CENTRE DE DROIT
BANCAIRE ET FINANCIER

Corporate Governance

Revision of the Swiss Code of Best Practice

Par Lukaz Samb le 4 May 2023

A revised version of the Swiss Code of Best Practice (SCBP 2023) has recently been published by economiesuisse. The CSBP is a series of non-binding recommendations, which are primarily aimed at listed companies, but can also serve as a basis for unlisted companies. As in previous editions, the Swiss Bankers Association was involved in drafting the CSBP. As in the case of some of the legal bases newly revised as part of the revision of corporate law, the CSBP as a whole is based on the “comply or explain” concept. As a result, companies that have adopted the CSBP are free to depart from it, provided they justify their choice in a transparent manner.

The last major revision of the CSBP took place in 2014, when the former Ordinance on Unfair Remuneration in Publicly Listed Companies (aORAb), now incorporated into the Swiss Code of Obligations, came into force. In a similar vein, the CSBP 2023 is published following the entry into force of the second and final part of the provisions of the revision of the law on public limited companies.

Unsurprisingly, the new and updated areas of interest compared to the 2014 CSBP coincide with the new features and clarifications introduced by the revision of the law on limited liability companies. The main topics covered are sustainability (1), independent representation (2), conflicts of interest within the board of directors and management (3) and the pursuit of greater diversity on boards of directors (4).

Sustainability

Sustainability plays a central role in the definition of corporate governance proposed by CSBP 2023. The latter defines corporate governance as “a set of principles focused on the pursuit of sustainable corporate interests […], [a] company’s activity [being] sustainable when the interests of the different stakeholders in the company are taken into account and economic, social and ecological objectives are pursued as a whole”.

According to the CSBP 2023, good governance, and therefore a sufficient standard of sustainability, is achieved when the company pursues a long-term objective, the latter being at the service of all other stakeholders.

To this end, the CSBP 2023 addresses the issue of reporting on non-financial issues (a new feature of art. 964a ff CO). Before being submitted to shareholders for approval, this report must be reviewed by the Audit Committee (art. 23 par. 6 CSBP 2023).

With regard to the content of the report, we remind you that it must comply with current legal regulations, and that companies are free to conform to internationally recognized standards and regulations in this area (art. 34 par. 3 CSBP 2023).

At the same time, it is recommended that the variable remuneration of senior executives be made dependent on the achievement of sustainability targets for the previous year. If such objectives are not met, variable compensation should take this into account and be reduced accordingly.

Independent representation

The recommendations concerning independent representation are limited to the innovations proposed by the revision of stock corporation law. Thus, the Board of Directors must ensure that the independent representative is able to carry out his duties, as far as possible, without interference (art. 7 CSBP 2023 and 689b para. 4 CO). For his part, the independent representative must keep all instructions received strictly confidential. However, he is authorized to give general indications of voting trends to the Board of Directors no earlier than three days before the Annual General Meeting (art. 7 CSBP 2023 and 689c para. 5 CO).

Conflicts of interest

The CSBP 2023 also addresses conflicts of interest within the Board of Directors and Executive Board (art. 19 CSBP 2023). This topic is now covered by a new art. 717a CO, which outlines the procedure to be followed in the event of conflicts.

Thus, when members of management or the Board of Directors discover a conflict, they inform the Board of Directors. Depending on the degree of conflict, the Board of Directors must take the necessary steps to remedy the situation. These measures can range from a simple double decision, with and without the executive in question, to recusal from the decision or deliberations. In serious cases, the executive will be asked to step down or not to stand for re-election. Various proposals are thus offered to implement art. 717a para. 2 CO.

Greater diversity on the Board of Directors

Gender representation on the Board of Directors and Executive Board is another new feature of the revised Corporate Law (art. 734f CO). This standard is also based on the “comply or explain” principle. The CSBP 2023 reminds us that companies must endeavor to comply with the new thresholds established by art. 734f CO. Lastly, the company must ensure that its members include experts from the Swiss and international markets, as well as a diversity of experience, origin and age (art. 13 par. 2 CSBP 2023).

Readers will have noticed that, with the exception of the recommendations on conflicts and variable remuneration, the CSBP 2023 does not introduce any major innovations. This revision is mainly focused on compliance with the new law. With regard to conflicts, the proposed measures were already covered extensively by legal doctrine and, to a certain extent, case law. The CSBP 2023 thus remains a practical guide for companies, offering a clear guideline on the governance objectives to be achieved in line with current law.
*** Translated with www.DeepL.com/Translator (free version) ***

Reproduction autorisée avec la référence suivante: Lukaz Samb, Revision of the Swiss Code of Best Practice, publié le 4 May 2023 par le Centre de droit bancaire et financier, https://cdbf.ch/en/1284/