Private Equity Minority Investments -
Sharing Control in Closely Held Private Family Firms

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from

Germany

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Zurich, May 2011

Judith Verena Söding
“It is one thing to be aware of a problem or issue, quite another to be able to do something about it.”

*Rupert Pearce/Simon Barnes, Raising Venture Capital, 2006*
Executive Summary

Triggered by the financial crisis starting in 2007, the private equity industry has entered a new investment cycle characterized by more conservative capital structures. As acquisition prices of target companies have remained comparatively high the equity tickets to acquire control ceteris paribus have increased. In addition, deal flow of high-quality assets has reduced. In search of new investment opportunities, a number of private equity funds have broadened their focus to include minority investments. At the same time, the new market reality has led some owners of family firms to consider partnering with private equity funds to gain access to capital as well as professional expertise, experience, and business contacts. Despite potential mutual benefits, minority investments carry considerable potential for conflicts between the business partners. In the absence of privately negotiated legal tools, private equity minority investors investing in closely held private family-controlled firms risk ending up with an economically significant investment with no de facto voice and control. In case of underperformance they have hardly any ability to intervene or exit the investment. This study explores the possibilities and limitations of statutory and privately negotiated legal tools and arrangements that minority investors can use to protect their interests, to reduce the probability of opportunistic behavior by controlling shareholders, and to enhance their influence both at the shareholder and the board of directors level. The principal non-financial means are voice and exit-related mechanisms. While touching upon exit, the focus of this legal analysis is on voice and voice-related rights. Voice is gaining importance as private equity investors increasingly focus on strategic and operational value creation in addition to or instead of leverage effects. Voice helps ensure that the value-enhancing strategies devised at the outset of the investment are implemented as planned.
Zusammenfassung

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<tr>
<td>AG</td>
<td>Stock corporation (<em>Aktiengesellschaft</em>)</td>
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<tr>
<td>AJP</td>
<td>Current Judicial Practice (<em>Aktuelle Juristische Praxis</em>); journal</td>
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<tr>
<td>AoA</td>
<td>Articles of association</td>
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<tr>
<td>approx.</td>
<td>approximately</td>
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<td>Art.</td>
<td>Article</td>
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<tr>
<td>BBI</td>
<td>Official Federal Gazette (<em>Bundesblatt der Schweizerischen Eidgenossenschaft</em>)</td>
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<tr>
<td>BGE</td>
<td>Decisions of the Swiss Federal Supreme Court (<em>Bundesgerichtsentscheide</em>)</td>
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<tr>
<td>BoD</td>
<td>Board of directors</td>
</tr>
<tr>
<td>BVCA</td>
<td>British Venture Capital Association</td>
</tr>
<tr>
<td>BVK</td>
<td>German Private Equity and Venture Capital Association (<em>Bundesverband Deutscher Kapitalbeteiligungsgesellschaften</em>)</td>
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<tr>
<td>CC</td>
<td>Swiss Civil Code of 10 December 1907 (<em>Schweizerisches Zivilgesetzbuch</em>); in its version dated 1 January 2011 (SR 210)</td>
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<tr>
<td>CEFS</td>
<td>Center for Entrepreneurial and Financial Studies of the Technical University Munich</td>
</tr>
<tr>
<td>CEO</td>
<td>Chief executive officer</td>
</tr>
<tr>
<td>cf.</td>
<td>confer</td>
</tr>
<tr>
<td>CHF</td>
<td>Swiss franc(s)</td>
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<tr>
<td>CISA</td>
<td>Swiss Federal Act of 23 June 2006 on Collective Investment Schemes (Collective Investment Schemes Act; <em>Kollektivanlagengesetz</em>); in its version dated 1 January 2009 (SR 951.31)</td>
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<tr>
<td>Diss.</td>
<td>Dissertation</td>
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<tr>
<td>Ed. / Eds.</td>
<td>Editor / Editors</td>
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<tr>
<td>EBITDA</td>
<td>Earnings before interest, taxes, depreciation, and amortization</td>
</tr>
<tr>
<td>e.g.</td>
<td>exempli gratia (for example)</td>
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<tr>
<td>et al.</td>
<td>et alii (and others)</td>
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<tr>
<td>etc.</td>
<td>et cetera (and so on)</td>
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<tr>
<td>et seq. / et seqq.</td>
<td>et sequitor (and the following page(s))</td>
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<tr>
<td>EVCA</td>
<td>European Private Equity and Venture Capital Association</td>
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<td>FN</td>
<td>Footnote</td>
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<tr>
<td>GM</td>
<td>General meeting</td>
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<tr>
<td>GmbH</td>
<td>Limited liability company (<em>Gesellschaft mit beschränkter Haftung</em>)</td>
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<td>Habil.</td>
<td>Habilitation</td>
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<tr>
<td>i.a.</td>
<td>inter alia (among others)</td>
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<td>i.c.w.</td>
<td>in connection with</td>
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<td>i.e.</td>
<td>id est (that is)</td>
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<td>incl.</td>
<td>including</td>
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<tr>
<td>IfM</td>
<td>German Institute for Research on small and medium-sized businesses, Bonn (<em>Institut für Mittelstandsforschung</em>)</td>
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<tr>
<td>IASB</td>
<td>International Accounting Standards Board (London)</td>
</tr>
<tr>
<td>IFRS</td>
<td>International Financial Reporting Standards, issued by the International Accounting Standards Board (IASB)</td>
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<tr>
<td>IPO</td>
<td>Initial public offering</td>
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<tr>
<td>IRR</td>
<td>Internal rate of return</td>
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<tr>
<td>KPI</td>
<td>Key performance indicator</td>
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<td>LBO</td>
<td>Leveraged buyout</td>
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<td>lit.</td>
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<td>MBI / MBO</td>
<td>Management buy in / buyout</td>
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<td>Merger Act</td>
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<td>Number</td>
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<td>NZZ</td>
<td>Neue Zürcher Zeitung</td>
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<td>PIPE</td>
<td>Private investments in public equity</td>
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<tr>
<td>PEMI</td>
<td>Private equity minority investor</td>
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<td>REPRAX</td>
<td>Journal on Commercial Register Practice (Zeitschrift zur Rechtsetzung und Praxis im Gesellschafts- und Handelsregisterrecht), Federal Commercial Registry Office (since 1999); journal</td>
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<td>SAG</td>
<td>Swiss Stock Corporation (Schweizerische Aktiengesellschaft); journal; since 1990 SZW</td>
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<td>SMEs</td>
<td>Small and medium-sized enterprises</td>
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<td>SR</td>
<td>Systematic Register of Federal Law (Systematische Sammlung des Bundesrechts)</td>
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<td>Swiss Journal of Commercial and Economic Law (Schweizer Schriften zum Handels- und Wirtschaftsrecht)</td>
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<td>ST</td>
<td>The Swiss Fiduciary (Der Schweizer Treuhänder); journal</td>
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<td>SWOT</td>
<td>Strengths, weaknesses, opportunities, and threats</td>
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<td>SWX</td>
<td>SWX Swiss Exchange, Swiss Stock Exchange (Zurich)</td>
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<td>Journal of the Bernese Law Society (<em>Zeitschrift des Bernischen Juristenvereins</em>)</td>
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<td>Journal of Business and Company Law (<em>Zeitschrift für Unternehmens- und Gesellschaftsrecht</em>)</td>
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Part One: Introduction and Theoretical Foundations
I Introduction

A Background

The private equity investment cycle ending in 2007 was characterized by abundant credit availability at favorable terms and advantageous fund-raising conditions fuelling a golden era of private equity.1 With the outbreak of the U.S. subprime mortgage crisis in the fall of 2007, the subsequent freeze of credit markets, and the ensuing global recession, the business environment for private equity funds changed dramatically resulting in a massive drop in leveraged buyout transactions (LBOs) across all regions.2 In 2010, private equity investors experienced an increasing availability of debt finance on the back of rising demand for speculative-grade debt3 and lenders’ renewed willingness to underwrite larger tranches of new debt for private equity transactions and to accept higher levels of leverage.4 Yet, even with credit conditions easing, leverage levels are considerably more conservative vis-à-vis the levels seen in 2007 (see Figure 4).5 Meanwhile, acquisition prices for target companies remain high given that major stock market indices recovered from their cyclical lows in early 2009 and given fierce competition for assets resulting from the massive cash positions of strategic buyers and private equity firms’ considerable ‘dry powder’6. Hence, while pre-crisis private equity investors could raise sufficient debt capital from banks and other lenders to acquire majority control positions in multi-billion euro companies, this has become more difficult post-crisis in the face of more conservative credit conditions and high acquisition prices. As a result, the equity tickets to acquire control have increased and a number of private equity investors have broadened their focus to include minority investments.7 In addition, coming out of the

---

1 Cf. MACARTHUR et al., 2010, p. 2.
3 See MACARTHUR et al., 2011, p. 7.
5 See MACARTHUR et al., 2011, p. 9.
6 Meaning capital committed by limited partners, but not yet invested. At the end of 2010, close to US$ 500 billion of committed, uncalled private equity capital was available for investments in buyouts and close to US$ 1 trillion was available for all private equity asset classes. For a detailed analysis, see MACARTHUR et al., 2011, p. 4, 32 et seqq.; ERNST & YOUNG, p. 31.
7 See “Rekordinvestitionen von Private Equity; Trend zu Minderheitsbeteiligungen und kleineren Transaktionen,” NZZ, 22 October 2008, p. 13; “Minderheitsbeteiligungen als Risiko für Private-Equity-Firmen,” NZZ, 5 June 2008, p. 3. See POUSCHINE, p. 60; ERNST & YOUNG, abstract and p. 5 (noting that minority investments, defined as ownership stakes of
financial crisis and facing more conservative debt levels and comparatively high acquisition prices, the private equity industry has entered a new investment cycle in which leverage effects and/or increasing valuation multiples can no longer be relied upon per se to generate returns. Focus has turned to the value-creation potential from strategic initiatives and operational improvements. To implement the devised value-creation strategies, private equity investors rely on having an active voice in corporate affairs – whether a minority investor or controlling shareholder.

The new market reality has also led some owner families to consider partnering with private equity investors as minority shareholders. Faced with traditional mezzanine providers’ lack of financing capital, along with local banks’ stringent credit terms, and at times thin equity cushions,

less than 50% of the equity, as a percentage of global private equity purchases rose from to 33% in 2007 to 45% in 2008 and to 50% in 2009. In Europe, minority investments represented 39% of acquisitions in 2009). A survey among private equity investors active in the German buyout sector revealed that minority investments in family firms are increasingly seen as attractive, see BVK, PE-Prognose, p. 16. In a 2011 study conducted by PwC among European private equity funds, half of funds anticipate opportunities to arise for minority shareholdings in private companies; see PwC, Private Equity Trend Report 2011, p. 17.

See MACARTHUR et al., 2011, p. 65 et seq. Also see “Private-Equity-Firmen erfinden sich in der Finanzkrise neu,” NZZ, 12 June 2008, p. 3. However, compare the PwC surveys among mostly European private equity funds in 2009 and 2010. In 2009, over 90% thought that the business model of the private equity market would change in the future, as the market would be relying less on financial engineering. In 2010, 90% of respondents reported no significant change to the business models since the global financial crisis, see PwC, Private Equity Trend Report 2010 and 2011, p. 8.


The increasing importance of private equity capital to Swiss owner families is revealed by a PWC study in which Switzerland had the highest percentage of owner families considering a potential sale to a private equity investor: 28% of the Swiss family firms surveyed state that they consider a sale to a private equity investor as a possible option, while only 22% do so in Europe, 20% in the emerging markets, and 15% in North America, see PwC, Family Business Survey, p. 7.

Although Switzerland did not experience a true credit squeeze, many Swiss companies complain about the banking industry’s stricter credit terms and requirements. Cf. “Schweizer Banken haben Talsohle durchschnitten,” SNA, 16 September 2010; “Credit Suisse sieht keine Kreditklemme in der Schweiz,” NZZ, 1 September 2010; “Keine Anzeichen für Kreditklemme - mögliche Trendwende,” AWP Swiss News, SNB/Hildebrand, 17 June 2010. During the 2007–2010 financial crisis, banks were facing, inter alia, margin pressure, and pressure to write down distressed assets on their balance sheets and to bolster their capital reserves. This led to their reconsideration of the cost-intensive and low-margin ‘classical’ credit business and to an optimization of credit risk management where credit conditions are determined by case-specific credit risks.

See PROGONUS, p. 9 et seq. (finding in a 1998 survey that one-third of Swiss small and medium-sized enterprises had an equity ratio of under 20%. Even more problematic has been the situation in the French-speaking region of Switzerland where 42% of SMEs had an equity ratio below 20%. Among the companies with revenues in excess of CHF 10 million, one-fourth had less than 20% equity. See LIEBERMANN, p. 44 (confirming these figures in 2001);
family firms have begun seeking alternative sources of capital to strengthen their balance sheets, to refinance existing debt, to expand operations, to pursue acquisition opportunities, to facilitate changes in the shareholder base, and to plan for succession without losing control. Moreover, by partnering with private equity investors, family firms usually gain more than equity injection as private equity investors contribute professional expertise, experience, ideas, and business contacts.

Despite potential mutual benefits, many, if not most, owner families and private equity investors alike have historically tended to shy away from minority investments. The transfer of decision-making power, the private equity investor’s alleged narrow focus on short-term returns, and fear of a reputation problem are only some of owner-family concerns. On the other side, private equity investors are concerned, inter alia, about the lack of control, deal negotiation complexities, exit limitations, and shortfalls in expected returns. Undeniably, a great potential for tensions and conflicts exist between majority shareholders and minority investors. In a worst case scenario, a minority investor may end up with an economically significant investment in an underperforming company with no de facto control, no ability to intervene, and no viable option to exit the investment.

GUINAND of CREDIT SUISSE (validating these figures in 2007), see KMU Portal of the Swiss State Secretariat for Economic Affairs, www.kmu.admin.ch.

13 See Section II.A.3.2.1.
14 See Section II.A.3.2.2.
15 See POUSCHINE, p. 60.
16 See MCCAHERY/VERMEULEN, p. 193 (noting that the private equity industry is making significant efforts to convince the corporate world of the value-added effect of private equity investments and their consequent benefits for job creation, innovation, and research and development). Cf. ACHLEITNER et al., Consequences, abstract (examining data from 1998 to 2006 and finding that private equity purchases of stock market listed shares in German companies generate positive wealth effects for target shareholders and do not adversely affect employment levels or wages in the target company); ACHLEITNER/LUTZ, abstract (concluding that private equity firms should not be labeled either “angels or demons” based on a literature review on the impact of private equity firms on employment in portfolio companies); ACHLEITNER/GEIDNER/KLOCKNER, p. 145 (examining financial data from 1997 to 2004 and finding that private equity and venture capital-financed portfolio firms contributed to job creation in Europe); The Center for Entrepreneurial and Financial Studies (CEFS), p. 7 (showing that job creation of buyout-financed firms between 1997 and 2004 grew in Europe by an average annual rate of 2.4%, nearly four times the annual growth rate of total EU employment between 2000 and 2004).

18 See POUSCHINE, p. 60 ("limited control over a business isn’t exactly a confidence builder").
B Research Topic

This dissertation explores the non-financial legal means available to private equity minority investors to protect themselves against downside slides in their investment and to promote upside potential. At center stage of this study are economically significant minority investments (between 20% and 49% of the equity) by actively engaged private equity investors (hereafter called the private equity minority investor or PEMI) in established medium and large-sized closely held private companies in which family shareholders (hereafter called the owner family or controlling shareholder, and when together with the PEMI, the parties) hold the majority of the equity and effectively control the firm. Particular focus is on private equity minority investments in family firms not only because family-owned and -controlled enterprises play an important role in the Swiss economy, but also because using the cooperation between owner families and private equity investors as an example to study the majority-minority shareholder relationship appears particularly noteworthy as the interests of these two types of shareholders can diverge considerably and, hence, their relationship is particularly prone to conflicts.

The most prominent means for PEMIs to protect their interests are voice, the ability to participate in corporate decision making, and exit, the ability to abandon an investment. Although a comprehensive set of minority investor protection measures involves both voice and exit rights, this dissertation primarily focuses on voice and voice-related rights as an under-appreciated alternative to exit aimed at protecting PEMI interests. Firstly, as outlined, the new private equity investment cycle is characterized by an

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19 See Ernst & Young, p. 5 (noting that the average deal size of private equity minority investments was US$ 35 million (globally) in 2008, down by 50% from US$ 70 million (globally) in 2008, and down by over 60% from US$ 90 million in 2007).

20 Oftentimes, private equity firms join forces in so-called club deals with each private equity investor purchasing a minority stake, but collectively having a control position. This dissertation does not focus on this type of deal, but investments alongside a majority shareholder who is not a private equity investor.

21 The terms owner family, family shareholder or controlling shareholder, and minority investor or PEMI refer to both a singular shareholder or, as the case may be, a tightly-knit group of shareholders. Of course, in reality, both the interests of minority investors and of owner families as a class are not necessarily homogenous because shareholders differ in terms of percentage of ownership, general interests, level of involvement, participation in management, etc. Nevertheless, in this dissertation, focus is on the relationships between majority-minority shareholders and internal shareholder group deviations of interests and resulting conflicts are neglected.

22 See Section II.A.2.

23 See Hirshman, p. 30 (characterizing voice “as any attempt at all to change, rather than to escape from an objectionable state of affairs”).

