own behalf.¹⁵⁰ A corporate director may therefore be held liable for usurping a corporate opportunity.¹⁵¹

Furthermore, a manager may be liable for not having taken action against an employee who has committed offenses such as damaging company property.¹⁵² Finally, it is not necessary for the offender to have acted with intention; recklessness will suffice.¹⁵³

Financial Damage. A corporate director would be liable if his violation of the management duty causes the company damage of a financial nature. This can consist in a decrease of assets, an increase of liabilities, non-decrease of liabilities, or non-increase of assets (lost profit). Damage also may arise by exposing property to danger, resulting in a decrease in its value.¹⁵⁴

A corporate director may not only be faced with civil liability based on the violation of his duty of care and duty to safeguard, but also criminal liability if he violates his duties and thereby causes damage to the company.

False Statements about Commercial Business

If a corporate director provides false information regarding the company to shareholders or other participants in the company, he may, under certain circumstances, be held criminally liable. Any member of the company (such as

147 M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), at p. 282; ATF 105 IV 307; ATF 81 IV 133.

148 ATF 100 IV 167.

149 B. Corboz, *Les infractions en droit suisse*, Volume I, (Berne, 2002), N 7 *et seq*; ATF 120 IV 192.

150 ATF 105 IV 307.

151 Also discussed in 'Prohibition on Competing with the Company', above.

152 ATF 113 IV 68.

153 ATF 123 IV 23.

154 ATF 121 IV 104; ATF 120 IV 122.

directors, auditors, or liquidators of a company limited by shares) who makes or causes a false or incomplete statement of substantial significance to be made to all the company members, partners, or shareholders of the company or to the participants in any other commercial enterprise by means of a public announcement or notice, report, or presentation that could cause another to dispose of his own assets in such a way that he sustains financial loss, can be held criminally liable for the offense.¹⁵⁵

This provision specifically applies to corporate directors or managing bodies of a company. It prohibits giving false or incorrect information to the public or to persons who financially participate in the company. Such information has to have substantial significance, in that it must be of a nature that causes the addressee to dispose of his own assets in such a way that he sustains financial loss. This provision typically concerns the management report which is to be drawn up by the board and presented at the shareholders' meeting,¹⁵⁶ or a prospectus distributed publicly.¹⁵⁷ It is the duty of the corporate directors to draw up a management report for each financial year, comprising the annual accounts and annual report.¹⁵⁸

The provision aims at avoiding the situation where a shareholder buys shares based on a balance sheet which contains erroneous information received from the board, auditors, or other member of the company. It also covers the situation where a shareholder decides not to sell shares of a company when that company is presented to him in a better financial situation than it is in reality.¹⁵⁹

False Statements to Commercial Register Authorities

Corporate directors also have an obligation to ensure that the information provided to the commercial register authorities is accurate. Any person who causes the commercial register authority to make a false entry in the register or withholds from it information which is required to be entered in the register is criminally liable.¹⁶⁰

False information can concern persons to be registered (eg, false nationality), the amount of the share capital, or nomination of members of the corporate bodies.¹⁶¹ Although this provision can theoretically apply to anyone, requests to

155 Criminal Code, art 152.

156 B. Corboz, *Les infractions en droit suisse*, Volume I, (Berne, 2002), art 152 CP, N 6, at p. 381.

157 B. Corboz, *Les infractions en droit suisse*, Volume I, (Berne, 2002), art 152 CP, N 3, at p. 381.

158 As discussed in 'Management Report and Shareholders' Meetings', above.

159 M. Garbarski, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA (Genève, Zürich, Bâle, 2006), at p. 276.

160 Criminal Code, art 153.

161 B. Corboz, *Les infractions en droit suisse*, Volume I (Berne, 2002), art 153 CP, N 5, at p. 386.

the commercial register regarding corporations must be made by two members of the board or a member having the authority to sign individually.¹⁶²

Given that corporate directors alone have the capacity to submit requests to the commercial register, they are the most likely to commit such an offense, unless an unauthorized person submits the request to the commercial register (eg, by using forged signatures).

