CORPORATE GOVERNANCE

A SWISS PERSPECTIVE

VENICE CONGRESS
3-6 JUNE 1999

Teresa Giovannini
Attorney at Law
Partner
LALIVE & PARTNERS
6, Rue de l’Athénée
1205 GENEVA
To my brother, Pier-Luigi
In the European Union, Corporate Governance is defined as "rules which aim to ensure competent direction and control of companies, with the interest of the shareholders in mind", an approach widely accepted in the US and in the UK. For the EU, the law must relate to the interest of the creditors and the third parties as well (art. 44 § 3g of the Treaty).

In practical terms, Corporate Governance covers two different issues: the organisation of top management so that leadership and monitoring remain appropriately balanced, and the agency relationship between management and shareholders, especially institutional shareholders¹.

This puts the Board of the Directors at the centre of the discussion

I. THE BOARD OF DIRECTORS

A. ELECTION, COMPOSITION

A.A. Appointment, Remuneration and Retirement of Directors

The General Assembly elects Board Members²,³, by a majority of the represented votes. This right of the General Assembly to elect members of the Board is not transmissible. Co-optation within the Board is not permissible⁴.

The General Assembly can likewise freely revoke Board Members at any time, pursuant to the same principle of the majority of the represented votes⁵. The bye-laws cannot limit the right of revocation to the existence of proper grounds⁶. Dismissed Board Members have no rights to particular compensation or damages. However, in a recent case largely reported in the press, a dismissed Board Member received more than SFr 8 million, which created a scandal of sorts in our country.

With respect to remuneration, and in the absence of any legal provisions in this respect, Board Members generally receive an annual lump sum fee that can vary from several thousands of SFr up to a few hundred thousands for the largest companies. For the latter group, the remuneration is generally closely connected to the company’s financial results.

¹ Peter Böckli, Corporate Governance, Der Stand der Dinge nach den Berichten “Hampel”, “Viénot und “OCDE” sowie dem deutschen “KonTraG”, SZW/RSDA 1/99, pp 1 – 16, 1;
² Art.698 al.2 ch.2 CO;
³ Art. 703 CO;
⁴ Pascal Montavon, Droit suisse de la SA, Droit et fiscalité, Comptes annuels, Comptes de groupe, Tome III, Lausanne, 1997, p.80;
⁵ Art. 703 and 705 CO;
⁶ ATF 80 II 118, JdT 1955 I 5;
A.B  Non executive Directors of the Board

In Belgium, the Commission for Corporate Governance (Commission Cardon) recommends that the majority of the Board consist of non-executive directors, i.e. directors that do not exercise a management function in the company or its affiliates (requirement of independence) and also do not represent major shareholders.

Swiss law does not require non-executive Directors to be on the Board. The system that prevails is the Unitary Board (as opposed for example to the German Two-Tier system\(^7\)) as in the USA or in Great Britain: executive directors directly participate in the final debate of the main Board, even if they are in the minority. They have a word in the election of top executives, in Board decisions, in monitoring, and also in nominating new candidates for Board membership\(^8\).

As a matter of practice, Swiss public companies generally include independent "outside" Directors, with specific professional knowledge and comprehensive know-how for the performance of the Board's non-transferable duties, namely the structure of the accounting system, financial controls and financial planning\(^9\).

A.C.  Representation at the Board level of Minority Shareholders

Swiss Law\(^10\) provides that should different categories of shareholders exist concerning either voting right or patrimonial rights, the bye-laws must ensure that each of them is entitled to the election of one Board Member at least. The legal provision further provides that the bye-laws can contain specific provisions to protect the minority or specified groups of shareholders.

In practice, the Swiss Supreme Court established a long time ago that minority shareholders are entitled to put forward a representative for election to the Board, and that such a proposal can be refused by the General Assembly on proper grounds only\(^11\).