24 Similarly, see the article of Means, p. 1218.
increasing focus on strategic initiatives and operational improvements to generate returns as opposed to relying solely on leverage effects and multiple expansions. To ensure that the envisioned strategies for enhancing firm value are actually implemented in the future, PEMIs tend to expect and demand significant voice in corporate decision making, especially concerning strategic decisions. Secondly, during the last investment cycle ending in 2007, in theory and practice, private equity investors’ voice-related rights received comparatively little attention mainly because leverage had been widely available at favorable terms, so that private equity investors had the means to buy majority stakes and receive voice de facto without entering into complex negotiations to obtain special protection rights. Today, with broadening focus on minority investments, interest has turned to the legal options through which private equity investors can protect their interests as minority shareholders. Thirdly, from a legal perspective, exit rights largely rely on contractual arrangements with the negative side effects of limited duration and enforcement uncertainty. Shareholders’ agreements are also the principal tool for PEMIs to secure voice in corporate decision making, but the options for securing voice at the corporate level via the articles of association and the organizational regulations, and thereby enhance the duration and enforceability of the voice-related agreements, are also manifold. Fourthly, an unplanned, early exit is a protection measure of last resort as the abandonment of the project is not the hoped-for outcome if it involves a degree of loss or at the very least, unfulfilled return expectations. Conversely, voice is a preventive measure of protection that allows PEMIs to actively influence corporate decision making throughout the investment period.\(^{25}\) Voice-related rights help prevent fallouts between the shareholders from occurring in the first place, or if they cannot prevent them, voice-related rights help solve these conflicts rather than enabling the PEMI to ‘cut and run’.\(^{26}\) Hence, voice is important as it allows the PEMI to protect and grow an investment. For these reasons, this dissertation focuses on voice and voice-related measures. Yet, the author recognizes that the effectiveness of voice also relies on information and exit rights that strengthen the effectiveness of voice.\(^{27}\)

By focusing on voice and touching upon access to information and exit rights, three primary questions shall be addressed in this dissertation: (i) To what extent does prevailing Swiss law grant PEMIs voice in corporate decision making, access to information, and exit rights? (ii) What potential deficits in terms of voice, access to information, and exit should PEMIs

\(^{25}\) See HIRSCHMAN, p. 37.

\(^{26}\) See HAYMANN, p. 26.

\(^{27}\) For more details, see Section VI.B.2.
address in privately negotiated arrangements? and (iii) What legal tools and arrangements are available to PEMIs to do so de lege lata?28

In Switzerland, the most common business form for privately held companies is the stock corporation (Aktiengesellschaft or AG)29 followed by the limited liability company (Gesellschaft mit beschränkter Haftung or GmbH). Minority investments in stock corporations are at the heart of this discussion. However, since the revision of the GmbH laws in effect since 1 January 2008, the GmbH can also be a suitable business form for the portfolio company30 and as this corporate vehicle is increasingly chosen,31 differences between the stock corporation and the GmbH are highlighted where appropriate.32 Generally, legal reference is made to Swiss law. Moreover, this study’s focus is on corporate law aspects, excluding tax law.

C  Research Objective

This study touches on both economic and legal facets of private equity minority investments. It provides insights for both scholars and practitioners interested in private equity minority investments and control sharing in closely held private companies. Firstly, by applying three economic and social theories – the agency, the stewardship, and the managerial hegemony theory – this study explores the relationship between majority shareholders and PEMIs and identifies the interests and concerns of both parties in closely held firms. It shows how the imbalance of power can result in minority shareholder oppression and explains the motives of PEMIs for securing voice in corporate decision making and exit rights. In providing insights on the motivations and objectives of the involved parties,

28 The statutory options for PEMIs to protect their interests ex post against developments and decisions unforeseen in ex ante negotiations are not examined in this dissertation. Tools to protect minority shareholders in cases of conflict with majority shareholders include denial of re-election, or removal of undesirable board members, refusal of a resolution of release of board members by the general meeting (CO 758), appointment of experts to examine the management (CO 731a II), a special audit (CO 697a), rights to bring legal actions (e.g., action for liability) (CO 754, 756), the right to claim the return of benefits (CO 678), the right to petition the court for a declaration of nullity (CO 706b, 714), and a request to the court for dissolution of the company for valid reasons (CO 736 IV). For more on such options, cf. WATTER, Minderheitenschutz, p. 118.
29 See Table 13. BÖCKLI, Aktienrecht, § 1, N 36 (“In der Schweiz ist … immer noch die AG auch für ‘private Gesellschaften’ die weitverbreiteste Gesellschaftsform.”).
30 For an overview of the GmbH’s advantages, see Section VII A.
31 See high single-digit annual increase of GmbHs registered in Switzerland versus low single-digit increase of stock corporations in Table 13.
32 In any event, the rules applicable to Swiss GmbHs expressly refer to the rules on Swiss stock corporations. E.g., CO 774a, 777c II, 781 V, 798a, 798b, 799, 800, 801, 805 V, 808c, 814 IV, 818, 819, 820 I, 821a, 826 II, 827, 831 II.
the analysis can help the reader to better assess their partners’ behavior, and prepare for more focused and efficient minority investment negotiations. Secondly, while touching upon exit rights and access to information, the focus of the legal discussion is on voice and voice-related rights. The dissertation analyzes the extent to which Switzerland’s legal framework protects PEMIs against oppressive behavior from majority shareholders and allows them to participate in corporate decision making and to access information, both at the shareholder and the board of directors level. As legions of legal scholars have dedicated themselves to exploring minority shareholder protection under Swiss statutory law, the purpose of this analysis of the Swiss legal framework is not to join in a normative discussion of the adequacy of minority shareholder protection under Swiss law, or to suggest more advantageous rules de lege ferenda for minority shareholders in general. The reason for presenting the prevailing legal framework de lege lata is to identify the gaps of protection, which PEMIs, a subtype of minority shareholders with relatively strong bargaining power, likely want to address via privately negotiated arrangements. This study’s goal is to explore the possibilities and limitations of statutory and privately negotiated legal tools and arrangements that allow PEMIs to protect their interests, that is, to reduce the probability of opportunistic behavior by the controlling shareholder (and the corporate organs nominated by him/her) (downside protection) and to create a more balanced sharing of control that allows PEMIs to realize the value-enhancing strategies devised at the outset of the investment (upside potential). Lastly, this dissertation includes a descriptive case study of a closely held Swiss family firm with a private equity minority investor that illustrates how the legal tools and arrangements discussed in theory have been employed in practice.

This study’s findings can benefit three audiences: legal scholars and practitioners, private equity professionals, as well as family-owned firms and family firm shareholders. Firstly, this study’s findings can assist legal practitioners and scholars to contextualize legal considerations by identifying the common and divergent motives, interests, and concerns of majority shareholders and PEMIs. Such understanding is key to structuring win-win deals creating value for both parties. Moreover, numerous legal questions are addressed by examining legal scholars’ various interpretations and the author’s perspectives on them. Many of the findings are not only relevant in the family-firm context, but are also applicable to minority

33 See NOBEL, Corporate Governance, p. 1059 (“Minderheitenschutz im Aktienrecht war ein Dissertationsthema für Generationen: Wo der Vater sein Klagelied abgebrochen hatte, konnte der Sohn weiterführen.”).
investment situations in closely held firms with controlling shareholders other than owner families.\textsuperscript{34}

A second target audience is private equity professionals seeking to protect their position as minority shareholders. The analysis provides this audience with a broad overview of non-financial legal tools and arrangements to do so. This overview can serve as a reference system for private equity professionals to structure minority investments. From a practical perspective, this dissertation fulfills its purpose if one or more of such legal tools and respective structuring recommendations prove helpful in designing shareholders’ agreements and the target company’s the articles of association, and organizational regulations.

Family-owned firms and family firm shareholders can also benefit from a clearer picture of the interests, motivations, and concerns of private equity professionals considering minority investments. This understanding can prove helpful in considering various financing options as well as in positioning a minority investment attractively for private equity investors, thereby obtaining a better price for the minority stake while striking suitable agreements for both parties. Finally, the case study presents an example of how an owner family has worked successfully together with a minority investor using some of the tools discussed herein.

D Research Contribution

The growing number of private equity minority investments\textsuperscript{35} has awakened scholarly interest. Both practitioners\textsuperscript{36} and scholars\textsuperscript{37} have begun to focus on this topic, and are drawing upon the findings of various related areas, including research on (i) minority shareholders, (ii) private equity investments, and (iii) private equity investments in family firms.

Research on minority shareholders. The status and protection of minority shareholders by statutory law is a recurring theme in both the economic and legal literature.\textsuperscript{38} The focus has been primarily on how the legislative and judicial branches can effectively protect minority shareholders, prevent exploitation by controlling shareholders, and strike a balance between

\textsuperscript{34} See Section II.A.4.1.

\textsuperscript{35} See FN 7.

\textsuperscript{36} See, e.g., Weiner/Lee; Pouschine.

\textsuperscript{37} See, e.g., Achleitner/Schraml/Tappeiner, Attitude; Achleitner/Schraml/Tappeiner, Familienunternehmen.

\textsuperscript{38} For legal literature in Switzerland, see, among many others, the principal work of Kunz, Minderheitenschutz.
competing interests. Much less attention has been devoted on the ways in which minority investors themselves can effectively protect their interests. A likely explanation of this phenomenon is that authors typically focus on minority shareholders with small stakes in large corporations who may not bring valuable resources and/or expertise to controlling shareholders and their firms and, hence, have little bargaining power. In contrast, the situation of private equity investors investing in minority positions of closely held private companies with a limited shareholder base is, in many instances, quite different as they bring with them significant capital and expertise. In this scenario, minority shareholders are likely to have considerable bargaining power to negotiate for legal tools that protect their interests (e.g., veto rights, board representation rights, exit rights). If offered little or no de facto influence over corporate affairs and no promising exit options, private equity investors will have little interest in investing in a minority position.\(^{39}\)

Based on these circumstances, this dissertation assumes that minority investors are not necessarily at the mercy of controlling shareholders, but have – at least ex ante, that is, before the investment deal is signed – the power to negotiate for certain rights and arrangements in order to better protect their interests ex post. As a result, this dissertation is not concerned with the protection of minority shareholders de lege ferenda, but is primarily interested in the Swiss statutory law de lege lata and therein the scope for negotiation of non-financial tools and arrangements that enable PEMIs to participate in corporate decision making, gain access to relevant information, and secure exit. Moreover, while the stock corporation has monopolized legal scholars’ focus on minority shareholder protection, there is comparatively little literature on minority investments in GmbHs, a gap that this dissertation helps to close.

**Research on private equity investments.** Academic research on private equity investments in Switzerland has mainly focused on venture capital and buyout transactions.\(^{40}\) Different from young, high-growth companies, later-stage companies, the focus of this dissertation, are not necessarily at a threshold of next-level growth. The companies generally command an established market position, generate profits, and have positive cash flows. They often have a performance track record spanning many years and immaterial assets are not necessarily critical. It follows that the investors’ concerns in later-stage companies are quite different from those investing in new ventures. Research that focuses on investments in later-stage companies typically examines buyout transactions where private equity

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\(^{40}\) See, e.g., dissertations of BECKER, BRINKROLF, BURKHARDT, SCHMOHL, TREZZINI. Also cf. publications of the Swiss Private Equity & Corporate Finance Association (SECA).
investors purchase all or a large majority of the equity of a target company. Yet, in light of the recent changes in the business environment that have led private equity investors to consider minority investments in established companies, this dissertation focuses on minority investments in later-stage firms. To date, this particular field of private equity research has received slight attention. Moreover, whereas the majority of the literature on private equity investments in Switzerland has focused on financial and other economic aspects, this dissertation contributes to the governance dimension from both economic and legal perspectives.

Research on private equity investments in family firms. While the literature on family firms is continuously growing, owner family partnerships with private equity investors is a largely unexplored field of research, reflecting the comparatively small number of private equity-backed family firms. UPTON and PETTY’s empirical survey, published in 2000, on transition financing in U.S. family businesses analyzes the criteria that private equity investors use when assessing potential investments in family firms during the succession phase. They identify qualified successors, companies with growth opportunities, and promising strategic business plans as the three most critical factors for private equity investors considering transition investments. In 2004, REIMERS conducts an empirical investigation of the circumstances and investment terms characterizing successful private equity investments in family firms compared to less successful ones in order to derive a set of success factors. Concerning the legal structuring of private equity investments, REIMERS identifies control and exit rights, followed by intervention rights, as the principal protection rights for private equity professionals for building a successful partnership with the owner family. In 2006, SILVA conducts an exploratory study of private equity investments in Finish family businesses to investigate investors’ investment rationale. SILVA finds that the assessment criteria are equivalent to those that investors apply when assessing any business opportunity. Yet, private equity investors recognize that investments in family firms present particular organizational and cultural features that can increase the level of complexity and investment risks. Investigating the decision-making criteria of private equity investors in family firms in 2006, DAWSON

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41 Based on a literature search, no research has been published on private equity minority investments in later-stage companies in Switzerland. For Germany, see ACHLEITNER/SCHRAML/TAPPEINER.
42 For legal private equity literature, see FRICK, GRONER, and VON SALIS-LÜTOLF.
43 UPTON/PETTY, p. 36.
44 REIMERS, p. 1 et seqq.
46 SILVA, p. 239.
concludes that private equity investors consistently use a narrow set of criteria, namely positive performance history, growing industry, experienced and professional managers, and continuity. In 2008, BURKARDT assesses private equity financing as an instrument of succession for small and medium-sized enterprises (SMEs) in Switzerland. While these research contributions on private equity investments in family firms focus mainly on majority investments, ACHLEITNER, SCHRAML, and TAPPEINER explore private equity minority investments in family firms. They analyze 21 case studies to examine what led owner families to seek private equity, to determine the benefits and drawbacks perceived ex ante, and the factors that influenced these perceptions. These authors also conduct interviews on the rationales for, the structuring of, and the consequences of minority investments of private equity investors in German family-owned firms. They find that family firms generally turn to private equity to finance growth and ownership restructurings. The family firms reported that the quality of the interpersonal relationship with the potential private equity partner(s) is the most important criteria in selecting PEMIs. This dissertation adds to this literature on private equity minority investments with a particular focus on family firms. As the potential for conflicts of interest is particularly large in this type of investments, the dissertation contributes to the field of research by exploring and assessing various legal tools and arrangements for sharing control and protecting minority investor interests in closely held firms.

**E Research Approach**

Although this dissertation is principally a legal study, the analysis draws on various economic research methods to render an economic perspective. A qualitative approach is chosen, firstly, because the structuring of private equity minority investments is a highly complex task and quantitative research methods generally cannot adequately capture the thoughts and rationale for, and the interrelationships between, the various legal arrangements in individual majority-minority owner partnerships. Secondly, given that the number of private equity minority investments in Swiss family-owned firms is minuscule and because private equity investors and owner families tend to guard the confidentiality of their agreements, there is hardly sufficient information available about private equity minority

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47 DAWSON, p. 8.  
48 BURKHARDT, Private Equity als Nachfolgeinstrument für Schweizer KMU.  
49 ACHLEITNER/SCHRAML/TAPPEINER, Attitude.  
50 ACHLEITNER/SCHRAML/TAPPEINER, Familienunternehmen, p. 5.  
51 Ibid, p. 34 et seq.
Chapter I: Introduction

investments to perform a statistically significant quantitative study. Public information on portfolio firms, the terms of their deals and their negotiated governance arrangements are often only rudimentary, if made public at all. Thirdly, this study deliberately considers the subjective views and objectives of the respective decision makers on both sides involved in minority investments as well as the interactions and dynamics among the business partners so as to better understand what factors motivate cooperation and give rise to conflicts between private equity investors and owner families, factors that also determine the legal structure chosen.

In following a qualitative research approach, this dissertation draws upon expert interviews and document analysis as the principal research methods. The author conducted a series of face-to-face, in-depth expert interviews with fourteen private equity professionals in the fall of 2009. The experts were selected based on their experiences with minority investments in closely held companies with a dominant controlling shareholder. The interviews typically lasted one hour and were guided by a semi-structured questionnaire. Anonymity was guaranteed to all interviewees. Following an introductory discussion on the interviewees’ general experiences with minority investments, the interviewer probed the interviewees about their motives for, experiences with, and resulting personal views of minority investments and the legal structuring thereof. In discussing specific minority investments the experts had been involved in, the interviewees were asked to describe the details of the voice and exit-related legal arrangements made, the rationale behind such arrangements, and how they arrived at these particular arrangements. The interviews served to assist the author assess the practical relevance of the legal tools and arrangements presented in this dissertation based on the experts’ practical experiences. The private equity professionals interviewed also provided insightful comments on current developments and expected trends related to private equity minority investments.

To identify the principal voice and exit-related legal tools and arrangements used in practice, the author analyzed key legal documents (including term sheets, shareholders’ agreements, and articles of association) of eight private equity minority investments. The legal documents were provided by the experts interviewed on a ‘no name’ basis. Compared to the expert interviews, which were limited by time and can contain bias and ambiguity particularly concerning the various legal structures, the author’s document analysis provided insights as to precisely how certain legal structures relevant to minority shareholders were structured in practice. Yet, these legal documents were tailored to specific investment situations, so drawing general conclusions was not always possible.
The selection of interview questions, along with the design, structure, and duration of the expert interviews; the examination of a limited number of legal documents; and the selection of the case study are the author’s subjective decisions. The research methodology chosen does not render evidence of certain theoretical findings as ‘true’ or generalizable. Particularly, the case study is not intended to verify or falsify the theoretical statements presented in this dissertation, but rather to enrich the theoretical considerations with anecdote based on experts’ practice and experiences. The aim is to enable the reader to understand the circumstances, principal considerations, and motives of the business partners that influenced the choice of legal arrangements and to learn from their experiences in employing the legal tools and arrangements discussed in this dissertation.