Insider Trading

In General. As a rule, corporate directors have direct access to very sensitive information regarding the company. The personal use of such information to obtain a financial advantage is, however, subject to the provisions regarding insider trading. Corporate directors may be held civilly liable based on their obligation of loyalty.¹⁶³ They also may be held criminally liable.

The term ‘insider trading’ is not used in Swiss legislation. However, Swiss criminal law prohibits the ‘exploitation of knowledge of confidential facts’. For the purpose of this chapter, the internationally recognized term ‘insider trading’ is used. The legislation on insider trading has recently been amended and reinforced in order to be in compliance with GAFI recommendations.¹⁶⁴ Previously, the relevant provisions were included in the Criminal Code but they have been transferred to the Federal Act on Stock Exchanges and Securities Trading (Stock Exchange Act).

Article 40 of the Stock Exchange Act provides that:

1. Whosoever as a body or a member of a managing or supervisory body of an issuer or of a company controlling or controlled by him or her, or as a person who due to his or her holding or activity has legitimate access to insider information, is liable to imprisonment of up to three years or a fine if he or she gains a pecuniary advantage for him- or herself or for another with insider information by:

- a. exploiting it to acquire, sell securities admitted to trading on a stock exchange or an institution which is similar to an exchange in Switzerland or to use financial instruments derived from such securities;
- b. disclosing it to another;
- c. exploiting it to recommend to another to acquire or sell securities admitted to trading on a stock exchange or an institution which is similar to an exchange in Switzerland or to use financial instruments derived from such securities.

2. Whosoever through activities as detailed in para. 1 gains a pecuniary advantage of more than one million Swiss Francs is liable to imprisonment of up to five years or a fine.

162 Ordinance on the Commercial Register (RS 211.411), art 17(1c).

163 Discussed in ‘Prohibition on Use of Inside Information’, above.

164 Message of the Federal Council 2011, at p. 6330.

3. Whosoever gains a pecuniary advantage for him- or herself or for another by exploiting insider information disclosed to them by a person as detailed in para. 1 or acquired through a crime or an offence to acquire or sell securities admitted to trading on a stock exchange or an institution which is similar to an exchange in Switzerland or to use financial instruments derived from such securities is liable to a imprisonment of up to one year or a fine.

4. Whosoever does not belong to the persons referred to in para.s 1-3 yet who gains a pecuniary advantage for him- or herself or for another by exploiting insider information to acquire or sell securities admitted to trading on a stock exchange or an institution which is similar to an exchange in Switzerland or to use financial instruments derived from such securities is liable to a fine.

In the case of planned merger of two companies limited by shares, Article 40 of the Stock Exchange Act applies to both companies. This provision applies by analogy if the exploitation of the knowledge of confidential information relates to shares, other securities, book-entry securities, or related options in a cooperative or a foreign company.

Perpetrator. Insider trading mainly applies to a limited circle of persons called 'insiders', such as board members, the auditor, *de facto* directors, the management, and counsels to the company or supervisory bodies such as the Swiss Financial Market Supervisory Authority (FINMA). A corporate director falls within the scope of persons that can be held liable for insider trading. However, and this is a novelty of the new provision, other persons may also be held liable for insider trading but sentenced solely to a fine.

Facts Covered. This provision encompasses all information that could influence stock prices. It covers imminent issuance of stocks or participation rights and mergers or takeovers, as well as sale of investments made before the announcement of a fall in profits in order to avoid the effects of the fall in the share price.¹⁶⁵ As this provision was revised recently, case law has not yet provided any guidance as to the new notion of insider trading.

Illicit Conduct. Illicit conduct consists of the use or disclosure of knowledge of confidential information which is likely to have a substantial and foreseeable influence on the price of listed securities. A person can only be held liable if he used or disclosed information which is confidential. The recipient of an indiscretion is punishable if he receives relevant information from an insider, which information is otherwise restricted to insiders.

The perpetrator of the indiscretion need not necessarily be sentenced for insider trading.¹⁶⁶ As indicated above, a person who obtains knowledge of confidential facts by chance or draws relevant conclusions from harmless information or mere allusions is now also punishable.