\(^7\) According to which top managers are legally disqualified from playing a role in the functions which are exclusively assigned to the “Aufsichtsrat”;
\(^8\) Peter Böckli, Corporate Governance: The “Cadbury Report” and the Swiss Board Concept of 1991, in SZW/RSDA 4/96, pp 149-163, 154;
\(^9\) Kuoni, Annual report 97;
\(^10\) Article 709 CO;
\(^11\) Swiss Supreme Court, Decisions in re Tobler and Julien, ATF 66 II 43, JdT 1940 I 272; ATF 107 II 179, JdT 1981 I 375, and Rita Trigo Trinlade, Le Conseil d’administration de la société anonyme, Composition, organisation et responsabilité en cas de pluralité d’administrateurs, Genève, 1996, p.98;
B. DIRECTORS' RESPONSIBILITIES, DUTIES AND LIABILITIES

B.A. Responsibilities

Under Swiss Law, the Board - without the requirement of subsequent approval at the shareholders’ meeting:

(i) has the ultimate responsibility for the strategy of the company;12
(ii) is responsible for the basic organisation of the company. It must decide on the setting up of the company’s accounting system, financial control and financial planning;13
(iii) has to see to monitoring executive functions;14
(iv) elects and dismisses the top executives of the company;15
(v) is to draw up bye-laws by which it structures the executive branch and determines its functions;16
(vi) regulates reporting.17

B.B. Duties

From the Corporate Governance perspective, the Board’s Duties can be summarised as follows:

(i) Fiduciary duties: acting in good faith: in particular by balancing the short term interests of the present shareholders against the long-term interests of future shareholders;
(ii) Care taking duty (civil liability towards the company and towards creditors).

B.C. Liability

Pursuant to Article 754 al.1 CO: "The members of the board of directors (...)... are liable not only to the Company, but also to each shareholder and to the company's obligees for the damage caused by an intentional or negligent violation of their duties".

In a decision dated May 28, 1996, the Swiss Supreme Court recalled the principles of the diligence required of a Board Member as follows:

(i) The Board Member must demonstrate all the necessary diligence required for the management of the company’s business”. He cannot satisfy himself or herself by observing the diligentia quam in suis, i.e. the diligence that he or she demonstrates in his/her own business.18

12 Art.716a, al 1 ch 1CO;
13 Art. 716a, al 1 ch 2 and 3 CO;
14 Art. 716a, al 1 ch 5 CO;
15 Art. 716a, al 1 ch 4 CO;
16 Art. 716b, al 2 CO;
17 Art. 716b, al 2 CO;
18 ATF 122 III 198 c. 3a;
(ii) The Board Member must closely watch the persons in charge of the management and of the representation of the company and make sure that he or she is regularly informed of the business’ running;  

(iii) The Board Member must dismiss the persons in charge of management when the control exercised upon them shows serious laxity;  

(iv) The Board Member who realises that he or she is merely serving the role of "front man" (homme de paille) must resign, or must exercise still stricter control since companies needing such persons are more likely to have doubtful activities than any others.  

B.D. Sanction with respect to Non-compliance

In the event of the violation of their legal duties as set forth above, Board Members are subject to three different kinds of civil actions, namely:

(i) corporate action;  
(ii) shareholders’ action;  
(iii) corporate creditors’ action.

With respect in particular to shareholders’ action, it must be emphasised that each shareholder can sue Board Members for the damages caused by their mismanagement. Contrary, however, to the general regime applicable in connection with civil liability, the shareholder can only ask for compensation of damages to benefit the company (for this reason, this action is identified as "l’action sociale oblique").

Pursuant to Article 756 al 2 CO, the judge can condemn the winning company to the payment of all expenses and fees incurred by the losing shareholder.

B.E. Board Committees

1. The Audit Committee

The Audit Committee, which has made its way into larger Swiss public companies in the last few years, fulfils the following tasks:

(i) following the work of both external and internal auditors;  
(ii) reviewing the quality of their cooperation;  
(iii) reviewing the work produced;  
(iv) drawing conclusions for follow-up by Management, Auditors and themselves;  
(v) assisting the Board in selecting new auditors if necessary.