F  Dissertation Structure

The dissertation is divided into three parts with Part One focusing on the economic aspects of partnerships between owner families and PEMIs and Part Two on legal considerations concerning the structuring of these partnerships. Part Three presents a case study. Part One outlines the background of the topic, its practical relevance, the research objectives, contributions of this study, and the research approach. Next, the terms and characteristics of private equity, family firms, minority investments, and closely held companies are discussed. Following this, three theoretical concepts, namely the agency, the stewardship, and the managerial hegemony theory, are introduced and employed to identify the core motivations, interests, and concerns of both controlling owner families and PEMIs. These theoretical considerations highlight the potential conflicts between the parties, demonstrate the associated risks of minority-shareholder oppression, and explain why PEMIs ex ante negotiate for legal rights and governance structures (among other measures) to protect their positions, interests, and expectations ex post.

Part Two focuses on the Swiss statutory framework of minority investments in stock corporations and GmbHs, and the legal tools and arrangements available to PEMIs to protect their interests, namely tools that allow for voice, access to information, and exit. First, the importance and key functions of voice and access to information for active PEMIs are highlighted. Next, the Swiss legal framework is explored, including the minority investor’s statutory rights to participation and information, both at shareholder and at board of directors level. Based on this analysis, the PEMIs’ need for participation and access to information, beyond what Swiss statutory law provides, is identified. To address this need, a plethora of legal tools and arrangements available to PEMIs in both stock
corporations and GmbHs are subsequently discussed. Following the analysis of voice-related rights and access to information is an examination of PEMIs’ exit rights along with an assessment of the legal relationship between voice and exit. Part Two closes with an assessment of the advantages and drawbacks of stock corporations and GmbHs related to voice, information aspects, and exit.

Part Three rounds out the analysis with a case study that discusses a successful private equity minority investment in a large Swiss private family-owned firm. Rather than drawing conclusions of a representative nature, this case illustrates how some of the tools and arrangements discussed in theory have been employed in practice, along with the PEMI’s respective experiences and lessons learned.

**Figure 1**: Structure of this dissertation
II Theoretical Foundations

To effectively structure minority investments, private equity investors and their advisors need to develop a solid understanding of the motivations, interests, and potential concerns of the parties involved and the issues that can fuel conflicts. Hence, this chapter is intended to provide some theoretical background to the legal discussion. Section A explains the basic terms and concepts by defining private equity, family firms, minority investments, and closely held companies. It outlines principal characteristics and interests of family firm shareholders and private equity investors, their motivations and concerns, and the risks associated with minority investments in family firms. Section B presents three theoretical concepts underlying this dissertation: the agency, the stewardship, and the managerial hegemony theory.

A Basic Terms

1 Private Equity

1.1 Term

There is no uniform definition of *private equity*, a phenomenon that has evolved in practice rather than in theory.\(^{52}\) In principle, private equity investors provide *medium to long-term*\(^{53}\) *equity capital*\(^{54}\) to selected

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\(^{52}\) See BADER, p. 4.

\(^{53}\) Private equity investments are typically held for a limited time at the end of which the investor will *exit*. The holding period usually ranges between 3 to 7 years. See LEVIN, § 103; EILERS/KOFFKA/MACKENSEN, p. 9 *et seq*.; N 20; ACHLEITNER/SCHRAML/TAPPEINER, *Familienunternehmen*, p. 11; KASERER et al., p. 14. Cf. BVCA (mentioning 5 to 10 years); EHRAT, *Private Equity*, p. 179 (mentioning 3 to 8 years); STRIEBEL, p. 14 and DAVIDSON, p. 183 (mentioning 3 to 5 years for buyouts and 5 to 10 years for venture capital investments).

\(^{54}\) In addition to common stock, private equity investors also invest in equity-like, hybrid, and debt securities. See FENN/LAING/PROWSE, p. 2, FN 4; VON SALIS-LÜTOLF, *Risiko- und Gewinnverteilung*, p. 13; BADER, p. 131 *et seq*. See EASTERBROOK/TISCHEL, p. 176 (noting three principal differences between equity and debt capital. For debt capital, (i) interest payments are tax deductible, (ii) lenders are protected by contracts and not by “fiduciary protections,” and (iii) debt capital can be combined with a ‘mandatory payout’). On the choice between debt and equity, see SHLEIFER/VISHNY, p. 761 *et seq*.* For private equity definitions that include investments in debt capital, see FRICK, § 1, N 46, N 66; EHRAT, *Private Equity*, p. 179; VON SALIS-LÜTOLF, *Finanzierungsverträge*, § 2, N 42; SCHECZYK, p. 97; with further references, BADER, p. 13.
privately held (not traded on a stock exchange)\textsuperscript{55} firms, which are commonly called portfolio companies.\textsuperscript{56}

This dissertation focuses on organized private equity;\textsuperscript{57} that is, private equity funds\textsuperscript{58} that function as specialized intermediaries raising capital from a limited number of institutional\textsuperscript{59} and well-funded private investors and investing the pooled funds in selected portfolio companies.\textsuperscript{60} The typical duration of private equity funds is ten years with a possible extension of two years.\textsuperscript{61} Private equity funds are managed by fund managers or advisors who provide advice to the private equity funds they organize and interact with the portfolio companies on their behalf.\textsuperscript{62} Through these fund managers, private equity funds, in addition to investing capital, regularly provide value-added services to their portfolio firms.\textsuperscript{63} For example, fund managers support and advise management on strategic, operational, financial, and governance issues drawing on their professional expertise, experience, ideas, and business contacts. In return, PEMIs ask for considerable control and participation rights. PEMIs seeking active participation in corporate decision making are characterized as active shareholders. MÄNTYSAARI defines active shareholders as those who “operate the business or at least be vocal, influence company decisions and use their voting and other rights.”\textsuperscript{64} Passive shareholders, on the contrary, are merely financial investors who rely on corporate governance rules,

\textsuperscript{55} At the time of the investment, the target company may be publicly listed, but with plans to ‘go private’ shortly thereafter, see EHRAI, Private Equity, p. 179; BADER, p. 10. Also, private equity investors invest in listed companies, so-called private investments in public equity (“PIPE”). In this case, however, the securities bought are typically not publicly traded, see LEVIN, § 103; TREVZINNI, p. 22. Some authors also include certain types of investments in publicly traded stocks in their definitions of private equity, e.g., FRICK, § 1, N 31 et seq.

\textsuperscript{56} See EVCA, Glossary, “Private equity”; GRONER, p. 1; EHRAI, Private Equity, p. 179; DAVIDSON, p. 21; VON SALIS-LÜTOLF, Finanzierungsverträge, § 2, N 40; for further references, BADER, p. 10.

\textsuperscript{57} Other types of investors such as business angels, hedge funds, and industrial, public, and debt investors are overlooked in the following. See on the organized private equity market, FENN/LAING/PROWS, p. 2 et seq. On corporate venture, joint ventures, hedge funds, and debt finance, see FRICK, § 1, N 51 et seq.; on industrial and public investors, see TREZZINI, p. 33 et seq.

\textsuperscript{58} In this dissertation, the term fund refers to a pool of investments and not a certain legal form.

\textsuperscript{59} Such as pension funds, investment companies, insurance companies, banks, family offices, and foundations/endowments. For the term institutional investor, see FORSTMOSER, Exit oder Voice, p. 788 et seq.

\textsuperscript{60} See FRICK, § 5, N 342, 354 et seq.; EHRAI, Private Equity, p. 179; GRONER, p. 2 et seq.; WEBER, Rechtsprobleme, p. 38; FENN/LAING/PROWS, p. 2; KLÖCKNER, p. 22.

\textsuperscript{61} See FRICK, § 6, N 394; KLÖCKNER, p. 23; LEVIN, § 103 (mentioning 10 to 13 years).

\textsuperscript{62} See TREVZINI, p. 32 (“Sie handeln typischerweise weder in eigenem Namen noch auf eigene Rechnung”); KLÖCKNER, p. 23; FN 82; FRICK, § 5, N 356; MCCABERY/VERMEULEN, p. 171.

\textsuperscript{63} See Section II.A.32.2.

\textsuperscript{64} MÄNTYSAARI, Comparative Corporate Governance, p. 5.
fellow (active) shareholders, and exit options to generate returns.\textsuperscript{65} Even though active private equity investors negotiate for enhanced shareholder rights, engage in active monitoring, and usually seek board representation, they rarely hold actual management positions.\textsuperscript{66}

From the investors’ perspective, the principal purpose of private equity investments is to realize a \textit{high absolute financial return}, typically measured in terms of a money multiple and the internal rate of return (IRR). Returns are made from investing in companies with a high potential for corporate value enhancement and realizing such gain at exit, plus dividends, if any, and/or interest received during the investment.\textsuperscript{67} PEMIs exit (usually after three to seven years\textsuperscript{68}) by selling their equity stakes to existing shareholders, managers, third parties,\textsuperscript{69} the general public in an initial public offering (IPO), or to the company\textsuperscript{70} at a profit.\textsuperscript{71} Focus is therefore on the portfolio firm’s \textit{medium to long-term value appreciation} rather than its short-term performance. During the holding period, private equity investments are typically highly illiquid.\textsuperscript{72}

Private equity, in a broad sense, encompasses investments in both small, early stage firms and larger, mature companies. \textit{Venture capital}\textsuperscript{73} refers to investments in small and medium-sized companies in early development or poised for launch or expansion that offer high growth potential.\textsuperscript{74} These equity investments are often in life sciences and technology firms, which

\textsuperscript{65} On the difference of active and passive investors, see FIESELER/HOFFMANN/MECKEL, p. 19 et seq.
\textsuperscript{66} See FN 144.
\textsuperscript{67} See SCHEFCZYK, p. 1; WEBER, Rechtsprobleme, p. 24 et seq.; TREZZINI, p. 31.
\textsuperscript{68} See FN 53.
\textsuperscript{69} Including industrial buyers (trade sale) or other financial investors (secondary sale).
\textsuperscript{70} So-called \textit{company buy-back}; of minor relevance due to legal restrictions (see Section VLA.2.1). Cf. WEBER, Rechtsprobleme, p. 26, 62 et seq.
\textsuperscript{71} See EHRAT, Private Equity, p. 179; KLOCKNER, p. 23; DAVIDSON, p. 181 et seq.; in detail, see BADER, p. 136 et seq. The exit strategy is oftentimes anticipated at the time the investment, see LEVIN, § 103. Further exit scenarios include a capital decrease, a company liquidation or bankruptcy, see WEBER, Rechtsprobleme, p. 26; SCHEFCZYK, p. 111.
\textsuperscript{72} Given that the shares are typically not traded on a primary market.
\textsuperscript{73} In certain jurisdictions, the term \textit{venture capital} is used interchangeably with the term \textit{private equity}, rather than as a subcategory thereof. Cf., e.g., LEVIN, § 102, also cf. SCHEFCZYK, p. 96 et seq.; DAVIDSON, p. 21. See EVCA, Yearbook 2010, p. 406 (stating that in Switzerland, the total amount of buyouts and growth investments accounted for 61% of all private equity investments (in a broader sense) in 2009, while venture capital reached 39%). On the differences between venture capital and private equity, see FRICK, § 2, N 109 et seq.; MCCAHERY/VERMEULEN, p. 184; KASERER et al., p. 14 et seq.; WEBER, Rechtsprobleme, p. 30 et seq.
\textsuperscript{74} See RÖTHELI/GROTZER, p. 39; BOHRER, § 11, N 454. Cf. also definitions of MCCAHERY/VERMEULEN, p. 156; TREZZINI, p. 22 et seqq.; RUPPEN, p. 19 et seq.; WEBER, Rechtsprobleme, p. 30 et seq.
may earn little or no revenue at the entry stage. Private equity invested in later-stage companies (private equity in a narrow sense) usually targets stable, profitable businesses\(^ {75}\) in the manufacturing, services, consumer goods/retail, and life sciences sectors.\(^ {76}\) Moreover, private equity investments can be subdivided in majority and minority investments.\(^ {77}\)

### 1.2 History and Economic Significance of Private Equity in Switzerland

In comparison to the U.S. and U.K., private equity investments in Switzerland only started to take root in the past two decades (see Figure 2).\(^ {78}\) Venture capital investments in Switzerland began during the 1990s\(^ {79}\) and notably increased in popularity when the SWX New Market was introduced in 1999, which reduced the barriers for firms wishing to go public and enhanced exit options.\(^ {80}\) In addition, more transparent listing rules for investment companies and improved disclosure standards supported the development of private equity investments in Switzerland.\(^ {81}\) The year 2000 set a first record in terms of capital raised by Swiss private equity firms amounting to €1.5 billion (see Figure 3). With the end of the ‘new economy boom’ in 2000, private equity investors shifted their focus to buyouts of later-stage companies. The emergence of buyout funds resulted from various factors, including favorable credit market conditions with abundant debt supply at low interest rates (see Figure 6), changing investor preferences, the increasing number of publicly listed private equity investment companies, and the growing popularity of alternative asset classes.\(^ {82}\) Private equity investments in Swiss firms more than tripled from €391 million in 2001 to a record of €1.3 billion in 2007, 92% of which was invested in buyouts and expansions. Although the remaining amount invested in seed and start-up companies was only 8%, the number of companies receiving venture-backed finance was almost as high as the companies that underwent a buyout or expansion indicating a substantially larger size of private equity investments in later-stage companies.

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\(^ {75}\) See FRICK, § 2, N 110.

\(^ {76}\) See EVCA Yearbooks.

\(^ {77}\) KASERER et al., p. 14. On minority investments, see Section II.A.1.

\(^ {78}\) For a general history of private equity investing, see LEVIN, § 106; FENN/LIANG/PROWSE, p. 7 et seqq.; McCAHERY/VERMEULEN, p. 171.

\(^ {79}\) See GRONER, p. 19.

\(^ {80}\) For more details, see RÖTHELI/GROTZER, p. 39; BOHRER, § 11, N 468.

\(^ {81}\) See RÖTHELI/GROTZER, p. 42.

\(^ {82}\) See McCAHERY/VERMEULEN, p. 172.
Part One: Introduction and Theoretical Foundations

With the financial crisis starting in 2007, the business environment for private equity investors changed dramatically. Private equity investments in buyouts and expansions of Swiss firms dropped by almost 40% in 2009. In 2010, the transaction volume more than doubled again, but largely driven by one singular transaction. While buyouts in the bubble years ending in 2007 were financed with an average debt level of 6.1x EBITDA and

83 New funds raised excluding realized capital gains.
84 On 28th October 2010, funds advised by CVC acquired Sunrise for a total consideration of CHF3.3 billion.
85 Earnings before interest, taxes, depreciation, and amortization.
equity cushions of one-third, the average debt level in 2010 was 4.4x EBITDA (see Figure 4) and the average equity contribution was 51% (see Figure 5). Debt supply was constrained and debt terms more stringent (see Figure 6).

Figure 4: Debt/EBITDA ratios for European LBOs (Source: S&P LCD)

Figure 5: Average equity contribution for European LBOs (Source: S&P LCD)

The financial crisis led private equity investors to devise new investment strategies and to broaden their focus from leverage effects and multiple expansions to the value potential to be realized from strategic repositioning and operational improvements. Moreover, due to more stringent credit requirements, private equity investors were looking more closely into minority investments.86

86 See Section I.A.
In 2009, private equity investors invested €555 million in Swiss companies, with buyouts, growth investments, and venture capital accounting for 47%, 14%, and 39% respectively.\(^87\) 85% of buyout capital in Switzerland in 2009 was invested in medium-sized companies.\(^88\) More than 80% of the total Swiss buyouts in 2009 were investments in business and industrial products and services as well as in life sciences firms.\(^89\) While private equity capital invested in Swiss companies as a percentage of Switzerland’s GDP increased between 2004 and 2010, dropping only in 2009, a comparison to other European countries, in particular the U.K. and Schweden, suggests that Switzerland still has potential for further growth (see Figure 7). In 2010, Switzerland was at 3.7‰, slightly ahead of the European average of 3.1‰.

\(^88\) Ibid.
\(^89\) Ibid, p. 408.
Chapter II: Theoretical Foundations

2 Family Firms

2.1 Term

Despite a considerable amount of literature on family firms, there is no universal definition of the term, reflecting the diversity of companies that are seen as family firms. The existing definitions reflect one or more of four components: (i) the percentage of the owner family’s equity stake in the company, (ii) the extent of de facto control of corporate decision making signified by management positions and/or board seats held by family members, (iii) the percentage of voting rights held by family members, and (iv) the cultural and historical roots of the firm. The lack of a broadly used, consistent definition of family firms is not without problems. Cf. Westhead/Cowling/Storey cited in Klöckner, p. 14, FN 48 (vividly demonstrating the extent of definitional confusion by showing that the share of family firms in their sample varied between 15% and 81% depending on the definition used). For a broad overview of the various definitions used in the literature, see Neubauer/Lank, p. 21 and Klöckner, p. 16. Also cf. Astrachan/Klein/Smyrnios, p. 45 et seqq. (choosing, as a response to the vast heterogeneity of family businesses, not to provide a precise definition of the term, but instead develop a family-power, experience, and culture (F-PEC) index as a standardized instrument to assess family influence on the family firm in the dimensions of power, experience, and culture).

15.0‰ United Kingdom
12.5‰ Sweden
10.0‰ Switzerland
7.5‰ Europe
5.0‰ Norway
2.5‰ France
0‰ Finland
11.2‰ Spain
3.7‰ Poland
3.1‰ Sweden
3.1‰ Norway
3.0‰ France
3.1‰ Finland
2.3‰ Spain
2.3‰ Poland
2.0‰ Switzerland
1.9‰ Norway
1.9‰ France
1.5‰ Finland
1.4‰ Spain
1.2‰ Sweden
0‰ United Kingdom
11.2‰ Sweden
12.5‰ Switzerland
10.0‰ Europe
7.5‰ Norway
5.0‰ France
2.5‰ Finland
0‰ Spain
4.0‰ Poland
3.0‰ Switzerland
2.0‰ Norway
1.0‰ France
0‰ Finland
0.9‰ Spain
1.2‰ Sweden
2.8‰ United Kingdom
2.9‰ Europe
3.6‰ Norway
2.0‰ France
1.2‰ Finland
1.4‰ Spain
1.2‰ Sweden

Based on private equity investments in the respective country, industry statistics.