165 L. Thévenoz and C. Bovet, *Journée 2006 de droit bancaire et financier* (Geneva, 2006), at p. 263.

166 ATF 119 IV 38.

Breach of Manufacturing Secret or Trade Secret

For a corporate director, the duty of loyalty encompasses a duty of discretion, particularly regarding manufacturing secrets or trade secrets. Any person who betrays a manufacturing or trade secret that he is under a statutory or contractual duty not to reveal, and any person who exploits this betrayal for himself or another person, will on the filing of a complaint, be criminally liable.¹⁶⁷

A manufacturing secret is a manufacturing process or formula which is neither of public knowledge nor easily accessible, and which the manufacturer has a legitimate interest in keeping confidential. A trade secret is any confidential information which can have an impact on the business result.¹⁶⁸ Corporate directors are under a statutory obligation not to reveal manufacturing or trade secrets.¹⁶⁹ A corporate director will therefore be liable if he betrays or exploits such a secret for himself or another.

Criminal Liability in Case of Bankruptcy

Corporate directors have specific obligations in case the company is in excessive indebtedness, particularly in light of Article 725 of the CO. Swiss criminal law contains specific provisions applicable in the event that a company is declared bankrupt.

These provisions trigger, in particular, the liability of corporate directors or managers of the company, all the more because they have a duty to regularly check and keep themselves abreast of the financial situation of the company.¹⁷⁰

Mismanagement

In General. Under Article 165(1) of the Criminal Code, any debtor who through mismanagement — in particular through inadequate capital provision, excessive expenditure, hazardous speculation, the negligent granting or use of credit, the squandering of assets, or gross negligence in the exercise of his profession or the management of his assets — causes or aggravates his excessive indebtedness, causes his insolvency or, in the knowledge that he is unable to pay, prejudices his financial situation, will be criminally liable if bankruptcy proceedings are commenced against him.

The Perpetrator. The offense of mismanagement can only be committed by a debtor and, in case of bankruptcy, by the company. The illegal conduct of the company that is the debtor will be attributed to the corporate directors or management of the company if they acted for the company.¹⁷¹

167 Criminal Code, art 162.

168 ATF 103 IV 283.

169 Discussed in 'Duty of Discretion', above.

170 Also discussed in 'Duty of Care' and 'Board Members' Duties under Article 725, above.

171 Further discussed in 'Corporate Directors' Liability for Offenses Committed by the Corporation', below.

The Illicit Conduct. Article 165(1) of the Criminal Code does not condemn fraudulent behavior, but lack of diligence. Typical examples of mismanagement are inadequate capital provision, excessive expenditure, hazardous speculation, negligent granting or use of credit, squandering of assets, or gross negligence in the exercise of professional functions or the management of assets. This list is not exhaustive.

In order to establish whether the debtor and its corporate bodies (ie, corporate directors or auditors) are guilty of mismanagement, it is necessary to refer to its obligations under civil law, particularly under the CO.¹⁷² This offense does not provide for independent obligations. It is therefore necessary to identify the specific obligations of a corporate director,¹⁷³ in order to determine whether he can be held liable for mismanagement.

Result. Mismanagement constitutes a criminal offense only if it leads to or aggravates excessive indebtedness.¹⁷⁴ The perpetrator has to act intentionally, although some conduct under this provision includes acts committed by mere negligence. Swiss case law has adopted the view that the perpetrator is liable for *légereté coupable* — that is, the perpetrator must know that his acts or omissions are likely to cause or aggravate excessive indebtedness.¹⁷⁵

A corporate director taking active part in the company's management may be liable for mismanagement even if he did not intentionally cause the company's excessive indebtedness but simply took excessive financial risks on its behalf.