19 ATF 122 III 198 c. 3a;  
20 ATF 122 III 199 c.3b;  
21 ATF 122 III 200 c. 3b;  
22 Art. 754 CO;  
23 François Chaudet, La responsabilité des administrateurs de sociétés anonymes, ATAG ERNST & YOUNG, Idées, Solutions, Résultats, 1998, p.8;  
24 Peter Böckli, Corporate Governance..., p. 156;
2. The Remuneration Committee

The Remuneration Committee\(^ {25}\) expresses its opinion on:

(i) the remuneration of the Board’s executive and non executive members;
(ii) the determination of the pay package, basic pay, performance-related stock options and pensions of top executives who are not members of the Board.

3. The Nomination Committee

The Nomination Committee is not required by Swiss law. It is not yet a standing institution of Swiss corporate practice\(^ {26}\). Where it exists, it is generally composed of the Chairman, the Vice-Chairman and two or three senior Board members.

C. THE BOARD OF DIRECTORS AND THE CHIEF EXECUTIVE OFFICER

C.A. The delegation of competence

Under Swiss Law, the Board of Directors constitutes the executive organ of the Company. However, Swiss law is flexible inasmuch as it authorises the delegation of such competence either to one or several Board Members or to a third person.

As a consequence, the law\(^ {27}\) limits the Board of Directors’ liability in the case of lawful delegation of competence.

The conditions of lawful delegation are twofold:

(i) from a formal viewpoint, the delegation must:
   
   - be authorised by the company’s bye-laws\(^ {28}\);
   - rely on organisational rules set by the Board of Directors\(^ {29}\).

   It results from these legal provisions that the General Assembly cannot directly provide for and organise the delegation\(^ {30}\);

(ii) from a substantial viewpoint, the delegation cannot include those competencies of the Board which, pursuant to the law\(^ {31}\), are not transmissible.

\(^ {25}\) Cadbury Report of Best Practices (1992), para 3.3. and Note 9;
\(^ {26}\) Peter Bückli, Corporate Governance... p.157;
\(^ {27}\) Article 754 al.2;
\(^ {28}\) Article 627 para 12 CO;
\(^ {29}\) Article 712b CO.;
\(^ {30}\) François Chaudet, La responsabilité des administrateurs de société anonymes, ATAG ERNST & YOUNG, Idées, Solutions, Résultats, 1998, pp 14 et 15;
\(^ {31}\) Art. 716a CO;
If the said conditions are fulfilled, the Board of Directors is only liable for the diligence in the choice, the instruction and the surveillance of the CEO (Cura in eligendo, in instruendo et in custodiendo).

In practice, it is rare to see a Board Member or the Chairman of the Board simultaneously assuming the role of Chief Executive Officer of the Company. Such a dual role might in fact be considered as contrary to Corporate Governance principles. This interpretation has recently been largely echoed in the Swiss press in the case of the Société Générale de Surveillance (SGS), where the same person assumed the triple role of Chairman of the Board, Board Delegate and CEO for several years. This situation created, in that precise case, significant problems of liability from the legal standpoint\(^\text{32}\).

C.B. The CEO's Powers

Swiss Company Law does not regulate the CEO's powers. As a matter of fact, the CEO or the Managing Director has an absolute, pre-eminent role in leading and inspiring the organization\(^\text{33}\).

D. TRANSPARENCY OF INFORMATION: ESSENTIAL ELEMENT

Swiss Company Law provides for the directors' right to obtain information on all the company's business\(^\text{34}\). In practice, this right remains in the hands of top executive and his inner circle, and there is no legal assistance whereby non-executive Directors can get at information potentially detrimental to the executive directors and to the power of the top executives.

The Directors' right to information covers the following topics:

(i) remuneration on share options, advances or credits;
(ii) annual report: clear, reliable and coherent image of the financial situation of the company supported by data concerning its results and perspectives;
(iii) annual reports must contain the data necessary for investors and their advisers to make an informed judgement about the assets, financial situation and results of the company.