For further references, see Le Breton-Miller/Miller, p. 1170; Klöckner, p. 14; Astrachan/Shanker, p. 211 et seqq.; Flören, p. 15. The lack of a broadly used, consistent definition of family firms is not without problems. Cf. Westhead/Cowling/Storey cited in Klöckner, p. 14, FN 48 (vividly demonstrating the extent of definitional confusion by showing that the share of family firms in their sample varied between 15% and 81% depending on the definition used). For a broad overview of the various definitions used in the literature, see Neubauer/Lank, p. 21 and Klöckner, p. 16. Also cf. Astrachan/Klein/Smyrnios, p. 45 et seqq. (choosing, as a response to the vast heterogeneity of family businesses, not to provide a precise definition of the term, but instead develop a family-power, experience, and culture (F-PEC) index as a standardized instrument to assess family influence on the family firm in the dimensions of power, experience, and culture).

E.g., Flören, p. 25 (qualifying a company as a family business if a family or a founder holds an equity stake in excess of 50%, used as one of several criteria); see also the definition of family firms of the Institut für Mittelstandsforshung Bonn, www.imf-bonn.org; Giger et al., p. 10; Ehhrhardt/Nowak, p. 17 (qualifying a business as family-owned, “if one or more individual members of one or two families (together) own a fraction of the equity of at least 75 percent”).

Figure 7: Private equity investments as per mil of GDP (Source: EVCA Yearbook 2010)
family members, (iii) the willingness of the owner family, or particular members thereof, to use such power and actively engage in business matters and decisions as a family, and (iv) the involvement of multiple generations in the past, and/or the intention to maintain family involvement in the future.

In this dissertation, the owner family is considered one or more of founders, or the descendants thereof, and their families, who hold the majority of the firm’s equity and have, as single members or collectively, de facto control or at least significant influence over corporate decision making, either directly, by holding executive management positions (called owner/family-managed companies) or indirectly, by being in a position to appoint the members of the board of directors (hereinafter board members or directors) and, through them, executive managers and by being in close contact with them (called family-controlled companies). The absolute size of the majority stake or the number of generations of the owner family involved in the business is of secondary importance. The term family in this dissertation is based on KLEIN’s definition, in which a family is considered “a social system consisting of individuals, related either by blood, by marriage or by legal adoption, interacting with and influencing the behavior of each other.”

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93 See KLEIN, Family businesses, p. 158 (assuming a company to be a family business if (i) the family owns at least part of the firm’s equity; and (ii) if the sum of the family’s share in total stock + its share of executive management positions + its share of board of directors’ seats is ≥ 1). Also see the definition of family firms of the Institut für Mittelstandsforshung Bonn (“Das IfM Bonn klassifiziert alle Unternehmen als Familienunternehmen, bei denen bis zu zwei natürliche Personen oder ihre Familienangehörigen mindestens 50% der Anteile eines Unternehmens halten und diese natürlichen Personen der Geschäftsführung angehören.”).

94 See NEUBAUER/LANK, p. 5 (“Whether a given family accepts that it controls its own enterprise.”); VON MOOS, p. 15.

95 E.g., certain scholars qualify businesses as family firms only if they have undergone a succession in the second generation or beyond. See BÜHLER, Regulierung, § 11, N 1322 (“mehrere Generationen derselben Familie sind im Unternehmen tätig”); VILLALONGA/AMIT, Family firms, p. 17; NEUBAUER/LANK, p. 5.

96 See LE BRETON-MILLER/MILLER, p. 1170; ASTRACHAN/SHANKER, p. 211; in detail on the categories, see FLÖREN, p. 23. Cf. also NEUBAUER/LANK, p. 5 et seq.

97 See the Family Business Governance Report, p. 10 et seq. cited in CONTINUUM et al. p. 31.

98 Ibid.

99 For similar definitions of family firms, see KRNATA, CO 717, N 236; BÜHLER, Regulierung, § 11, N 1323; MÄNTYSAARI, The Law of Corporate Finance, p. 294; VON MOOS, p. 15 et seq.

100 KLEIN, Family businesses, p. 158. This definition is also used by KLÖCKNER, p. 13; FLÖREN, p. 28. Cf. also VOGEL, p. 21 (“kommen nur Verwandte, Verschwägerte oder Ehegatten in Frage”).
2.2 Economic Significance of Family Firms in Switzerland

Approximately 88% of Swiss companies\textsuperscript{101} are estimated to be family firms (see Figure 8).\textsuperscript{102} A 2003 cross-country comparison by CAPPUYUN et al. shows that family firms play a particularly significant role in the Swiss economy compared to, for example, in Germany or Spain where family firms account for 68% and 71% respectively, of all companies.\textsuperscript{103}

<table>
<thead>
<tr>
<th>Large Company</th>
<th>Non-Family</th>
<th>Family-Dominated</th>
</tr>
</thead>
<tbody>
<tr>
<td>SME</td>
<td>0.06%</td>
<td>0.14%</td>
</tr>
<tr>
<td></td>
<td>11.54%</td>
<td>88.26%</td>
</tr>
</tbody>
</table>

*Figure 8: Economic significance of family firms in Switzerland (Source: PWC, Nachfolger gesucht, p. 9; with reference to FREY/HALTER/ZELLWEGER, p. 6)*

The large majority of family firms in Switzerland are small and medium-sized enterprises considered those with 250 employees or less.\textsuperscript{104} Yet, even among large firms, the share of family firms is above 50%.\textsuperscript{105} FUEGLISTALER and ZELLWEGER estimate that family firms account for approx. 60% of Switzerland’s GDP and employ a similar percentage of the Swiss work force.\textsuperscript{106} In 76% of Swiss family firms surveyed by FUEGLISTALER and HALTER in 2004, the owner family owns 100% of the equity, and in another 22% the family owns at least 51% of the equity (see Figure 9).\textsuperscript{107} Almost 80% of the family firms surveyed have a maximum of three shareholders.\textsuperscript{108} In 63% of the family firms surveyed the family holds 100% of the top management positions, but in 2/3 of the family firms covered, third parties (non-family members) sit on the board of directors alongside family members.\textsuperscript{109}

\textsuperscript{101} At the end of 2010, there are 536'458 firms (Zentraler Firmenindex, 2010).
\textsuperscript{102} FUEGLISTALER/HALTER, p. 36. Cf. NEUBAUER/LANK, p. 10 (estimating that 85% of the companies registered in Switzerland are family firms).
\textsuperscript{104} See FUEGLISTALER/HALTER, p. 36.
\textsuperscript{105} FUEGLISTALER/ZELLWEGER, p. 30. Data from 2005.
\textsuperscript{106} Ibid; ZELLWEGER, p. 16.
\textsuperscript{107} FUEGLISTALER/HALTER, p. 36.
\textsuperscript{108} FREY/HALTER/ZELLWEGER, p. 9.
\textsuperscript{109} FUEGLISTALER/HALTER, p. 36.
Figure 9: Influence of owner families on their companies (Source: FUEGLISTALER/HALTER, p. 37)

3 Minority Investments

3.1 Term

Private equity investors typically acquire significant ownership stakes\textsuperscript{110} – whether control stakes or significant minority positions – and, hence, are considered major shareholders.\textsuperscript{111} In essence, the term minority is a relative legal concept.\textsuperscript{112} In quantitative terms, minority can relate to less than 50\% of the firm’s equity,\textsuperscript{113} the votes,\textsuperscript{114} or the number of shareholders.\textsuperscript{115} These parameters do not necessarily concur. For example, a singular shareholder (out of five shareholders in total, that is, representing 20\% based on the number of shareholders) with a 40\% equity stake in a company...
controlling 60% of the votes, could qualify as a majority shareholder if votes are taken as the determining factor. Based on the other two criteria, the singular shareholder would be considered a minority. Numerous scholars use *qualitative elements* when describing minority shareholders, namely the lack of control over a corporation.\(^{116}\) **HERMAN** defines *control* as “the capacity to initiate, constrain, circumscribe, or terminate action, either directly or by influence exercised on those with immediate decision-making authority.”\(^{117}\)

In this dissertation, the term *minority* is primarily understood as a quantitative term and refers to a shareholder who owns less than 50% of a company’s stock. Regularly, this means that the shareholder controls only a minority of the votes and hence lacks control over the company (*non-control minority*), particularly when opposing a controlling shareholder. Thus, the terms *majority shareholder* and *controlling shareholder* are used interchangeably. Yet, this terminology does not mean that the minority investor (who owns less than 50% of the equity) needs to accept a position of total non-control. Control is not only derived from a majority stake in the equity, but can also follow from legal devices such as voting shares, without majority equity ownership. It can result from extra legal factors such as the nature of the shareholder base. For example, a stable minority holding 40% of the equity (and votes) can very well set the tone if the remaining (majority of) stock is spread across many small and independent shareholders and therefore characterized as random and changing.\(^{118}\) In this case, the major (minority) shareholder is said to hold a “control minority” or to be in a position of “strategic non-control” (see Table 1).\(^{119}\)

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\(^{116}\) *Cf.* HÜNERWADEL, p. 15 (“Der Minderheitsaktionär … kann dauernd und institutionell keinen Einfluss auf die Willensbildung der Aktiengesellschaft nehmen”); HÖRBER, *Informationsrecht*, p. 278, N 872 (“Minderheitsaktionäre sind Aktionäre, die zwar über eine relativ bedeutenden Anteil am Grundkapital verfügen, damit aber keinen bestimmenden Einfluss auf die Gesellschaft ausüben können”); HETHERINGTON/DOOLEY, p. 5, N 7 cited in MOLL, *Fair value*, p. 295, FN 2 (using the terms *majority* and *minority* to “distinguish those shareholders who possess the actual power to control the operations of the firm from those who do not.”); HAYMANN, p. 19 (“die Geschäfte mitgestalten wollen, jedoch hierzu aufgrund ihrer Kapital- und Stimmkraft nicht in der Lage sind”).

\(^{117}\) **HERMAN**, p. 17.

\(^{118}\) *See* HÖRBER, *Informationsrecht*, p. 279, N 873.

\(^{119}\) *See* POUCHINE, p. 60. For the term “minority control”, *see* BERLE/MEANS, *Corporation*, p. 67.
Table 1: Control cases of minority shareholders

3.2 Motives and Challenges

Owner families are oftentimes reluctant to share control in their firm and want the business to remain in family hands because they fear a loss of entrepreneurial freedom. Yet, in today’s globalized economy, companies wishing to remain ahead of competition need to invest in growth, economize their operations, cut costs, and realize economies of scale. The associated need for capital and expertise cannot always be fulfilled by the company’s or shareholders’ available resources. Seeking private equity capital can be a viable option because not only does the company gain access to fresh capital, but also to value-added services which is why private equity is also referred to as intelligent money.

3.2.1 Source of Capital

Historically, bank loans have been the most prevalent source of financing for SMEs in Switzerland. However, if a firm has difficulty raising bank financing, for example, due to insufficient equity cover, lack of collateral, inadequate near-term cash flows to service the debt, or uncertainties about

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120 See ACHLEITNER/SCHRAML/TAPPEINER, Familienunternehmen, p. 25.
121 Cf. AMSTUTZ, Macht und Ohnmacht, p. 13.
122 See RUPPEN, p. 21.
123 See HOFSTETTER/STEINBRECHER, p. 935.
the success of a planned investment, SMEs turn their focus to equity and equity-linked instruments. Private equity capital has various benefits to which the firm gains access if the Pemi invests in shares held by and/or newly issued by the company.  

(i) It allows the firm to pursue growth opportunities by funding acquisitions and investments in, for example, a new production site or product line, a store rollout, geographic expansion, and research and development projects.  

(ii) It improves the firm’s liquidity not only from providing fresh capital, but also because, depending on the respective instrument chosen, such capital does not come with accruing interest and fixed repayment obligations.  

(iii) It enables the firm to enhance its capital structure. It can help survive a period of distress by paying down debt to a sustainable level and preventing a breach of leverage covenants. (iv) It functions as bridge finance until a planned IPO occurs or, conversely, it helps finance a public-to-private. Closely related to this point is the signaling effect of private equity involvement, which investors and banks often perceive as a statement of confidence in a firm’s valuation – an important factor for an IPO or sale of the firm. (v) Private equity can enhance the firm’s access to debt finance. By increasing the firm’s equity cushion, the lender’s risk decreases and a better credit rating may be achieved. Moreover, due to the lower default risk, the interest rate on borrowed capital may decrease.  

(vi) Private equity also decreases a company’s dependence on the financial resources of the owner family by providing a more diverse funding base. (vii) If the private equity investor buys the minority stake in the target company from the owner family (or another selling shareholder) the capital invested by the Pemi does not flow to the company, but to the seller who can cash out all or part of his/her holdings, while the family retains control. Private equity allows owner families to withdraw some of their capital invested in the family business and thereby to diversify their funds over a broader range of investments. (viii) In family firms, it is often impossible to prevent increases in the number of family shareholders via inheritance. Splintered company structures, quarrelling family members or factions, and family leadership crises can incapacitate company leadership, thus jeopardizing shareholder

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124 See Shleifer/Vishny, p. 765.  
On the motivators of private equity investments, see EVCA, Glossary, “Private equity;” Fenn/Laing/Prowse, p. 3. With respect to minority investments, see Achleitner/Schraml/Tappeiner, Familienunternehmen, p. 20 (stating that financing growth and a change in the ownership structure are the two most common motivators for inviting private equity investors to invest as minority shareholders).  

125 See Müller-Stewens/Rowenta, p. 9; Le Breton-Miller/Miller, p. 1174.  

126 See Müller-Stewens/Rowenta, p. 8.  


128 See, for further references, Braun, p. 157.
interests and goals. Private equity enables the consolidation of a company’s shareholder base, allowing certain family shareholders to exit, which can help to solve conflicts among family shareholders.⁸⁰ PEMIs can also function as referees for the diverse interests of family shareholders and reduce the associated potential for conflict.⁸¹ (ix) Succession solutions in Swiss SMEs via private equity buyouts have been discussed in a number of studies and expert articles over the last few years.⁸² Focus has been on the complete sale of the family enterprise to private equity investors. In certain situations, however, family shareholders oppose the transfer of complete ownership as part of a succession plan.⁸³ A private equity minority investment is a useful instrument that enables a gradual succession, in which family shareholders tender their shares to the external co-investor bit by bit. The reasons for such a tailor-made succession rather than an immediate, complete sale are manifold. For example, the owner family, particularly a figurehead may find it emotionally difficult to let go all at once, given the family’s history in the business.⁸⁴ Moreover, splintered ownership, heterogeneous aims, values, and ages of the shareholders could render a sale of the entire enterprise difficult at best and impossible at worst.⁸⁵ Private equity investors also may desire a gradual transition of management, due to their need for continued availability of the figurehead’s or management’s experience, to maintain a loyal customer base and positive community relationships, and to sustain workforce morale during the (gradual) transition.⁸⁶

⁸⁰ See ACHLEITNER/SCHRAML/TAPPEINER, Familienunternehmen, p. 20.
⁸¹ See MÜLLER-STEWENS/ROVENTA, p. 7.
⁸² See, e.g., BURKHARDT, HOFMANN, KUSIO, REIMERS.
⁸³ See KUSIO, p. 166.
⁸⁴ See KREBS/ECKHARDT, p. 355.
⁸⁵ See KUSIO, p. 166.
⁸⁶ See KREBS/ECKHARDT, p. 355.
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3.2.2 Value-Added Services

Private equity investors provide capital and value-added services to their portfolio companies.\footnote{Indeed, private equity entails far more than merely the financing of corporate activity by an investor as assumed by the Swiss Federal Supreme Court in its decision of 21 November 2003, 4C.143/2003 (E. 3.3). \textit{Cf.} Eilers/Koffka/Mackensen, p. 7, N 14; Ehrat, \textit{Private Equity}, p. 179; Groner, p. 8 \textit{et seq.}; Kowatsch, p. 140; Trezzini, p. 39 \textit{et seq.}; Davidson, p. 177 \textit{et seq.}; Levin, § 103; Sahlmann, p. 473.} The latter include (i) assisting the controlling shareholder in \textit{monitoring} management, benchmarking business performance internally and externally, and requesting board accountability; (ii) helping to \textit{shape the corporate vision}, setting ambitious goals, and developing appropriate strategies;\footnote{Strategy is understood as the definition of long-term goals and the planning of measures to achieve those goals, see Ruppen, p. 94.} \textit{identifying and evaluating business opportunities} to enhance firm value, bringing in ideas for add-on investments, \textit{making critical strategic decisions} (e.g., on acquisitions, strategic alliances, investments, disinvestments); (iii) \textit{attracting key...
management personnel and devising suitable incentive mechanisms (e.g., management participation programs to avoid principal-agent problems); (iv) providing financial advice (e.g., concerning capital structure adjustment, debt restructuring, (re)negotiation of financing terms, rating analysis, hedging currency, interest, and input risks); (v) providing operational support\(^{139}\) (e.g., concerning cost management, margin development, working capital management, business process re-engineering, product management and innovation, marketing strategies, identification of new customers/suppliers, asset management, tax optimization); (vi) enhancing corporate governance (e.g., by changing the company’s business form, adapting the organizational structure, improving control, risk management, and information systems), thereby helping the company to comply with increasing demands regarding corporate governance and risk management; (vii) leveraging the private equity investor’s industrial network and establishing contacts to potential customers, suppliers, capital providers, industry experts, consultants, lawyers, tax advisors, etc.; and (viii) functioning as a referee among the shareholders.\(^{140}\)

Generally, private equity investors function as *sparring partners*\(^{141}\) to stimulate both owners and managers to think broadly and creatively about business opportunities\(^{142}\) and to proactively challenge management with alternative strategies to maximize firm value. PEMIs typically provide non-financial support via participation in corporate organs (e.g., the board of directors, advisory boards).\(^{143}\) A special form of support is the *temporary assumption of management functions* by external interim managers brought in by PEMIs. This type of support is rare since PEMIs are generally not directly involved in the day-to-day business operations. By exception, a temporary assumption of management functions may occur, for example, in cases of severe management failure, in other crisis situations or in cases of

\(^{139}\) See BLEICHER, p. 451 (understanding operational management as “auftragsbezogene, lenkende, gestaltende und entwicklende Willensbildung, -durchsetzung und -sicherung in Prozessen durch Projekte”); RUPPEN p. 101 (understanding all day-to-day management activities as operational management).