Fraudulent Bankruptcy and Pledge Fraud

Corporate directors may further be liable if they fictitiously diminish assets of the company to the detriment of creditors. Besides mismanagement, a debtor who fictitiously diminishes his assets to the detriment of the creditors — in particular, by hiding or concealing assets, making fictitious debts, recognizing fictitious claims, or having them asserted — is criminally liable if he has been declared bankrupt or if a loss certificate has been issued against him.¹⁷⁶

The offense of fraudulent bankruptcy can only be committed by the debtor in case of insolvency of a person or by the company in case of its bankruptcy. The illegal conduct of the company that is the debtor will be attributed to the corporate directors or management of the company if the directors acted on behalf of the company.¹⁷⁷

172 ATF 116 IV 26; F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), at p. 706.

173 Discussed in detail in 'Duty of Care' and 'Board Members' Duties, under Article 725, above.

174 ATF 6P.180/2000 of 9 May 2001.

175 ATF 6P.180/2000 of 9 May 2001; ATF 115 IV 41; F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), at p. 707.

176 Criminal Code, art 163.

177 Discussed in 'Corporate Directors' Liability for Offenses Committed by the

This provision aims at the debtor (ie, corporate directors acting for a debtor company) who fictitiously diminishes the assets of the company (in case of bankruptcy), in order to avoid having to pay creditors, particularly when this is done by not booking assets or booking debts that do not exist. The fictitious diminishment of assets does not necessarily have to lead to damage of creditors; endangerment is sufficient.¹⁷⁸

Preferential Treatment of Creditors

Corporate directors may be liable for paying certain creditors on a priority basis if they are aware of the insolvency of the company. A debtor who in full awareness of his insolvency undertakes acts with the intent of preferring individual creditors to the detriment of others — in particular, by paying debts not yet due or by paying a debt due with unusual means of payment or by securing a debt through his own assets without being obligated to do so — is criminally liable, if he has been declared bankrupt or if a loss certificate has been issued against him.¹⁷⁹

This provision is similar to fraudulent bankruptcy and pledge fraud, except that instead of fictitiously diminishing his assets the debtor undertakes acts in order to prefer individual creditors to the detriment of others.

Questionable Payments (Corruption)

In General. Until recently, Switzerland only prohibited active and passive bribery of Swiss public officials. In recent years, following the international tendency to reinforce the fight against corruption, Switzerland has amended the Criminal Code to match the requirements of the Organization for Economic Cooperation and Development (OECD) Convention on Corruption.

By amending the Criminal Code in 1999, Switzerland prohibited corruption of foreign public officials. This provision entered into force on 30 July 2000. Furthermore, in 2006, Switzerland amended the Unfair Competition Act¹⁸⁰ to criminalize ‘private corruption’ (corruption in the private sector).

The Criminal Code prohibits active and passive bribery of Swiss officials,¹⁸¹ bribery of foreign public agents,¹⁸² granting and acceptance of an advantage, and (based on the statutes of unfair competition) private corruption.¹⁸³

Regarding possible liabilities of corporate directors, the question of bribery primarily arises with respect to possible questionable payments to Swiss or

Corporation’, below.

178 F. Chaudet, A. Cherpillod, and J.C. Landrove, *Droit suisse des affaires*, 3rd ed (Helbing Lichtenhahn, 2010), at p. 704.

179 Criminal Code, art 167.

180 RS 241.

181 Criminal Code, arts 322 *ter* and 322 *quater*.

182 Criminal Code, art 322 *septies*.

183 Unfair Competition Act, art 4a.

foreign officials in the framework of the acquisition of state contracts, as well as the offering or receiving of questionable payments in the framework of private tender offers.

In terms of the liability of corporate directors, only bribery of foreign public officials and private bribery are discussed. Notably, the provisions regarding bribery of Swiss public officials are almost identical, with the exception that they address specific Swiss officials.

Bribery of Foreign Public Officials. A foreign public agent is any official who is acting for a foreign state or international organization as a member of a judicial or other authority; as a public official; as an officially appointed expert, translator, or interpreter; as an arbitrator; or as a member of the armed forces.

Any person who offers, promises, or grants an undue benefit to a foreign public agent in favor of such person or a third party, for the execution or omission of an act that is related to his official activity and that is contrary to his duties or falls within his discretion, is criminally liable for active bribery.¹⁸⁴ This provision provides for a mirroring offense for the foreign public agent who requests, accepts the promise of, or accepts an undue advantage (passive bribery).

In both offenses, there is no need for a result. The simple act of offering an undue benefit or requesting or accepting such a benefit is sufficient to constitute the offense of active or passive bribery, even if the person sought to be corrupted or bribed refuses the proposition from the outset.