\(^{32}\) See Le Temps, May 27, 1999, p.27;
\(^{33}\) Peter Böckli, Corporate Governance..., p.155;
\(^{34}\) Art. 715a) CO,
II. FINANCIAL CONTROLS AND REPORTING

It is almost impossible to discuss Corporate Governance without - albeit briefly - mentioning the relationship between the shareholders and the Board in relation to the reporting of financial information and the role of the auditors in this, i.e.:

(i) external and objective role of auditors to provide a check on the directors’ financial statements as presented to the shareholders;
(ii) an effective internal control system and clear demarcation of the responsibilities of directors and auditors in the process of reporting to shareholders. This is particularly important in connection with the statutory obligations of directors to maintain accounting reports and financial statements by preparing an annual report and financial statements. In this respect, the Directors are:

- to appoint an audit committee;
- to explain their responsibility for preparing the accounts next to the auditors’ statements;
- to report to the shareholders on the effectiveness of the company’s internal systems;
- to report to the shareholders that the business is a going concern, with supporting assumptions or qualifications as necessary.

(iii) taking into consideration the recommendations of non executive directors;
(iv) the remuneration committee, if any, is to be composed of exclusively by non-executive directors.

III. RIGHTS AND RESPONSIBILITY OF THE SHAREHOLDERS

In Switzerland, shareholders' rights fall under three distinct categories, namely:

(i) the patrimonial rights connected to the shares;
(ii) the credit rights and
(iii) the social rights.

The present paper will limit itself to the analysis of the most important category in connection with Corporate Governance, the Social Rights, which in turn can be sorted into three categories, namely:

(i) the right to participate in the social decisions (right to be present or represented at the General Assembly, voting right, etc.);
(ii) the right to information;
(iii) the right to control, the right to the institution of a special control and minority shareholders’ rights (the so-called “protective rights”).
A. THE RIGHT TO PARTICIPATE IN SOCIAL DECISIONS

The right to participate in social decisions implies, in legal terms, the right to be present or represented at the General Assembly, the right to vote, etc. This right is obviously strictly connected to both the access to information, on the one hand, and the possibility of control, on the other hand.

B. THE RIGHT TO INFORMATION

The law of share capital companies provides for two distinct rights with respect to the right to information:

- the right to information;
- the right to consult corporate documents.

These rights have an autonomous character and can be exercised independently of any claim to substantial rights or particular grounds.

More precisely, the right to information relates to:

(i) The right to have access to the annual management report including the balance sheet, the accounts, the Board's report, the audit report and as the case may be, the consolidated statement of accounts; this report does not prevent the shareholder from asking for complementary information at the general assembly;
(ii) The right to ask for supplementary information and to consult certain documents;
(iii) The right to consult the General Meetings' minutes, at the seat of the company;
(iv) The right to receive the statement of accounts for the past financial year;
(v) The right to receive information on the organisation of management. This right does not include the right to obtain the rules of organisation enacted by the Board of Directors.

The right to information is orally implemented, at the occasion of the General Assembly, with respect to the Board of Directors.

The right to consultation of social documents is the complement or the alternative to the right to information aforementioned. It is conditional upon the agreement of the

---

35 Art. 697 CO;
36 Art. 697 al 1 and 2 CO;
37 Art. 697 al 3 CO;
38 Art. 696 al 1 CO;
39 Art. 662 ff and 696 CO;
40 Art. 697 CO;
41 Art. 702 al 2 CO;
42 Art. 697 h al 1 CO;
43 Art. 716 b al 2 CO;
Management or of the General Assembly. This right has a practical impact on the minority shareholder, which can thus verify that management decisions do not have an impact on the equality of treatment amongst shareholders from the economic point of view.

Concerning the extent to the right to information, the latter is given only to the extent that it is necessary to the exercise of the shareholders’ rights. The information thus obtained must allow the shareholder concerned (a) to take a decision on a vote; (b) to ask for a special control, (c) to judicially contest a decision or (d) to initiate proceedings against Board Members. Besides, this information must be provided when it deals with the contents and details of the annual statements of accounts; the economic and financial situation of the company; the company's strategy; staff policy, restructuring, Research and Development, when these subjects have a functional link with voting rights.

On the one hand, management can refuse the information when the requests are considered abusive or irrelevant to the company's management, and when the information required relates to business or other social interest secrecy.