\(^{140}\) See McCAHERY/VERMEULEN, p. 162; STRIEBEL, p. 31; SCHEFCZYK, p. 111; GRÖNER, p. 8 et seq.; TREZZINI, p. 40; RUPPEN, p. 94 et seq.; WEBER, Rechtsprobleme p. 27; ACHLEITNER/SCHRAML/TAPPEINER, Familienunternehmen, p. 22 et seq.; BETSCH/GROH/SCHMIDT, p. 133; RECHSTEINER/WILD, p. 7. Generally, see BRINKروف, p. 124 et seq. (characterizing a private equity investor as a “Kontrolleur,” “Ratgeber,” “Manager auf Zeit,” “Kontaktvermittler,” “Know-how-Vermittler,” “Krisenhelfer,” and “Motivator”).

\(^{141}\) See ACHLEITNER/SCHRAML/TAPPEINER, Familienunternehmen, p. 52; BETSCH/GROH/SCHMIDT, p. 133.

\(^{142}\) See ACHARYA/KEHOE/REYNER, p. 2.

\(^{143}\) See SCHEFCZYK, p. 110.
temporary vacancies. Through their professional expertise, experience, and business contacts, private equity investors are in a position to make important contributions to their portfolio firms’ economic success. Because of the non-financial added value they provide, the identity of the private equity investor is of immense importance as it is not only critical that capital per se is provided, but equally who provides such capital.

### Figure 11: Private equity added value

#### 3.2.3 Potential Drawbacks

Even if only a minority, private equity involvement causes a degree of corporate power to shift into the hands of an external investor, thereby limiting the owner family’s influence and independence to a certain extent. Family-specific views and convictions are not as easily enforced with outside private equity investors. Indeed, ACHLEITNER, SCHRAML, and TAPPEINER, in examining private equity investments in German family firms, identify a fear of losing independence as family firms’ main hesitation towards private equity minority investments. Moreover, owner

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144 Cf. DEIBERT, p. 25; SCHEFCZYK, p. 111; RUPPEN, p. 101 et seq.; WEBER, Rechtsprobleme, p. 23.

145 See MEIER-HAYOZ/FOSTMOSER, § 3, N 9 et seq.; MEIER-HAYOZ/SCHLUEP/OTT, p. 301.

146 See STRIEBEL, p. 63; HOHMANN, p. 74 (citing a study in which loss of control is cited as the primary reason not to seek private equity).

147 ACHLEITNER/SCHRAML/TAPPEINER, Familienunternehmen, p. 25; also cf. SILVA, p. 240.
families fear *divergences of opinion* (see Section II.A.3.2.5) concerning, for example, risk-return preferences and investment horizon.\(^{148}\) Shared control makes corporate decision making more *time-consuming* and can *reduce the firm’s responsiveness*. Also, the communication, disclosure, and coordination can be *costly*. Worst case, the company’s operability, profitability, and mobility are negatively affected. Therefore, suitable conflict resolution mechanisms should be in place to avoid a permanent deadlock. In addition, family shareholders must cope with the risk of a *reverse agency problem*.\(^{149}\) a situation in which the minority shareholder abuses his/her participation rights and protective devices (e.g., veto rights) to exact disproportionate concessions or otherwise to block business-critical decisions, thereby preventing the company from pursuing promising business opportunities, or even provoking the company’s paralysis or breakdown.\(^{150}\) Family shareholders may also fear a *loss of family firm culture*.\(^{151}\) Another perceived drawback relates to *disclosure*. Family firms often have a culture of discretion and are reluctant to reveal their finances to outsiders which private equity funds require to comply with their reporting duties vis-à-vis their fund investors.

### 3.2.4 Owner Families’ and Minority Investors’ Shared Interests and Benefits

The motive commonly shared by both owner family shareholders and PEMIs is to grow the firm and maximize firm value. In many instances, all or most of the family’s wealth is invested in the company. Hence, the company’s underperformance has considerable negative financial consequences for the family shareholders.\(^{152}\) Private equity investors are under pressure to generate superior returns for their investors in order to stay in business and raise funds in the future. They have a “relentless focus on value creation levers,”\(^{153}\) which also benefits the owner family’s finances. As a result, BERLE and MEANS observe that “presumably many if not most of the interests of a minority owner run parallel to those of the controlling majority and are in the main protected by the self-interest of the latter.”\(^{154}\) Secondly, by having two or more major shareholders invested in a

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\(^{148}\) See ACHLEITNER/SCHRAML/TAPPEINER, *Familienunternehmen*, p. 25.

\(^{149}\) See UTSET, p. 1344 (“legal (or contractual) rules aimed at reducing the ability of one party to act opportunistically … have the reciprocal effect of increasing the other party’s ability to act opportunistically”); also see PERAKIS, p. 85.

\(^{150}\) See MCCAHERY/VERMEULEN, p. 46; PERAKIS, p. 84.

\(^{151}\) See ACHLEITNER/SCHRAML/TAPPEINER, *Familienunternehmen*, p. 25 et seq.

\(^{152}\) See *ibid*, p. 19.

\(^{153}\) ACHARYA/KEHOE/REYNER, p. 3.

\(^{154}\) BERLE/MEANS, p. 68.
company with roughly equal incentives to monitor and control the business’s performance, the monitoring activities can be shared among the major shareholders enabling each to benefit from time and cost advantages. Family shareholders have an advantage in monitoring and disciplining managers who are family members via relational governance mechanisms, that is, due to the numerous dimensions of interpersonal relationships maintained over an extended period of time. These strong social ties among family members facilitate a degree of social control. On the other hand, private equity investors have particular expertise for and motivation in setting up and expanding efficient institutional governance mechanisms by implementing control and information systems. Both relational and institutional governance mechanisms are complementary and hence both shareholder groups mutually benefit from each other’s monitoring activities. Similarly, co-ownership also saves time and cost related to decision making by dividing the responsibilities for certain types of ownership decisions based on each other’s areas of expertise. Yet, such benefit is conceivable only in areas where the parties’ interests are largely congruent. Thirdly, owner families and private equity investors equally benefit from each other’s experiences, expertise, skills, and contacts.

3.2.5 Sources of Divergences and Conflicts of Interest

Once the purchase price and the principal investment terms are agreed upon and the capital is invested, divergences of opinion between the controlling shareholder and the minority investor will most likely arise in the following months and years despite their common goal of maximizing the firm’s value. The following are some common sources of conflict.

Heterogeneous risk-return preferences. Family shareholders may have different risk-return preferences than private equity investors. As owner families have often invested substantial funds and human capital in their single firm, they are typically more risk averse, and consequently are satisfied with lower returns than the 20 to 25% annual return expectations of private equity investors. They seek continuity and oftentimes strive to

156 See MÄNTYSAAARI, The Law of Corporate Finance, p. 288; cf. also RUFFNER, Aktive Grossaktionäre, p. 256.
157 See WEBER, Rechtsprobleme, p. 27.
158 See AMOUR/WHINCOP, p. 80.
159 See MÄNTYSAAARI, The Law of Corporate Finance, p. 289; SHLEIFER/VISHNY, p. 758; RUFFNER, Grundlagen, p. 219; BOHRER, § 4, N 139.
keep the company in family hands for generations to come.\textsuperscript{160} They put particular emphasis on maintaining flexibility and liquidity as well as long-term sustainability and financial independence.\textsuperscript{161} The shareholders’ risk aversion has an impact on the corporate strategy pursued, and affects the target capital structure, the appetite for leverage, and the planned dividend policy. Higher risk aversion limits the willingness to invest in risky projects and to pursue expansion strategies.\textsuperscript{162} Conversely, private equity investors may have higher return targets and, hence, be willing to accept higher risks. Besides, they typically manage a portfolio of diverse holdings in companies across industries enabling them to reduce firm-specific risks across their portfolio.\textsuperscript{163} Private equity investors may prefer higher leverage, for example, via incurring additional interest-bearing debt, initiating share repurchase programs, reducing the share capital, or paying a special dividend in order to more efficiently put invested equity capital to work, minimize the tax burden, and discipline management. While such measures can increase the potential return on equity, they also increase volatility and risk and may thus be opposed by family shareholders.\textsuperscript{164}

\textit{Different investment horizons.} Even if both the controlling shareholder and the minority investor have aligned goals to maximize firm value, their views on the time horizon for such value maximization to materialize can fundamentally differ. Family firms and many closely held companies typically have a medium to long-term investment horizon.\textsuperscript{165} Family-firm-specific values frequently include the commitment to maintain and build the business for future generations.\textsuperscript{166} Private equity investors are also considered long-term investors motivated by the capital return to be realized over several years – typically between three to seven years\textsuperscript{167} rather than by short-term profitability. However, while private equity investors may view their investment horizon as comparatively long, the family firm sees their profit horizon in terms of decades or even generations. The respective investment horizons again have an impact on both corporate strategy and financing targets. Private equity investors tend to approve of fundamental transactions, investments, and restructurings if such transactions promise a more efficient use of corporate resources to pay

\textsuperscript{160} See MÄNTYSAARI, \textit{The Law of Corporate Finance}, p. 289; ACHLEITNER/SCHRAML/KLÖCKNER, p. 17 \textit{et seq}; BRAUN, p. 53.
\textsuperscript{161} See ACHLEITNER/SCHRAML/KLÖCKNER, p. 17 \textit{et seq}.
\textsuperscript{162} See, for further references, LE BRETON-MILLER/MILLER, p. 1172 \textit{et seq}.
\textsuperscript{163} See RUFFNER, \textit{Grundlagen}, p. 219.
\textsuperscript{164} See RUFFNER, \textit{Aktive Grossaktionäre}, p. 252; TRICKER, p. 109.
\textsuperscript{165} See CONTINUUM et al., p. 8.
\textsuperscript{166} See FN 160.
\textsuperscript{167} See FN 53.
off during the investment period or reflected in the sales price of their stake when they eventually sell it.

**Information asymmetries.** Divergences of opinion can also arise from different access to information. Family shareholders may be able to leverage their strong social ties with family managers to obtain information.  

168 In effect, controlling shareholders of closely held companies can be assumed to have practically unlimited access to information.  

169 As a result, they have no incentive to demand a high level of official disclosure of corporate information. Conversely, PEMIs rely much more on formal information channels, for instance in the form of written business reports.

**Different levels of expertise, experiences, and professionalism.** Different views as to which course of action is best for maximizing firm value can also result from different levels of expertise, experiences, and professionalism among the respective groups of shareholders.  

170 In owner-managed family firms, top executives’ positions may not always be based on their skills, talents, and abilities, but on other factors such as birth order, gender, the personal sentiments of the firm’s founder or current chief executive officer (CEO), family tradition, and politics.  

171 This may not serve the firm well and the compromise of meritocracy can result in poorly run businesses and difficulties in attracting outside talent.

**Incongruent values and convictions.** Incongruent values and convictions are another source of conflicts. Aside from firm value maximization, decision making in family firms can be driven by factors such as particular needs of family members and other personal and family-related factors  

173 that are often irrelevant to the private equity investor and contrary to the best interests of the firm’s bottom line. While family shareholders may want to maintain certain traditions and long-established business practices, the minority investor may find them hopelessly outdated and counterproductive, even detrimental to the business.  

174 For example, a minority investor may suggest shutting down an unprofitable factory based on economic grounds, while the controlling family shareholder may oppose

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168 See FN 156.
169 See MÜNCH, p. 17.
170 See HESS, p. 82; BOHRER, § 4, N 139; see also RUFFNER, Aktive Grossaktionäre, p. 256.
171 See, for further references, LE BRETON-MILLER/MILLER, p. 1172; VON MOOS, p. 42 et seq.; BRAUN, p. 50.
172 See LE BRETON-MILLER/MILLER, p. 1173 (stating that “[a] shortage of managerial talent or de-motivation of middle managers caused by ‘glass ceilings’ may drain initiative and thereby require more authoritarian or bureaucratic management”); also see MÄNTYSAARI, The Law of corporate Finance, p. 289.
173 See HESS, p. 83.
174 See KRNETA, CO 717, N 238; cf. also LE BRETON-MILLER/MILLER, p. 1174.
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in order to maintain the company’s (family’s) reputation and connections in the area. Likewise, the disposal of non-core assets that a private equity investor may propose could prompt the family to balk, claiming they would be “selling the family silver.” Of course, considerations concerning the tradition as a family firm, and local reputation are also important for private equity investors. Yet, the owner family and the private equity investor may differ on how much weight these aspects carry in making decisions.

Non-alignment of financial interests. A significant potential for conflict arises in situations in which the private equity investor’s and family shareholders’ financial interests are misaligned and in which the family shareholders have different financial incentives than the PEMI, for example, concerning tax-efficient wealth accumulation or private benefits. The causes and consequences of private benefits of control are discussed in detail in Section II.B.1.2.1.3.

Whatever a potential source of conflict between family shareholders and PEMIs, it is advisable to address these issues prior to entering a partnership. By explicitly and jointly determining corporate strategies, financial targets, investment horizons, company values, and addressing other topics that could give rise to conflict, business partners enhance their credibility, confidence, and mutual trust while reducing potential for conflict down the road.

4 Closely Held Companies

4.1 Term and Characteristics

Family firms are a typical example of closely held companies. While there is no commonly accepted definition of closely held companies, whether formed as a stock corporation or a GmbH, they are typically described as possessing the following characteristics: (i) a relatively small circle of owners who are generally personally acquainted with each other and often linked by family or other personal or business relationships; (ii)

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175 See ARZT-MERGEMEIER, p. 55.
176 TRICKER, p. 109.
177 See SPILLMANN, p. 257 (“Immer dann also, wenn die Aktivität institutioneller Investoren nicht zur Produktion eines kollektiven Gutes, bspw. die Verbesserung der Überwachung des Managements, führt, sondern eine Vermögensverschiebung zwischen verschiedenen Aktionärsgruppen resultiert, treten die hier angesprochenen Interessenkollisionen auf.”); LE BRETON-MILLER/MILLER, p. 1173.
178 See O’NEAL/THOMPSON, § 1.2.
179 See, for further references, O’NEAL/THOMPSON, § 1.2; MOLL, Fair value, p. 300.
frequently dominated by majority shareholders (very often families, foundations, the state, and private equity investors) who are actively involved in corporate decision making, and (iii) limited fungibility of the shares.  

Although closely held companies are usually SMEs, the size of a firm’s assets, the amount of turnover, the scope of operations, and the number of employees are not suitable indicators of a particular company characterized as closely held.  In fact, closely held companies can have enormous assets, multi-billion Euros worth of sales, and worldwide operations. Yet, as a result of the specific features, oftentimes “a more intimate and intense relationship exists between capital and labor” as is the case in public corporations. It follows that the identities of the individual shareholders (their personal characteristics, idiosyncrasies, and skills) make a difference in closely held firms and explain the owners’ strong desire to control the shareholder base.

4.2 Oppression Problem

4.2.1 Term

The principal characteristics of closely held companies give rise to the oppression problem – the ability of controlling shareholders to oppress minority shareholders. In determining whether the majority shareholder’s

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180 A well-known definition of the closely held company was formulated by the Supreme Judicial Court of Massachusetts in Donahue v. Rodd Electrotype Co., Inc., 328 N.E.2d 505, p. 511 (Mass. 1975) stating: “We deem a closely held company to be typified by: (1) a small number of stockholders; (2) no ready market for corporate stock; and (3) substantial majority stockholder participation in the management, direction and operation of the corporation.” Also see O’NEAL/THOMPSON, § 1.2 (mentioning the following possible definitions of a close corporation: “a corporation which has relatively few shareholders;” “a corporation whose shares are not generally traded in the securities markets;” “a corporation in which the participants consider themselves partners in interest and have tried by shareholders’ agreements or otherwise to obtain for the enterprise one or more partnership advantages or attributes;” a corporation in which “management and ownership are substantially identical;” and “any corporation which elects to place itself in that grouping”); McCAHERY/VERMEULEN, p. 24; GRONER, p. 47; BURKHALTER, Einheitsaktien, p. 35, FN 154; HAYMANN, p. 18 et seq.; MEIER-HAYOZ/SCHLUPE/OTT, p. 308; MEIER-HAYOZ, p. 384 et seq. The terms closely held firm and close corporation are considered to be synonymous in this dissertation.

181 See O’NEAL/THOMPSON, § 1.3.

182 THOMPSON, Oppression, p. 702.

183 With regard to private equity investors, see FN 145.

184 See O’NEAL/THOMPSON, § 1.9 (“shareholders in a close corporations commonly are greatly concerned about the identity of their associates and have a strong desire to gain and hold the power to choose future shareholders”); McCAHERY/VERMEULEN, p. 24; FORSTMOSER, Schnittstelle, p. 378; HAYMANN, p. 19.