Any person can perpetrate bribery (as the paying party). There is not yet much case law with respect to bribery of foreign public officials, as the provision has been in effect only since 2000. However, the tendency of Swiss criminal authorities is clearly to pursue company managers and corporate directors.

The term ‘undue advantage’¹⁸⁵ encompasses all advantages granted freely, whether material or immaterial, to the extent that they are objectively measurable.¹⁸⁶ Swiss law only excludes from ‘undue advantages’ those advantages which are in conformity with law or with the regulations of the foreign public official’s country, as well as those which are of little value or are considered as socially acceptable.¹⁸⁷

If a corporate director or a manager offers an undue advantage to a public foreign official, for example, in order to obtain, in the framework of a tender,

184 Criminal Code, art 322 *septies*.

185 As compared with ‘undue pecuniary or other advantage’, as provided for by the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art 1.

186 Message of the Federal Council, at p. 6563.

187 Swiss Criminal Code, art 322 *octies*, para 2; Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art 1, para 1(8). The Commentaries are available at <http://www.justice.gov/criminal/fraud/fcpa/docs/combabribe2.pdf>.

confidential information about the conditions of the tender or to obtain favorable advance opinions of several agents, he would be liable for bribery of a foreign public official.

Private Bribery. Any person who offers, promises, or grants an undue advantage to an employee, associate, agent, or other ancillaries of a third party in the private sector, in favor of such person or a third party, for the execution or omission of an act relating to his service or professional tasks that is contrary to his duties or falls within his discretion, is criminally liable.

The same provision provides a mirroring offense for the employee, associate, agent, or other ancillary who requests, accepts the promise of, or accepts an undue benefit.¹⁸⁸ Contrary to the provisions applicable to bribery of public agents, which involve two separate offenses (active and passive bribery), this provision does not distinguish between a Swiss company and a foreign company.¹⁸⁹

The perpetrator of this offense (the bribed party) may be an employee, associate, agent, or other ancillary who violates a relationship of trust and loyalty for his own economic benefit. This provision covers any person collaborating with an employee, associate, agent, or other ancillaries of a third party on the basis of any relationship. The triggering element is the tripartite relation in which the perpetrator is bound to the victim by an obligation of loyalty.¹⁹⁰

Acts contrary to duty are understood as relating to duties provided for by the contractual relationship, including implicit duties. This encompasses the general obligations of a duty of care.¹⁹¹ A corporate director may be an employee or an agent of the company and, as such, has an extensive duty of loyalty toward the company. He therefore clearly falls under the scope of this provision.

Contrary to bribery of public agents, in the framework of private bribery, a corporate director is not only liable for making questionable payments, but also for receiving such payments. If, for example, a corporate director who is empowered (alone or collectively) to adjudicate certain work and has the latitude to choose the enterprises which are invited to bid takes advantage of his functions in order to give preference to certain enterprises, to obtain in return financial advantages in the form of monetary remuneration or in kind (materials, appliances, workforce), he would be liable for private bribery.

Corporate Directors' Liability for Offenses Committed by Corporation

The violation of a special obligation establishes or increases criminal liability and is incumbent only on the legal entity, the company, or the sole proprietorship. Under article 29 of the Criminal Code, this violation is attributed to a natural person if that person acts as a governing officer or as a member of a governing officer of a legal entity; as a company member; as an employee with

188 Unfair Competition Act, art 4a.

189 Message of the Federal Council 2004, at p. 6573.

190 Message of the Federal Council 2004, at p. 6576.

191 Message of the Federal Council 2004, at p. 6577.

independent decision-making authority in his field of activity within a legal entity, a company, or a sole proprietorship; or (without being a governing officer) member of a governing officer, company member, or employee, as the *de facto* manager.¹⁹²

This provision is a general norm applicable to any offenses having as a condition of fulfillment the violation of a special duty which obliges the company. If the duty is incumbent upon the company, its violation will be attributed to the person who acted on behalf of the company.¹⁹³ In other words, corporate directors or employees with independent decision-making authority may be held liable for an offense which would normally bind the company on whose behalf they act.