Every shareholder has the right to information, independently of the number of shares he/she owns.

If the request is denied, the shareholder concerned can revert to the Judge.

C. THE RIGHT TO CONTROL (The so-called “PROTECTIVE RIGHTS”)

The principle of equality of treatment (protection of shareholders) implies:

(i) the prohibition of arbitrary acts by resolutions of the general assembly or governing board’s decisions and

(ii) the principle of proportionality, that requires that an infringement of shareholders’ rights be made with care: if various possibilities exist to reach a determined goal, the company must choose the way which limits shareholder’s rights the least.

In Switzerland, shareholders’ interventions in the form of proposals of resolutions presented at the General Assembly are practically unknown, due to shareholders’ passivity in the field. Moreover, this kind of intervention is contradicted by the Board’s attitude, which is not used to such debates, by relying upon their legal competence. Be it as it may, Swiss law entitles the shareholder to express himself/herself at the General Assembly and to submit proposals in the framework of the Agenda. Swiss doctrine holds

44 Art. 697 al 2 CO;
45 Art. 697 al 2 CO;
46 Art. 663 h al 1 CO;
47 ATF 117 II 302;
48 Art.716a CO;
49 Art. 700 al 4 CO;
that provided the proposal is not illegal, the Chairman of the Assembly must submit the proposal to a vote by all shareholders.

Contrary to the situation where a shareholder wants to insert a specific issue in the Agenda, the individual shareholder who wants to make a proposal to the General Assembly need not have a quorum as regards the amount of shares he/she owns. However, the following rules must be complied with:

(i) the proposal of resolution must be a decision of the General Assembly;
(ii) the proposal must comply with the agenda;
(iii) the intervention must take place prior to or during the General Assembly.

It must be emphasised that in Switzerland, shareholdings are traditionally held by commercial banks, which implies that the debate relating to the shareholders’ rights is much more limited than in the US for example. Recent changes in this respect, with the introduction in the “stock market” of institutional or individual shareholders\(^{50}\) have had as a consequence that under present Swiss Law, institutional representation is ruled in a way that the shareholder can be represented by an independent person chosen by the company\(^{51}\), whilst, pursuant to art. 689d CO, the depository bank must ask for the depositor's instructions prior to the General Assembly.

The largely exclusive competence of the Board can seriously limit the shareholder's right to make proposals of resolutions and therefore, changes. The example of a proposal made in the US that the company hire Catholics and Protestants in Northern Ireland would most probably be denied in Switzerland, due to the exclusive competence of the Board in the field of personnel management.

However, conflicts of competence between the General Assembly and Board of Directors could be easily solved, as demonstrated by the fact that:

(i) the shareholder is entitled to propose a resolution requiring information in writing in the form of a report by the Board to the General Assembly\(^ {52}\);
(ii) the shareholder is entitled to propose to the General Assembly that the Board adopt a specific behaviour for the same. Should, however, such a resolution be adopted, this would remain a sort of “consultative resolution”, the Board remaining free - under its responsibility - to comply or not with the said resolution\(^ {53}\). The General Assembly could also compel the Board of Directors to adopt a certain line of conduct, subject to the mandatory competence of the same\(^ {54}\);

\(^{50}\) Jacques-André Schneider, *La gestion de fortune institutionnelle et l’éthique de la responsabilité*, Revue suisse de assurances sociales et de la prévoyance professionnelle, 1996, pp 1-24;

\(^{51}\) Art. 689c) CO;

\(^{52}\) Art. 662a) CO;

\(^{53}\) ATF 100 II 388;

(iii) the right to insert a specific topic in the Agenda, even though, in Switzerland, such a right belongs only to those who have a qualified minority. Thus, the right to ask for the insertion of an item in the agenda can be exercised only by a shareholder(s) having at least 10% of the share capital\textsuperscript{55}.

**IV. **LENDERS AS A FORCE IN CORPORATE GOVERNANCE\textsuperscript{56}

Most enterprises in Switzerland are very dependent on loans\textsuperscript{57}. Banks constitute the typical and as far as Switzerland is concerned the main source of financing for most corporations\textsuperscript{58}. From a Corporate Governance perspective one is to identify the role of these lenders in their capacity as shareholders and stakeholders in the monitoring and/or participation in management.