185 See UITSET, p. 1339.
conduct can be deemed as oppressive, many U.S. courts have relied on the definition of oppression as “burdensome, harsh and wrongful conduct … a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.”\textsuperscript{186} Most commonly used is, however, the so-called \textit{reasonable expectations} standard whereby oppression is understood as the “frustration of the reasonable expectations of the shareholders.”\textsuperscript{187}

4.2.2 Seeds of Oppression

There are two principal reasons for majority shareholder power over minority shareholders that can give rise to oppression: the lack of voice and the lack of exit options.\textsuperscript{188} In addition, peripheral forces, as subsequently discussed, can either cause or enhance these two principal seeds of oppression.

\textit{Lack of complete contracts}. Prior to the investment, PEMIs regularly insist on amending the articles of association and negotiating shareholders’ agreements with the controlling shareholders, thereby using their ex ante bargaining power to protect their reasonable expectations ex post. However, due to the long-term and complex nature of the relationships among the shareholders and with the company, it is neither possible nor reasonable to stipulate precise rules ex ante for every conceivable future event and potential risk that may materialize, that is, it is impossible to effectively write complete contracts covering every possible conflict or issue of contention.\textsuperscript{189} The transaction costs associated with identifying all possible future states of the world and the bargaining over the parties’ respective rights and obligations in each and every possible situation would be excessive.\textsuperscript{190} \textsc{Trianitis} holds that “contractual incompleteness is efficient to the extent that the bargaining costs are too high to provide for that contingency, the contingency has a low probability of occurring, the cost of verifying its occurrence is high and the cost of settling disputes is low in the event the contract does not provide for the contingency.”\textsuperscript{191} Shareholders’

\textsuperscript{188} In detail, see MEANS, p. 1217 \textit{et seqq}.
\textsuperscript{189} See RUFFNER, \textit{Grundlagen}, 133, 162; AGHION/BOLTON, p. 287 (“If it was costless for contracting parties to write a \textit{complete} contract specifying precise provisions for every conceivable future event then the problem of control … would never arise.”). In detail on incomplete contracts, see HART, \textit{Incomplete contracts}.
\textsuperscript{190} UTSET, p. 1381; RUFFNER, \textit{Grundlagen}, p. 163.
\textsuperscript{191} TRIANTIS, p. 103; referring to SHAVELL, p. 121 \textit{et seqq}.
agreements are characterized as long-term, *relational contracts*.\(^{192}\) GOETZ and SCOTT consider a contract relational “to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations” as the obligations cannot be defined ex ante “because of inability to identify uncertain future conditions or because of inability to characterize complex adaptations adequately even when the contingencies themselves can be identified in advance.”\(^{193}\) DEAKIN and MICHIE employ the concept of *relational contracting* to characterize situations in which the relationship among the contracting parties is based on their ongoing relationship and dependence on each other rather than on formal contractual agreements.\(^{194}\) According to HVIID, the key features of relational contracts are incompleteness and longevity.\(^{195}\) In the same vein, RUFFNER states that in relational contracts the allocation of risk, in contrast to discrete single-interaction contracts, can take place only rudimentarily due to the nature of corporate activities in dynamic and insecure surroundings.\(^{196}\) Thus, the articles of association and shareholders’ agreements regularly contain provisions on how to modify the agreed-upon arrangements, to adapt the distribution of risks to changing circumstances, and on how to decide on questions not yet raised.\(^{197}\) Nevertheless, a certain extent of freedom in decision making will always remain unregulated ex ante for the majority shareholders to use to oppress minority investors ex post; consequently, minority investors are vulnerable to a degree of exploitation.

**Majority rule and resulting lack of voice.** Since relational contracts cannot provide for every contingency that may arise during the course of the investment, a decision-making process must be determined to establish how problems shall be addressed and how decisions shall be made in the case of unforeseen, unspecified circumstances.\(^{198}\) In both stock corporations and GmbHs, decisions are, as a rule, made by the majority shareholders. While the majority principle, in the realm of legislative law, is based on people and reflects the idea that the majority vote guarantees a proper and fair decision as it balances conflicting interests, in contrast, in corporate law, the majority principle serves to promote the company’s functionality. Here, the majority is based on equity participation and not on the people affected by the decision.\(^{199}\) A shareholder controlling the majority of the votes has

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\(^{193}\) GOETZ/SCOTT, p. 1091.

\(^{194}\) DEAKIN/MICHIE, p. 51.

\(^{195}\) HVIID, p. 46.

\(^{196}\) RUFFNER, *Grundlagen*, p. 163.

\(^{197}\) See RUFFNER, *Grundlagen*, p. 164.

\(^{198}\) See AGHION/BOLTON, p. 287 et seq.

\(^{199}\) See HÜNERWADEL, p. 31.
control over (at least ordinary\textsuperscript{200}) decisions taken at the \textit{general meeting}, the assembly of the shareholders of a stock corporation or the \textit{meeting of members} in a GmbH, with a binding effect for all other shareholders (or members). The minority investor, on the other hand, is unable to veto these ordinary decisions even if holding a sizeable investment.\textsuperscript{201} Moreover, since the board of directors is elected by the general meeting following the majority principle and since Swiss corporate law does not ensure minority shareholder representation on boards of directors, the minority investor de facto does not have the power to appoint any directors, even if de jure entitled to participate in the respective elections. As the directors are oftentimes influenced by the wishes of the shareholders who elected them\textsuperscript{202} they can be expected to promote the controlling shareholder’s interests within their legitimate discretionary powers. Even if a minority investor has representatives on the board of directors, the investor has little power to block decisions supported by the majority of the board members who represent the controlling shareholder’s interests. It follows that the controlling shareholder most likely controls the general meeting of shareholders, along with the board of directors, and – through there – the executive management. Conversely, the minority investor is virtually excluded from corporate decision making enabling the controlling shareholder to make business decisions favorable to his/her own interests and ignore the PEMI’s interests and concerns.\textsuperscript{203}

\textit{Limited fungibility of shares and resulting lack of exit options.} Even with the lack of voice, the oppression problem would be far less acute if minority investors could easily exit their investment by selling the shares at a fair price (so-called taking the \textit{Wall Street walk}\textsuperscript{204}), thereby escaping any abuses of power.\textsuperscript{205} The market mechanism restrains controlling shareholders (and the company organs nominated by them) from taking actions that harm the

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\item[200] Decisions other than those listed in CO 704 I.
\item[201] However, depending on the size of the minority stake and the type of decision, minority shareholders may have a blocking minority with respect to certain important decisions (CO 704).
\item[202] See O’NEAL/THOMPSON, § 3.43.
\item[203] See UTSET, p. 1339, 1341; cf. also MEANS, p. 1208.
\item[204] See MEANS, p. 1208, FN 3; BOHRER, § 8, N 330; KUNZ, \textit{Minderheitenschutz}, §4, N 64; HIRSCHMAN, p. 46.
\item[205] See MOLL, \textit{Minority oppression}, p. 891; UTSET, p. 1339; ROCK/WACHTER, p. 916 \textit{et seq.} (“difficulty of exit … lies at the heart of the evolution of minority shareholders’ remedies for ‘oppression.’”). However, cf. MEANS, p. 1217, FN 39 (“[i]t should be noted, however, that the ability to exit from a public corporation through sale of stock does not offer perfect protection for shareholders, who may be forced to take losses in order to sell.”); STOUT, p. 795 (“Although a single shareholder may be able to sell a small number of shares easily, when exploited shareholders try to sell en masse, the result is a predictable loss of value.”).
\end{enumerate}
\end{footnotesize}
minority shareholders’ interests.\textsuperscript{206} However, closely held companies have a number of obstacles to exit. Firstly, by definition, there is no organized market for the trade of the shares of closely held companies that are not traded on stock exchanges or actively traded by brokers.\textsuperscript{207} Identifying potential buyers for stakes in closely held firms requires more time and greater expenses than for publicly traded stocks.\textsuperscript{208} Even if potential buyers are found, the negotiations on the purchase price are often grueling due to the lack of a market price and other objective valuation mechanisms, and because of the information gap on firm characteristics the buyer must fill.\textsuperscript{209} Secondly, many closely held companies impose legal restrictions on the transferability of corporate stock either in the articles of association or via shareholders’ agreements with the aim of deliberately keeping the shareholder base close.\textsuperscript{210} These legal restrictions limit shareholders’ ability to sell their shares to third parties, for example, in that the other shareholders have the right of first refusal or a respective approval right to the assignment of company shares. Thirdly, the relationships among the shareholders, who consider themselves partners inter se\textsuperscript{211} (i.e., due to family ties or their perceived duty not to disappoint their partners), may also bar the way to exit. With limited options to exit an investment, a PEMI is essentially locked in the investment the moment the investment contract is signed.\textsuperscript{212} Thus, the minority investor’s capital can, in effect, be “held hostage by those in control,”\textsuperscript{213} freezing the investor out from the benefits of ownership and participation. Being highly dissatisfied with the situation, the PEMI may finally agree to sell its shares to the controlling shareholder at an unreasonably low price.\textsuperscript{214}

\textit{Lack of market surveillance.} The fact that closely held company stock is not traded on stock exchanges not only prevents minority investors from easily exiting their investments, but also results in fewer oversight mechanisms aimed to prevent opportunistic behavior and uncover fraud as existing in publicly traded firms, conducted, inter alia, by stock exchange institutions,

\textsuperscript{206} \textit{See} MOLL, \textit{Minority oppression}, p. 896.
\textsuperscript{207} \textit{See} O’NEAL/THOMPSON, § 1.9; McCahery/VERMEULEN, p. 45; GRONER, p. 49 \textit{et seq.}; EASTERBROOK/FISCHEL, p. 230; MEANS, p. 1217; with further references, MOLL, \textit{Minority oppression}, p. 891 \textit{et seq.; cf. also} BRÖCK, p. 70.
\textsuperscript{208} \textit{See} UTSET, p. 1341.
\textsuperscript{209} \textit{Ibid.}
\textsuperscript{210} \textit{See} FN 184.
\textsuperscript{211} \textit{See} HAYMANN, p. 19; MÄNTYSAAARI, \textit{The Law of Corporate Finance}, p. 304.
\textsuperscript{212} \textit{See}, for further references, MOLL, \textit{Minority oppression}, p. 896.
\textsuperscript{213} MOLL, \textit{Minority oppression}, p. 897.
\textsuperscript{214} \textit{See} McCahery/VERMEULEN, p. 145; MOLL, \textit{Minority oppression}, p. 891; SIEGEL, p. 380, FN 8.
rating agencies, and research analysts. Moreover, the threat of takeover serves to constrain abuse by managers of public corporations. Minority investors in non-listed companies, however, are largely on their own when it comes to monitoring the controlling shareholders’ and managers’ behaviors and the validity of the information they share with the minority investors.

**Lack of diversification.** Being locked in a minority investment with no control and no viable exit route is particularly dire if the investment represents a significant percentage of the PEMI’s total available funds. Private equity investors hold significant stakes in a limited number of portfolio firms, thus exposing them to firm-specific risks. As a result, PEMIs are dependent on the controlling shareholders’ and managers’ actions and particularly vulnerable to their oppressive or dishonest conduct. The lack of diversification adds to the problems related to the lack of voice and exit.

**Lack of advance planning.** Even if prior to committing any capital, the PEMI has sufficient bargaining power to negotiate for certain control and exit rights, and even if the benefits of adopting specific provisions in the articles of association and shareholders’ agreements are significantly greater than the associated transaction costs, PEMIs may still fail or deliberately choose not to bargain for such protections, and instead prefer to deal with conflicts informally as they arise. There are a number of explanations for this decision, including PEMIs’ over-optimism, initial mutual trust and over-confidence in the relationship with the business partners, and/or excitement about the business opportunity (which UTSET coins *projection bias*).

Another reason may be lack of foresight, that is, the PEMI simply may be unable to visualize the countless potential problems and types of oppressive conduct of the controlling shareholder.

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215 See McCahery/Vermeulen, p. 145.
217 See McCahery/Vermeulen, p. 34.
218 UTSET, p. 1383.
219 With further references, UTSET, p. 1337 (“parties will tend to underappreciate, at the time of entering into the transaction, the need to adopt contracts aimed at curbing the ability of one or both parties to take harmful actions during the transaction”); MOLL, *Minority oppression*, p. 912.
220 See MOLL, *Minority oppression*, p. 913 (“In light of the countless ways in which oppressive conduct can occur, it is quite difficult to foresee all (if not most) of the situations that may require contractual protection”); Blair/Stout, p. 1805 (seeing “ignorance, lack of imagination, or poor legal advice” as explanations for the failure to draft contracts in close corporations”). See also O’Neal, p. 881 (“As minority participants in a close corporation may not anticipate dissension or oppression, and indeed may be unaware of their
Even if minority investors are aware of the involved risks, they may feel that asking for special protection at the onset of a long-term relationship, indeed before it officially begins, would create an atmosphere of mistrust among the parties.\(^{221}\) Scholars also mention signaling concerns, that is, concerns that the minority investors’ reluctance to trust the other party signals their own untrustworthiness.\(^{222}\) In addition, PEMIs may choose not to bargain for initial contractual protections and instead prefer to rely on non-legal sanctions resulting from the firm’s loss of reputation and the inability to raise capital in the future.\(^{223}\) The failure or deliberate decision not to negotiate for protective rights, even where this is de facto possible, exacerbates the PEMI’s oppression problem.

**B Economic and Social Theories**

In the entrepreneurship literature, and in this study, a prominent theoretical approach to examining the relationship between controlling and minority shareholders is the *agency theory*. In addition, two other theoretical concepts, the *stewardship* and the *managerial hegemony theory*, also are employed in this study. The aim of this analysis is threefold: (i) to further develop our understanding of the core motivations, interests, and concerns of controlling shareholders and PEMIs who partner with each other; (ii) to identify potential mitigants, for which PEMIs can negotiate ex ante to protect their positions and ensure that the controlling shareholders endeavour to achieve their reasonable expectations ex post; and (iii) to explore why PEMIs and controlling shareholders would be willing to make concessions in the negotiations.

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221 With further references, MOLL, *Minority oppression*, p. 912 (“a minority shareholder may be hesitant to even raise the topic of dissension because of a fear that it will damage the trust between the shareholders”); HETHERINGTON/DOOLEY, p. 36 et seq. (“[T]he minority investor may be hesitant to raise too many reservations for fear of demonstrating too little confidence in the majority and thereby queering the deal.”); UTSET, p. 1348 (“because proposing and bargaining over these contracts can undermine the often fragile trust that exists at the beginning of ventures.”).

222 See McCahery/Vermeulen, p. 34.

223 See MAHONEY, p. 177.
Part One: Introduction and Theoretical Foundations

1 Agency Theory

1.1 Basic Concept

1.1.1 Overview

The agency theory, an economic theory developed in the U.S. and derived from the works of BERLE and MEANS, is based upon the notion of separation of ownership and control in modern corporations. 224 JENSEN and MECKLING define an agency relationship as a contract between a principal and an agent in which the former engages the latter to perform certain services. 225 As a result, the welfare of the principal depends upon the agent’s actions. 226 Ultimate risk bearing and decision making are separated, with the principal taking the risks and the agent making the decisions.

1.1.2 Underlying Assumptions and Key Messages

The agency theory is based on a model of man that assumes each of the contracting parties have their own interests that they pursue in a rational, opportunistic, and self-interested manner so as to maximize their individual personal economic utilities (homo oeconomicus). 227 As the parties’ interests are not necessarily congruent, conflicts of interest arise. Since the agent’s behavior affects the principal’s welfare, the agent’s self-interested behavior can work to the principal’s disadvantage or expense, thereby triggering agency problems. The agent is able to behave self-interestedly by capitalizing on the information asymmetries between the parties that arise from the separation of ownership and control. 228 These information asymmetries allow agents to misrepresent their abilities before signing contracts with principals (hidden characteristics), and thus may cause the principals to hire unqualified individuals (called the problem of adverse selection). 229 Once the relationship is established, information asymmetries allow agents to engage in certain hidden actions that benefit their own interests, but harm those of the principals. 230 Such behavior gives rise to the problem of moral hazard, which refers to the risks principals assume that

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224 BERLE/MEANS, The Modern Corporation and Private Property; see also FAMA/JENSEN, Separation of Ownership and Control.
225 JENSEN/MECKLING, p. 308.
226 See AMOUR/HANSMANN/KRAAKMAN, Agency problems, p. 35; PRATT/ZECKHAUSER, p. 2.
227 See JENSEN/MECKLING, p. 308; DAVIS/SCHOORMAN/DONALDSON, p. 22.
228 See DEAKIN/MICHIE, p. 6; STIGLITZ, p. 469.
229 See EISENhardt, p. 61; ARTHURS/BUSENITZ, p. 147; LUBATKIN et al., p. 315.
230 See FRICK, § 3, N 232.
agents may use information asymmetries to shirk or misappropriate corporate resources for their benefit and to the principal’s detriment. To reduce these agency problems, the principal can engage in monitoring activities to reduce the information deficit and uncover the agent’s hidden characteristics and/or self-interested actions. Secondly, the principal can implement incentive structures that can motivate the agent to act in line with the principal’s interests. Thereby, the preferences of both parties are aligned and the potential for conflicts of interest reduced. Thirdly, the parties may agree upon bonding mechanisms where the agent guarantees not to take actions to the detriment of the principal and/or agrees to pay for the costs if he/she takes such actions. In any case, principal-agent relationships create agency costs consisting of monitoring costs, costs related to incentivization and bonding, as well as residual losses resulting from characteristics not uncovered and actions not prevented.

1.1.3 Application of Theory

The agency theory is used to analyze a wide variety of agency relationships, such as between the parties of employment, agency, franchise, or credit agreements. A classic field of application is the large modern corporation where the agency theory is used, inter alia, to analyze the relationship between shareholders and managers. In this context, potential conflicts of interest between the parties arise if managers engage in actions not aimed to maximize shareholder returns, for instance, by paying themselves excessive salaries, which reduce the firm’s profit (type I agency problems).