For example, disloyal management, as provided for under Article 158 of the Criminal Code, requires the existence of a duty of management and safeguard.¹⁹⁴ This duty of management and safeguard can be an obligation of a company toward a third party. However, as a company cannot be held liable for such an offense, the offense will be attributed to the relevant corporate director or employee with independent decision-making authority.

Notably, however, this provision does not create a presumption of responsibility for the persons listed under Article 29 of the Criminal Code. They are only liable for the offense if they effectively took part in the perpetration of the offense.¹⁹⁵

Liability for Acts of Subordinates

Civil and commercial law attributes certain assignments and obligations to specific persons within a corporation, which has consequences on the assessment of their actions in criminal law. This particularly concerns offenses that are committed by omissions. When the behavior is punishable solely if the person has an obligation to act pursuant to specific legal obligations (ie, hold a position of guarantor), the specific civil or commercial obligations of a member of a corporate body will be relevant.¹⁹⁶ In this context, the corporate directors' overall obligation of supervision becomes relevant.¹⁹⁷

Certain individuals may indeed be held liable not only for offenses they personally committed or in which they were involved, but also for offenses committed by third parties, based on the violation of the obligation to supervise. This liability is not expressly mentioned by the Criminal Code, but only by the

192 Criminal Code, art 29.

193 Message of the Federal Council 1999, at p. 1821.

194 Discussed in 'Disloyal Management', above.

195 U. Cassani, in R. Roth and L. Moreillon (eds.), *Commentaire Romand Code pénal I* (2009), art 29 CP, N 6, at p. 360.

196 U. Cassani, 'Infraction sociale, responsabilité individuelle: de la tête, des organes et des petites mains' in *La responsabilité pénale du fait d'autrui* (Centre du droit de l'entreprise de l'Université de Lausanne, Lausanne, 2002), at p. 53.

197 Discussed in 'Overall Supervision of Persons Entrusted with Management', above.

Federal Act on Administrative Criminal Law,¹⁹⁸ which provides for criminal penalties in administrative matters.¹⁹⁹

However, this liability also applies to ordinary criminal offenses based on the provision that a felony or misdemeanor also may be committed by a failure to comply with a duty to act.²⁰⁰

The head of a company may be liable, by omission, if he notices that his subordinates are about to commit an offense and does not intervene to prevent them from doing so. The Swiss Supreme Court has rendered two significant decisions in this respect, extending criminal liability to corporate directors who were aware of the illicit conduct of their subordinates, but did not stop them from continuing such conduct.²⁰¹

The Swiss Supreme Court has confirmed the sentencing of the managing director of a company, who was not even aware of the illicit conduct of the subordinates. The managing director was held accountable for not having taken the necessary organizational measures for the company to have structures in place to enable it to appropriately handle risks related to its employees' illicit conduct. The corporate director was therefore not condemned for having intentionally committed the offense, but merely for being negligent.²⁰²

The trend of Swiss courts is clearly to extend the criminal liability of corporate directors — or, more generally, company managers — based on their obligation of surveillance and their position as guarantor.

Corporate directors may therefore not only face criminal liability regarding offenses they directly committed or in which they were involved, but also for offenses committed within the company that they failed to prevent.

Conclusion

The crucial point in both civil and criminal liability of corporate directors is non-compliance with their statutory duties and with duties arising out of the company's articles of association and/or mandate/employment agreements.

Corporate directors' liabilities are primarily defined by civil law, which regulates their specific duties and responsibilities. Criminal law only applies as *ultima ratio* to deal with the most serious breaches of corporate duties.

198 RS 313.

199 The Federal Act on Administrative Criminal Law, art 6(2) provides that a company manager, employer, mandatory, or representative who, in violation of his legal obligations and through intention or negligence, fails to prevent the perpetration of an offense by a subordinate, agent, or principal or to eliminate the effects of the offense, falls under the criminal provisions applicable to the perpetrator of the offense.

200 Criminal Code, art 11; U. Cassani, 'Sur qui tombe le couperet du droit pénal? Responsabilité personnelle, responsabilité hiérarchique et responsabilité de l'entreprise', *Journée 2008 de droit bancaire et financier* (2009), at p. 62.

201 ATF 96 IV 155.

202 ATF 122 IV 104 (von Roll).