The Swiss regulatory framework allows for universal banking, which allows banks to own shares in financial as well as in non-financial firms.

There has been an extensive debate regarding banks’ ability to vote on their clients’ shares\textsuperscript{59}. As a matter of fact, lenders are generally passive in corporate management. This passivity is in particular evidenced by the fact that there are almost no court cases on lender’s liability for involvement in the management of a firm, despite the fact that, pursuant to Swiss law\textsuperscript{60}, such a lender would be considered as a de facto director and that the Swiss Supreme Court has proven sympathetic to plaintiffs suing lenders that have participated in management decisions\textsuperscript{61}.

Be it as it may, any lender’s monitoring or managing role will first depend on the information flow, i.e. the quantity and/or quality of information provided to lenders.

In that respect, while Swiss corporations have long had a reputation for the total lack of transparency especially as far as their financial statements were concerned, growth, globalisation and regulatory requirements have obliged many major Swiss corporations to increase their capital. As a consequence, there has been a need to attract foreign investors, especially institutional investors, which have triggered more transparent accounting requirements\textsuperscript{62}. As a matter of fact, as from 1995 many major Swiss companies have voluntarily adopted Internationally Accounting Standards, which implies

\textsuperscript{55} Art.699 al 3 CO;
\textsuperscript{57} Taking 1995 as an example, the ratio of outstanding credits/outstanding bonds was above 140% in Switzerland, compared to 83% in the U.S., 75% in the UK and 94% in Germany;
\textsuperscript{58} For 1990, 1992 and 1995 data on the (higher) indebtedness of Swiss Firms compared to the U.S., U.K and (to some extent) German firms, see Varnholt, Burkhard *Modernes Kredit-risiko-Management 17* (Zürich, 1997);
\textsuperscript{59} Eric R. Scherrer, *Die Stimmenrechtsausübung durch Depotvertreter*, Zürich, 1996;
\textsuperscript{60} Art. 754 CO;
\textsuperscript{61} ATF 107 II 349 (1981);
\textsuperscript{62} See Schweizer Börse, *Kotierungsreglement*, January 24, 1996;
that lenders are now in a position to demand detailed and specific financial information from major listed companies.

As regards voting rights, and due to the present structure of Swiss companies being generally dominated by one shareholder or by a group of shareholders, lenders, which generally represent small shareholders, cannot represent a threat for management, due in particular to the fact that institutional investors tend to use proxies other than banks.

As to Board Representation, at the end of 1995, major Swiss companies had a bank representative on their board. Their influence is however relative, since:

(i) it is generally not one, but several banks that have representatives on the board, which actually cannot but neutralise each others influence,
(ii) bankers’ individual qualities rather than their status as lenders’ representatives enable them to play a corporate governance role.

However, huge credit losses, the increase in competition, and experience gained from the international creditworthiness of the company, imply that lenders’ role in corporate governance is bound to increase.

V. PRACTICE AND FUTURE

A. THE PROBLEM

In early 1998, the UBS and SBS General Assemblies decided on the merger between these two companies. Amongst the deciding shareholders were pension funds, which hold a significant portion of the capital.

As it is well known, the merger was perceived suspiciously by many people, such as the employees and trade unions (frightened by the possible consequences on the employment front), certain public corporations were worried about tax consequences and unsatisfied clients changed banks. More importantly, the negative reaction of the public was closely connected to the feeling of absolute lack of power on these kinds of decisions while the same public was going to have to bear the consequences thereof. Various solutions were discussed on this occasion, such as taxation on capital gains, taxes on mergers or terminations of employment contracts: the goal of such measures was clearly to have the companies and the deciding shareholders support the consequences financially. Another trend - supported by a Center of Study and Counsel to investors in Fribourg, called Centre Info - suggested (i) compelling, like in the USA, pension funds (which occupy a privileged situation in this respect) to exercise their voting rights and “to use all the care, all the expertise, all the caution and diligence required” in the exercise of these rights and (ii) to setting up a real commission of operations boursières like the COB in France or the SEC in the United States, in order to ensure the respect of the shareholders rights and/or facilitating the dialogue between companies and shareholders.