1.2 Application of Theory to Closely Held Companies

1.2.1 Agency Problems

Agency problems in closely held companies differ from those in large corporations with diffuse ownership structures. Firstly, while shareholders

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231 For details on the term shirking, see Section II.B.1.2.1.1 and FN 256.
232 See EISENHARDT, p. 61; LUBATKIN et al., p. 315; PICOT/DIETL/FRANCK, p. 75.
233 See EISENHARDT, p. 61.
234 See EISENHARDT, p. 61; AMOUR/HANSMANN/KRAAKMAN, Agency problems, p. 35; also see SHLEIFER/VISHNY, p. 744.
235 See JENSEN/MECKLING, p. 308; KLOCKNER, p. 34; TREZZINI, p. 59.
236 See JENSEN/MECKLING, p. 308; KLOCKNER, p. 35; GRONER, p. 55; TREZZINI, p. 59; BADER, p. 24. For a comprehensive overview of the empirical evidence on agency costs, see SHLEIFER/VISHNY, p. 746 et seqq.
237 See BERLE/MEANS; JENSEN/MECKLING, particularly p. 309; SHLEIFER/VISHNY, p. 740.
238 See FN 242.
with relatively small stakes in large companies are subject to collective action problems leaving management to make decisions largely independently, major shareholders’ oversight of management in closely held companies is typically much closer as shareholders – due to the increased incentives, knowledge, and power that follow from the concentration of ownership in the hands of fewer shareholders – are more involved in decision making. Secondly, major shareholders of closely held companies oftentimes hold executive management positions in the firm. As the interests of management and shareholders are more aligned and actions are more transparent, owner-manager agency problems are much less prevalent in closely held firms. However, different types of agency problems may arise from the conflicts between controlling shareholders and minority investors in closely held companies. Such minority-majority owner conflicts (type II agency problems) are particularly prone to arise if the controlling and minority shareholders have different agendas, as may be the case with a PEMI investing alongside family shareholders, and if the shareholders’ cash-flow rights (e.g., dividends) are low compared to the private benefits which the controlling shareholder receives by diverting corporate assets for his/her own benefit. Once more, it is the separation of ownership and control that lies at the heart of these agency problems. In case of minority-majority owner conflicts, the separation of ownership and control is due to the fact that PEMIs cannot elect representatives to the board of directors under a straight voting system and therefore, in the absence of privately negotiated arrangements, have no voice in the appointment of the firm’s executive management. Control is largely

239 Collective action problems (also called free rider problems, see SHLEIFER/VISHNY, p. 754) arise if shareholders with only small stakes in a company do not have sufficient expertise, resources, and incentives to acquire the information necessary for the informed exercise of voting rights and to engage in activities to monitor and control managers. In such situations, the costs of obtaining relevant information exceed the expected benefits and therefore cause the shareholders to behave ‘rationally apathetic’. See EASTERBROOK/FISCHEL, p. 66 et seq.; BAUMS, p. 111; BOHRER, § 8, N 328 et seq.; RUFFNER, Aktive Grossaktionäre, p. 263 et seq.; RUFFNER, Grundlagen, p. 175.

240 See FORSTMOSER, KMU, p. 484; SHLEIFER/VISHNY, p. 754; KIM/KITSABUNNARAT-CHATJUTHAMARD/NOF Singer, p. 862. Particularly, in the context of family firms, see LE BRETON-MILLER/MILLER, p. 1186.

241 See SHLEIFER/VISHNY, p. 754, 758; KIM/KITSABUNNARAT-CHATJUTHAMARD/NOF SINGER, p. 863; GILSON/GORDON, p. 1651; BÜHLER, Regulierung, § 5, N 399; GRONER, p. 51.

242 See VILLALONGA/AMIT, Firm value, p. 387 (defining the conflict between controlling shareholders and minority shareholders as “Agency problem II”); ROE, p. 2 (labeling these types of problems vertical and horizontal governance problems, respectively); equally NAGAR/PETRONI/WOLFENZON, p. 2.

243 See MCCAHERY/VERMEULEN, p. 7.

244 See ibid, p. 225.

245 See FN 1369.

246 See Section IV.E.1.2.
vested to the majority shareholder, who controls decision making either directly by holding executive management positions or indirectly by appointing the board of directors and, through them, the executive management. The minority investor’s welfare in this context depends on the controlling shareholder’s (the agent’s) behavior. Again, it is assumed that the parties behave in a rational, opportunistic, and self-interested manner favoring their own interests and seeking to maximize their individual utilities. Since the shareholders’ interests are not necessarily aligned, conflicts of interest arise if the controlling shareholder uses his/her position of control and information asymmetry to entrench the minority investor and appropriate corporate resources for his/her personal benefit, and to the PEMI’s detriment. As a result, closely held companies with a controlling shareholder are characterized by a three-way conflict among controlling shareholders, minority investors, and executive managers (see Figure 12).  

**Figure 12:** Types of agency problems  

This study focuses on agency conflicts between controlling owner families and PEMIs, or *type II agency problems*. The conflicting views, interests, and incentives between the parties result in agency problems for the minority investor due to *information asymmetries* between the PEMI and the controlling shareholder (and the corporate organs nominated by

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247 See McCahery/Vermeulen, p. 7.
248 See ibid, p. 8.
him/her, and *hold-up problems*\(^{249}\) that enable the controlling shareholder to consume *private benefits of control* at the PEMI’s detriment.

### 1.2.1.1 Information Asymmetries

Information asymmetries between the controlling shareholder and the PEMI, with the former having more access to corporate information, can result from the controlling shareholder’s direct involvement in the executive management, long-standing relationship with top management who distribute information selectively\(^{250}\) (relational information channels), and/or deliberately concealing information from the PEMI during the course of the fiscal year.\(^{251}\) The controlling shareholder is therefore likely to be fully informed on business matters and have a better view on the firm’s prospects than the PEMI, who, due to the above reasons, and separation of ownership and control, lacks pertinent knowledge and insights.\(^{252}\)

Information asymmetries result in *adverse selection problems* if the controlling shareholder misleads the PEMI on the firm’s value or other pertinent facts, prior to investment, thereby inducing the minority investor to invest at all, or at an inflated price.\(^{253}\) Once the minority investor has invested, information asymmetries can conceal certain actions of the majority shareholder (and the company organs effectively nominated by him/her) that promote his/her own interests, at the PEMI’s expense.\(^{254}\) For example, the controlling shareholder, in exercising a managerial function, may quietly *extract private benefits of control*\(^{255}\) or *shirk responsibilities* (e.g., by working at a ‘slacker’s pace’ or avoiding making necessary, but difficult decisions, failing to drive innovation, casting aside a challenging project, or not supervising out-of-control management).\(^{256}\) In short, information asymmetries make monitoring and assessment of management

\(^{249}\) On the term, see Section II.B.1.2.1.2.

\(^{250}\) On the problem of selective disclosure, see, with many further references to legal experts, BÜHLER, *Leitlinien*, p. 320, FN 26.


\(^{252}\) *See* MAROLDA MARTÍNEZ, p. 90; RUFFNER, *Grundlagen*, p. 81.

\(^{253}\) In the context of venture capital, *see* ARTHURS/BUSENITZ, p. 147. Such misrepresentation may be made consciously or unconsciously. The latter may be the case if the controlling shareholder, due to his ‘bounded rationality,’ presents information that is distorted by his/her personal attachment and resulting in overestimation of the firm’s value. Also in the context of venture capital, *see* McCABERY/VERMEULEN, p. 9 *et seq.*

\(^{254}\) *See* LIPS-RAUBER, p. 112; MÜNCH, p. 19.

\(^{255}\) *See* Section II.B.1.2.1.3.

\(^{256}\) *See* EISENBERG, p. 1471.
performance more difficult, and hence, the attractiveness of the investment diminishes for PEMIs, which can contribute to the illiquidity of minority stakes. This kind of agency problem provides one explanation, among others,\(^{257}\) as to why controlling shareholders may want to keep disclosure at a minimum.

1.2.1.2  

**Hold-up Problems**

Minority-majority owner conflicts also arise due to so-called hold-up problems referring to the principal’s inability to stop the principal’s undesired behavior.\(^{258}\) Hold-up problems arise if the controlling shareholder has the power to influence or control the firm’s executive organs to act in line with his/her views, risk preferences, and personal interests, rather than those of the minority investor. This type of agency problem arises not because the minority investor is unaware of the agent’s actions, but because of a lack of power to prompt the agent to act differently; the PEMI must therefore acquiesce to such actions due to the limited liquidity of its stake.\(^{259}\) Hold-up problems in closely held companies can explain the controlling shareholder’s reluctance to grant PEMIs enhanced voice in corporate decision making. Quite the opposite, the controlling shareholder may want to limit the PEMI’s influence, and can do so in various ways including diluting its voting power through additional share issues,\(^{260}\) by removing PEMI’s representative(s) from executive positions (e.g., the board of directors), by increasing the size of the board and filling vacancies with preferred candidates to reduce the PEMI’s influence, and/or by amending the articles of association and the organizational regulations rendering them unfavorable to the minority investor (e.g., abolish cumulative voting).\(^{261}\)

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\(^{257}\) On legitimate reservations, see Section V.D.3.

\(^{258}\) See Ruffner, Grundlagen, p. 636; Trezzini, p. 56; Picot/Dietl/Frank, p. 75.

\(^{259}\) On the lack of voice and exit, see Section II.A.4.2.2.

\(^{260}\) See, in detail, Münch, p. 20 et seq. (noting that in case of capital increases, the PEMI has preemptive rights. However, a disadvantage can arise “wenn die Majorität die Minoritäten nur scheinbar gleichstellen will, in Wirklichkeit jedoch darauf ausgeht, dass diese auf die Geltendmachung des Bezugsrechts verzichten werden”); equally Haymann, p. 23. Also see McCahery/Vermeulen, p. 46; Perakis, p. 60 et seq. For the Swiss Federal Supreme Court’s decision concerning such a situation, see BGE 99 II 55 (E.2: “Die Zwangslage sodann, entweder unter Einzahlung neuen Kapitals vom Bezugsrecht Gebrauch zu machen oder die erwähnten Nachteile auf sich zu nehmen, ist zwar die unmittelbare Folge der angefochtenen Beschlüsse, aber von einer ungleichen Behandlung kann trotzdem nicht die Rede sein, denn die Beschlüsse stellen alle Aktionäre vor die gleiche Wahl.”).

\(^{261}\) See Perakis, p. 60 et seq.
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1.2.1.3 Private Benefits of Control

Information asymmetries and hold-up problems allow the controlling shareholder to assume and benefit from so-called private benefits of control\(^{262}\) – benefits enjoyed only by those in control of a company.\(^{263}\) These benefits can be pecuniary or non-pecuniary in nature. With regard to pecuniary private benefits, financial resources of the company are misappropriated for the benefit of the controlling shareholder.\(^{264}\) Since controlling shareholders benefit from the full amount of such diverted resources, but only bear part of the costs (and risks), such actions serve their financial interests while harming those of the minority investor.\(^{265}\) Tunneling refers to value transfers (e.g., assets, cash flows, or the company’s equity) out of the company to those in control,\(^{266}\) either directly, such as by increasing the controlling shareholder’s personal assets (via bonuses and other methods described below), or indirectly, such as by increasing the assets of third-party beneficiaries or of an independent company controlled by the majority shareholder.\(^{267}\) The methods of extracting pecuniary private benefits are myriad, and include the following examples.

→ Paying excessive (above-market) compensation to controlling shareholders holding management positions or serving on the board of directors in the form of salaries, bonuses, and other perks

\(^{262}\) Also called control rents. Private benefits of control by dominant shareholders are the focus of research by Shleifer/Wolfenzon, Bebchuk, and Grossman/Hart. For further references, see also Le Breton-Miller/Miller, p. 1170; Arzt-Mergemeier, p. 55 et seq.; Baums/Scott, p. 3; Kim/Kitsabunnarat-Chatjuthamard/Nofsinger, p. 862.

\(^{263}\) Cf. definitions of Gilson/Gordon, p. 786 (“benefits to the controlling shareholder not provided to the non-controlling shareholders”); Bebchuk/Kahan, p. 1090 (“includes any value captured by those controlling the company after the contest and not shared among shareholders at large”).

\(^{264}\) Diverse approaches and data have been used to measure the magnitude of private benefits (see, for further references, Nenova, p. 326). One approach is to use the size of the control premium, defined as the difference between the market value of shares conferring company control and those that do not as an approximation. See, e.g., Barclay/Holderness, p. 371 (finding that block trades “are typically priced at substantial premiums;” they argue that “the premiums, which average 20%, reflect private benefits that accrue exclusively to the blockholder because of his voting power”). For a similar study, see Dyck and Zingales. Other studies measure private benefits by comparing the prices of shares with different voting rights, but identical cash-flow rights (e.g., studies by Zingales, DeAngelo/DeAngelo, and Lease/McConnell/Mikkelson).

\(^{265}\) See Hart, Financial contracting, p. 5.

\(^{266}\) See Johnson et al., p. 22.

\(^{267}\) See Munch, p. 19.
such as general retirement allowances, and stock option programs, rather than via dividends, which also flow to the PEMI;\textsuperscript{268}

\begin{itemize}
  \item Internal consumption of profits via \textit{high out-of pocket expenses};
  \item \textit{Self-dealing}, that is, transactions between the company and the controlling shareholder (or closely related parties) in terms that benefit the controlling shareholder at the company’s expense (versus the fair-market terms of arm’s-length transactions)\textsuperscript{269} such as: the controlling shareholder sells tangibles (e.g., supplies, land) and intangibles (e.g., patents, brands)\textsuperscript{270} to the company and performs services (e.g., accounting, consulting)\textsuperscript{271} at above-market prices either directly or indirectly, via a wholly-owned independent company;\textsuperscript{272} the controlling shareholder purchases assets and services from the company at below-market prices; and/or the controlling shareholder obtains leases, loans, and guarantees at favorable terms;\textsuperscript{273}
  \item \textit{Misappropriation of business opportunities} that belong to the company and instead are pursued by the majority shareholder or related parties (or other entities controlled by them);\textsuperscript{274}
  \item \textit{Trading in the company’s shares,}\textsuperscript{275} for example, the controlling shareholder sells shares to the company at higher-than-fair-market prices;\textsuperscript{276} or the controlling shareholder purchases newly issued shares at dilutive prices without the minority investor participating.\textsuperscript{277}
\end{itemize}

Private benefits of control can also be \textit{non-pecuniary}. These types of private benefits confer psychological utility to the beneficiary.\textsuperscript{278} Examples


\textsuperscript{269} See Enriquez/Hertig/Kanda, p. 154; McCahery/Vermeulen, p. 7; Ruffner, \textit{Grundlagen}, p. 219 et seq.

\textsuperscript{270} See Morck/Yeung/Wolfenzon, p. 23.

\textsuperscript{271} See Hühnerwaadel, p. 15.

\textsuperscript{272} See Gilson/Gordon, p. 790; Shleifer/Vishny, p. 742.

\textsuperscript{273} See Nagar/Petroni/Wolfenzon, p. 27; Münk, p. 20.

\textsuperscript{274} See Enriquez/Hertig/Kanda, p. 154; Nagar/Petroni/Wolfenzon, p. 27; McCahery/Vermeulen, p. 7, 25; Perakis, p. 60 et seq.; Ruffner, \textit{Grundlagen}, p. 219 et seq.

\textsuperscript{275} See Enriquez/Hertig/Kanda, p. 154.

\textsuperscript{276} See Nagar/Petroni/Wolfenzon, p. 27.

\textsuperscript{277} See Ehrhardt/Nowak, p. 7; see famous decision by the Swiss Federal Supreme Court, BGE 102 II 265.

\textsuperscript{278} See Gilson, p. 1664.
for non-pecuniary private benefits enjoyed by controlling shareholders include amenities, for example, the joy of owning a newspaper and influencing public opinion;\(^{279}\) and reputational benefits such as the social prestige derived from running a successful and reputable firm, upholding family tradition, and the ability to promote relatives and offspring.\(^{280}\) Even if non-pecuniary, they are nevertheless viewed critically in economic literature.\(^{281}\)

### 1.2.2 Mitigants

In light of the potential conflicts of interest in majority-minority shareholder relationships, information asymmetries, hold-up problems, and other causes of minority shareholder oppression in closely held companies, the question arises as to what strategies and tools PEMIs can use to align controlling shareholders’ interests with their own, minimize agency costs, and protect their wealth. Agency theorists describe a variety of mechanisms that can broadly be classified as market mechanisms and legal instruments. The latter are either set by statutory law or privately negotiated by the parties. Taking the market situation and statutory rights as a given, this dissertation’s main focus in obtaining additional protection of minority investors’ interests and in mitigating the risk of oppression is on the privately negotiated legal tools and arrangements that can be implemented at the corporate level and agreed upon via contract.\(^{282}\)

#### 1.2.2.1 Voice

Given that contracts are inherently incomplete,\(^{283}\) PEMIs need an alternative mechanism to prevent or end the controlling shareholders’ harmful (or potentially harmful) conduct. One way to do so is by opting out of the majority rule and obtaining veto power over certain important corporate decisions both at shareholder level and on the board of directors, particularly over transactions with inherent conflicts of interest.\(^{284}\) Voice in

\(^{279}\) See EHRHARDT/NOWAK, p. 6; DEMSETZ/LEHN, p. 1162.


\(^{281}\) E.g., EHRHARDT/NOWAK, p. 9 \(et\ seq.\) (“the existence of any private benefit not shared with the minority shareholders – whether pecuniary or non-pecuniary – gives the controlling owner an incentive to deviate from the maximization of total firm value … even amenities and reputation benefits will in most situations lead to the minority shareholders being worse off.”); see also GILSON, p. 1667 \(et\ seqq.\)

\(^{282}\) See UTSET, p. 1342 \(et\ seq.\) (referring to a “preventive contracting’ approach to shareholder oppression”).