63 Philippe Spicher, Pour une vraie commission des opérations boursières, AGEFI, 13 février 1998;
B. THE PRACTICAL SOLUTION: PRIVATE INITIATIVES

In order to fill the huge gaps left by Swiss law and Swiss institutions with respect to Corporate Governance, various institutions have been set up this last decade in order to ensure in one way or in another that corporate life takes into legal consideration the interest of the public in a sound and transparent economy.

The first group of investors to decide to move in that direction were the pension funds, which, in the 1990’s, had only 5% of their investment in shares, and in 1997, had increased their investment to 30 – 40%. In 1997, they set up a Foundation named Ethos, in partnership with two major Swiss private Banks, (Lombard Odier and Sarasin) and with the counsel and active assistance of Centre Info (Fribourg), a company set up in 1990 for the assistance and counsel to pension funds and Swiss and foreign financial institutions willing to integrate their environmental and social responsibility into their investment choices.

Ethos represents\textsuperscript{64} FRS 520 million in shares and bonds today, composed of (i) international shares; (ii) European shares; (iii) Swiss shares and (iv) international bonds. It is composed of 52 members, amongst which 13 public pension funds and 39 private pension and other funds.

Ethos enacted Guidelines concerning Voting rights\textsuperscript{65} in March 1998, on the following premises:

(i) institutional investors have the responsibility to ensure that long term investments are made in the absolute respect of the classical criteria of return, safety, diversification and liquidity. In this respect, the integration of environmental and social dimensions into the economic activities and in the decisions of the company is the only viable option;

(ii) the determination to hold long term positions in companies which pursue a strategy of sustainable economic, environmental and social development.

On these premises, Ethos recommends:

(i) Not to approve the Board of Directors annual report if:

- the Board refuses to publish important information requested;
- the Board does not correctly answer a legitimate request for complementary information;
- the Board Members or the Chairman is under criminal investigation.

(ii) Not to approve the annual statement of accounts and the audit report if:

\textsuperscript{64} Source: Ethos, \textit{Le Développement durable}, figures as at 11 May 1999;

\textsuperscript{65} Ethos, \\textit{Fondation suisse d'investissement pour un environnement durable}, Actions Europe, Ex Suisse, Lignes directrices concernant l’exercice des droits de vote, Genève, le 12 mars 1998;
important questions pertaining to the clarity of the accounts remain unanswered;
- the accounting principles used are too far from the internationally recognised accounting principles.

(iii) Not to approve the dividend allocation and distribution if:
- if the dividend proposed seems inappropriate, taking into consideration the company's financial situation and perspectives;

(iv) Not to give a discharge to the Board of Directors if:
- the information is withheld or there is some serious doubt on the quality of the information provided;
- there is a judicial investigation;
- there is serious disagreement on the management.

(v) To approve elections to the Board, subject to the right to ask for a specific election in case of potential conflict of interest or weak performance of the company.

(vi) To approve the election of the auditors, subject to unexplainable changes in this respect.

(vii) To approve the Board members' compensation (if known), subject to inadequacy with the company results or too much difference with other companies' Board members remuneration;

(viii) To approve resolutions implying a structure in capital without privileged voting shares and without restrictions as to the voting rights.

(ix) To approve the increase in capital except for in cases where (a) the increase is not economically justified and (b) the issuance conditions are too limiting for the shareholders in terms of patrimonial or social rights;

(x) To approve the payment of dividends through share allocation, except if this operation corresponds to an inappropriate distribution as compared with the company's financial situation or perspectives;

(xi) To approve the company's purchase of its own shares within the limits imposed by the law, with the exception of the case where this purchase is contrary to the shareholders' interest.

(xii) To approve the reduction in capital, with the exception of the case where this reduction is contrary to the shareholders' interest.
(xiii) To approve the financial participation of the company’s employees if it favours the company's value in the long term.

(xiv) To approve mergers and acquisitions if justified on the economic level and if the partners’ interest is duly taken into consideration.

(xv) To approve restructuring with the exception of cases where the operation disadvantages to a large extent one of the partners;

(xvi) To approve modifications in the bye-laws if these modifications do not alter the shareholders interest on a long term basis pursuant to the Ethos Chart;

(xvii) To approve the shareholders’ proposals to the General Assembly if these proposals aim at maintaining or improving the substance of the company pursuant to the Ethos Chart.

(xviii) To approve all propositions aimed at reporting all information allowing the shareholders and the partners to better know the company and its strategy, with the exception of the cases where the proposal triggers too much in costs as compared with the expected advantages.

In practice, Ethos enacts precise recommendations along the said lines for each and every shareholder that it represents. As an example:

- At the General Assembly of ABB AG of March 18 1999, Ethos recommended to the shareholders concerned not to vote on the re-election of various Board Members all together, considering that such a vote would be contrary to the Corporate Governance principles, which require a single vote on each and every Board Member's election;

- At the General Assembly of Addeo SA OF April 20, 1999, Ethos recommended the refusal of the Board’s proposal to convert bearer shares into registered shares and to limit, as a matter of principle, the registry of a shareholder with voting right to the shares registry to 5% of the stock capital. Ethos indeed considered that such a decision would be contrary to the principles of equality of treatment.

Ethos recently published a guide to companies examined from the perspective of financial, social and environmental sustainability. Quite amazingly, almost all Swiss companies answered the survey undertaken on this occasion and indeed figure in the said publication.

The corporate world in Switzerland may be changing…
**GENERAL BIBLIOGRAPHY**

<table>
<thead>
<tr>
<th>Author</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Peter Böckli</td>
<td><em>Schweizer Aktienrecht</em>, 2.Auflage, Zürich, 1996;</td>
</tr>
<tr>
<td>Peter Böckli</td>
<td><em>Corporate Governance, Der Stand der Dinge nach der Berichten “Hampel”, “Viénot” und “OCDE” sowie dem deutschen “KonTraG”, SZW/RSDA 1/99, pp 1 – 16;</em></td>
</tr>
<tr>
<td>Pascal Montavon</td>
<td><em>Droit suisse de la SA, Droit et Fiscalité, Comptes de Groupe</em>, Tome III, Lausanne, 1997;</td>
</tr>
<tr>
<td>Rita Trigo Trinlade</td>
<td><em>Le Conseil d’administration de la société anonyme, Composition, Organisation en cas de pluralité d’administrateurs</em>, Genève, 1996;</td>
</tr>
<tr>
<td>François Chaudet</td>
<td><em>La responsabilité des administrateurs de sociétés anonymes, ATAG ERNST &amp; YOUNG, Idées, solutions, résultats</em>, 1998;</td>
</tr>
<tr>
<td>Jacques-André Schneider</td>
<td><em>La gestion de fortune institutionnelle et l’éthique de la responsabilité, Revue suisse des assurances sociales et de la prévoyance professionnelle</em>, 1996, pp 1-24;</td>
</tr>
<tr>
<td>Eric R. Scherrer</td>
<td><em>Die Stimmenrechtsausübung durch Depotvertreter</em>, Zürich, 1996;</td>
</tr>
<tr>
<td>Philippe Spicher</td>
<td><em>Pour une vraie commission des opérations boursières</em>, AGEFI, 13 February 1998;</td>
</tr>
<tr>
<td>ETHOS</td>
<td><em>Le développement durable;</em></td>
</tr>
</tbody>
</table>
ETHOS

Lignes directrices concernant l'exercice des droits de vote, 1998.

Jacques-André Schneider:  
Le droit de l'actionnaire de proposer une résolution au vote de l'Assemblée générale, in AJP/PJA 5/98, pp 547 –554;

Peter Böckli:  

Peter Böckli,  
Corporate Governance, Der Stand der Dinge nach der Berichten “Hampel”, “Viénot” und “OCDE” sowie dem deutschen “KonTraG”, SZW/RSDA 1/99, pp 1 –16;

Gerard Hertig,  

******