\(^{283}\) See Section II.A.4.2.2.

\(^{284}\) See McCAHERY/VERMEULEN, p. 227.
corporate decision making is vital for PEMIs to have the controlling shareholder and management respect their interests and wishes with regard to decisions on matters unforeseen at the outset of the investment, and intervene if the company’s performance heads south.\textsuperscript{285} De facto voice is a fundamental mechanism to protect the minority investor’s interests, particularly in closely held companies with a relatively small number of shareholders, in which the minority investor has limited exit options.\textsuperscript{286}

\subsection{1.2.2.2 Exit}

If the PEMI discovers that agents (controlling shareholders or managers) are shirking their duties or enriching themselves at the expense of the other shareholders and the firm, and if the PEMI has no de facto power to stop such behavior, the PEMI’s last resort is to exit the investment. Exit is a mechanism frequently described by agency theorists for shareholders to escape hold-up problems by selling their shares.\textsuperscript{287} The effectiveness of the market mechanisms for providing an exit opportunity to PEMIs depends on the liquidity of the market in which the shares are sold. While the financial market may be an effective mechanism to restrict opportunistic behavior in public companies, it is less effective with respect to non-listed closely held companies given that there is no ready market for the shares.\textsuperscript{288} In addition to, or instead of, exit opportunities de facto provided by the financial market, the minority investor may have legal exit rights. The PEMI’s legal exit rights may enable him/her to control exit in terms of timing, price, and strategy. Yet, PEMIs as shareholders do not have any statutory exit rights, and to obtain privately negotiated (contractual) exit rights, PEMIs need considerable bargaining power. Moreover, appropriate exit rights and related terms can be difficult to determine in the pre-deal negotiations, when the minority investor’s bargaining power is greatest. Besides, as outlined in the introduction,\textsuperscript{289} an early exit triggered by an insuperable fallout with the controlling shareholder is only a protection measure of last resort.

\begin{footnotesize}
\begin{enumerate}
\item See SHLEIFER/VISHNY, p. 741; RUFFNER, Grundlagen, p. 637.
\item With respect to public corporations, see COFFEE, p. 1329 (“public shareholders in the modern corporation purchased liquidity at the cost of control”). In closely held companies where options to exit from the unsatisfactory situation are scarce, shareholders focus on voice.
\item See, e.g., SCHWAB/THOMAS, p. 1024 (“capital markets, the market for corporate control, and product markets” are important markets “to constrain corporate conduct that deviates too far from maximizing shareholder profits”). Also see FN 205.
\item On the causes for limited fungibility of shares, see Section II.A.4.2.2.
\item See Section I.B.
\end{enumerate}
\end{footnotesize}
1.2.2.3 Access to Information

Transparency is the primary instrument for PEMIs to address agency problems caused by information asymmetries. Prior to investing, PEMIs engage in extensive due diligence processes to prevent adverse selection. Once invested, minority investors require comprehensive access to information to thoroughly monitor the agents’ actions and bring hidden characteristics and opportunistic behavior of the controlling shareholder and the managers to the PEMI’s attention. Access to information is particularly necessary in situations and decisions that are prone to conflicts of interest, for example, in case of related-party transactions and concerning managerial compensation. Access to information is based partly on statutory shareholders’ and directors’ information rights and partly on privately agreed-upon disclosure rules. While transparency can mitigate information asymmetries, it does not remedy hold-up problems based on the PEMI’s lack of control or influence over the firm.

1.2.2.4 Ex Ante Set Rules

To mitigate opportunistic behavior, the principal and agent may agree ex ante on specific rules on how to act in certain defined situations, particularly situations predisposed to conflicts of interest. At the corporate level, for instance, procedural rules can be set up with regard to self-dealing transactions. Moreover, the parties can expressly agree on rules on how the shareholders’ funds invested shall be used, how profits shall be distributed, and how to vote on certain matters at the general meeting. If stipulated with legal and financial ramifications, ex ante set rules provide important incentives for controlling shareholders (and the corporate organs nominated by them) to refrain from behaving opportunistically ex post. Yet, the mitigation of agency problems via ex ante set rules requires that the opportunistic behavior can be anticipated ex ante and is observable ex post. Secondly, it is simply impossible to establish rules of conduct for every conceivable form of opportunistic behavior. Thirdly, privately negotiated rules require the controlling shareholder’s consent that will not come easily if such duties force him/her to forgo substantial private benefits. Finally, as RUFFNER points out, rules of conduct cannot fine tune the agent’s risk behavior nor control the timing of management actions. Even if rules of conduct can improve rational decision making, excessive procedural rules

290 On related-party transactions, see Section IV.E.4.3.2.
291 On self-dealing transactions, see Section IV.E.4.3.2.
292 See SHLEIFER/VISHNY, p. 741.
293 See ARTHURS/BUSENITZ, p. 150.
enhance leadership bureaucracy and can discourage entrepreneurial behavior.\(^{294}\)

### 1.2.2.5 Governance Structures

A further mechanism for mitigating agency problems is the implementation of appropriate institutional corporate governance structures that provide for control mechanisms (checks and balances) tailored to detect and discourage the agent’s opportunistic behavior. A myriad of possible corporate governance instruments are available to this end, including rules on a balanced composition, structure, and procedures of the board of directors; strict internal accounting standards; and independent auditors reviewing non-recurring transactions and payments for regular services provided by related parties. Another example of such corporate governance structures are conflict resolution procedures, that is mechanisms that regulate how the business partners deal with disagreements or conflicts,\(^{295}\) rules on the casting vote, the engagement of a third-party referee, alternative dispute resolution procedures, etc.\(^{296}\)

Suitable governance structures can promote efficiency, oversight, and accountability within firms, and are a precondition for exercising control and reducing information asymmetries. Conflict resolution mechanisms can prevent permanent deadlock that can impair the firm’s functionality. However, to be effective, governance mechanisms must contain sufficient incentives and sanctions, so that the players actually follow them, otherwise the mechanisms will become toothless. Moreover, conflict resolution mechanisms can only be complementing protection measures as they contain guidelines for dealing with conflicts, but do not prevent conflicts in the first place.

### 1.2.2.6 Incentives, Bonding, and Contingent Contracting

Incentive structures and bonding mechanisms\(^{297}\) may be employed to align the majority-minority shareholder interests and thereby give the controlling shareholder incentives to work toward the common objective of maximizing firm value. Via executive compensation schemes and profit sharing arrangements the financial benefits of the controlling shareholder with

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\(^{294}\) See RUFFNER, *Grundlagen*, p. 638.

\(^{295}\) See UTSET, p. 1343.

\(^{296}\) On mechanisms to solve conflicts of interest (deadlock-breaking devices), see Section IV.D.3.3.4.8.

\(^{297}\) See Section II.B.1.1.2.
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Executive functions are tied to shareholder returns. Contingent contracting – the contracting for financial benefits, voice, exit rights, and other rights based on the fulfillment of certain conditions stipulated via contract (e.g., missing certain financial targets, a missed alternative liquidity event) – also sets incentives for the controlling shareholder and corporate organs to meet agreed-upon investment targets and maximize firm value. Contingent contracting can relate to various rights and be based on a number of triggers. Performance-related contracting can confer financial benefits via ratchet structures whereby the controlling shareholder’s equity share increases upon reaching certain milestones or vice versa, decreases if performance targets are not met. Also conceivable is that the parties agree to determine the price of the minority stake only in the course of the investment depending on the firm’s performance. Moreover, a PEMI may negotiate for a non-financial contingent right to choose the chairman of the board of directors, to replace managers, to hire consultants, for information rights, for put and call options, and other performance-related exit rights. With a contingent option to purchase voting shares and/or a contingent right to nominate additional board members, the PEMI can obtain active voice and control certain critical decisions (called a control flip or voting switch). The triggers for such contingent rights can be quantitative (e.g., revenue, EBITDA, cash-flow metrics, dividend payments, financial covenants, industry-specific key performance indicators (KPIs), market share), or qualitative (e.g., product development stages, expansion targets, realization of certain projects, retention of key personnel, promotion of certain exit routes).

Via contingent contracting, the controlling shareholder’s desire to retain control, on the one hand, and the PEMI’s desire for downside protection in

298 See DONALDSON/DAVIS, p. 50.
299 Cf. ACHLEITNER/SCHRAML/TAPPEINER, Familienunternehmen, p. 47 (finding in research on private equity minority investments in German family firms, that performance-related rights are relatively rare. In only 5 of 21 minority investments surveyed, the private equity investor had some sort of special rights).
300 See RUPPEN, p. 155; BARTHOLD, p. 883.
301 See RUPPEN, p. 155.
302 See RUPPEN, p. 155 et seq.; PEARCE/BARNES, p. 45; ACHLEITNER/SCHRAML/TAPPEINER, Familienunternehmen, p. 47.
303 See CAMP, 166; FRICK, § 12, N 1385; GRONER, p. 294; VON SALIS-LÜTOLF, Finanzierungsverträge, § 12, N 1436. To exercise the option, the controlling shareholder can, for instance, be obligated to vote for the creation of voting right shares (excluding subscription rights) in the general meeting. Also, the PEMI may be granted a contingent option to purchase voting shares from the controlling shareholder.
304 Quantitative performance triggers have the advantage of lower verification costs as they are easier to define and measure.
305 See CAMP, 166.
306 See RUPPEN, p. 153; FRICK, § 12, N 1385.
the form of voice and exit options in case the company’s performance significantly deteriorates or deviates from the strategy and investment targets devised at the time of investment, on the other hand, are both fulfilled, so that in case of an unforeseeable deterioration in business performance the minority investor does not bear an unexpectedly large loss without being able to intervene by, for example, replacing management. However, a number of challenges must be overcome in order for this tool to work effectively. Firstly, the contracting parties must agree ex ante on appropriate determinants to discern future states of the world, define suitable triggers and respective thresholds, and the consequences in terms of rights and obligations if the thresholds are met. The agreement should also take into account the cause of underperformance. A different allocation of control may be warranted if underperformance is due to endogenous causes such as a natural disaster (tornado, flood, earthquake, etc.) rather than management mistakes. Hence, contingent rules on control require extensive guidelines, which at times may be too complex, too difficult to handle, or not worth the cost of negotiation. Moreover, it must be noted that contingent contracting only takes effect if a substantial performance drop has already materialized. Hence, this tool allows the PEMI to intervene only ex post, rather than act preventively. Finally, verification problems exist when underperformance occurs due to management mistakes that are difficult to verify. As a result, whether contingent contracting is a useful tool must be decided on a case-by-case basis. Generally, the higher the costs of negotiating a contingent control arrangement, the higher the costs of verifying whether the trigger thresholds are hit, the lower the probability of identifying a specific cause of underperformance, the smaller the negative financial consequences of the underperformance, and the greater the minority investor’s options for dealing with the underperformance by other means, the lower the benefits from negotiating a contingent control arrangement.

1.2.3 Aspects of Negotiation

In order for the PEMI to implement the mitigants discussed in the preceding section via privately negotiated means, the controlling shareholder’s consent is required. This agreement may be difficult to obtain if such measures will cause the controlling shareholder to forego substantial future private benefits of control. The question arises why the controlling shareholder would be willing to agree to such measures. The exact reasons

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308 See ibid, p. 100.
309 See ibid, p. 101, 110 et seq.
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as to why are myriad, but they melt down to reaching a situation in which the expected benefits from a PEMI investment (and its paying a higher price for the minority stake\textsuperscript{310}) resulting from the controlling shareholder’s self-imposed limitation, exceed the controlling shareholder’s benefits in case of retaining full control and continuing to extract private benefits of control. If the company is in urgent need of outside funding in order to seize corporate opportunities, the controlling shareholder may be willing to forego private benefits in order to convince private equity investors to invest, thereby counting on the potential incremental returns as a result of the PEMI’s investment.\textsuperscript{311} Reputation building is another explanation as to why controlling shareholders may voluntarily agree to measures that prevent him/her from consuming private benefits.\textsuperscript{312} With respect to potential conflicts of interest, the controlling shareholder may choose to abstain from extracting private benefits so as to raise funds at favorable terms in the future by inducing investors to perceive that the firm holds a relatively low risk of agency conflicts.\textsuperscript{313} The controlling shareholder therefore has an interest to create a win-win situation. Moreover, even though the PEMI holds only a minority position in the portfolio firm, the interest is still likely to be economically significant\textsuperscript{314} and being granted some degree of control can motivate the PEMI to contribute expertise, experiences, and resources, to engage in solid monitoring, and to support management to enhance firm value. The control achieved by the PEMI also benefits the controlling shareholder (in savings of time and costs) since decision making and supervision of the company’s management, at least in

\begin{footnotesize}
\textsuperscript{310} Cf., DODGE/KAROLYI/Stulz, p. 3 (“Better governance reduces a firm’s cost of funds only to the extent that investors expect the firm to be governed well after the funds have been raised. It is therefore important for the firm to find ways to commit itself credibly to higher quality governance”). An interesting study was undertaken by BOTOSAN and PLUMLEE who measure the relationship between expected cost of equity capital and company disclosure. They find that a firm’s cost of equity capital is decreasing in annual report disclosure level by approx. 0.5-1 percentage point, after controlling for market beta and firm size. Yet, they also find that the cost of equity capital and the level of more timely disclosures (e.g., quarterly reports) is positively related. Also see De HONAN/SANZ, p. 13 (showing that family shareholders of firms operating in legal environments that offer little minority shareholder protection need to find mechanism to embed minority shareholder protection in order to attract funding). See also, for further references, GRONER, p. 62; PERAKIS, p. 26; RUFFNER, Grundlagen, p. 576.

\textsuperscript{311} Formulated differently, these mechanisms help prevent underinvestment problems. See MODIGLIANI/ Perotti, p. 81 (showing that if PEMIs are poorly protected and private benefits extracted from the company, the firm’s possibility of raising equity capital is impaired causing an underinvestment problem).

\textsuperscript{312} Cf. SHELLEIBER/VISHNY, p. 749.

\textsuperscript{313} Cf. for further references, SHELLEIBER/VISHNY, p. 749 (acknowledging that reputation explains only part of the reason why firms can raise external funding).

\textsuperscript{314} Cf. FN 111.
\end{footnotesize}
part, are collective goods. In addition, if the controlling shareholder is a group of family shareholders, it is in the family’s best interest to prevent individual family shareholders from enjoying private benefits at the expense of other family shareholders. Clear rules mutually protect family shareholders against opportunistic behavior within the controlling shareholder group. They also ensure the necessary stability and help create positive relationships not only between the controlling shareholders and the PEMIs, but also among the members of the controlling owner family.

On the other hand, why would a PEMI fail to or deliberately not contract for protection against the controlling shareholder’s opportunistic behavior? Possible explanations are discussed in Section II.A.4.2.2, inter alia, the protection bias, information asymmetries, and strategic considerations. Moreover, the parties will want to avoid overregulation – numerous and redundant agreements that entail excessive transaction costs, create unnecessary complexity and paralyze the firm’s development.

1.3 Limitations

Even though the agency theory is a prominent and well-respected theory that capably explains the majority-minority shareholder relationship, two aspects are subject to particular criticism. Firstly, many legal scholars are questioning the validity of the model of man, namely that of the *homo oeconomicus*, upon which the agency theory is based, because, in reality, human nature is too complex to render humans as purely self-serving beings. Particularly in the context of family firms, authors such as KLEIN point to the limited explanatory power of the agency theory. While the *homo oeconomicus* has a short-term focus, family firm shareholders generally hold a long-term perspective to preserve transgenerational sustainability, and are driven by other than purely financial motivations, such as preserving family name, tradition, social status, and respect. Secondly, the agency theory assumes a minority-majority owner interest divergence and implies that the controlling shareholder has an interest in maintaining and/or even increasing the information asymmetries so that he/she can readily hide unfavorable data or information (that would dampen

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315 See Section II.A.3.2.4. In the context of institutional investors of publicly listed firms, FORSTMOSER, *Exit oder Voice*, p. 802.
316 See FN 21.
318 See, e.g., DOUCOULIAGOS, p. 877 et seqq.
319 With further references, KLEIN, *Corporate governance*, p. 2.
320 See KLEIN, *Corporate governance*, p. 2 et seq.
321 See ASTRACHAN/JASKIEWICZ, p. 142.
the price a PEMI would be willing to pay) and engage in hidden actions and thereby promote personal interests at the expense of the PEMI. However, equally conceivable is a situation in which the common interests of the parties outweigh their potentially deviating interests and in which the controlling shareholder attributes more value to a successful long-term cooperation and a trusting relationship with the PEMI than on short-term private benefits.\textsuperscript{322} Thirdly, the PEMI’s request for comprehensive access to information and enhanced voice in order to effectively participate in corporate decision making is not necessarily primarily motivated by the intention to monitor the controlling shareholder and the management appointed by him/her and to intervene where they are assumed to extracting personal benefits. The PEMI’s primary motivation for voice may very well be to build a foundation upon which to effectively contribute professional expertise, experience, ideas, and business contacts in order to maximize firm value. Consequently, examining the majority-minority shareholder relationship from the agency theory lens is insightful in that various explanations for the parties’ behaviors can be derived. However, exclusive reliance upon the agency theory may mask or overlook alternative explanations for the parties’ interests and behaviors.

2 Stewardship Theory

2.1 Basic Concept

2.1.1 Overview

The stewardship theory, an organizational theory rooted in sociology and psychology,\textsuperscript{323} is another theory that scholars use to describe the majority-minority shareholder relationship. It was first developed by DAVIS, SCHOORMAN, and DONALDSON who studied situations in which agents’ (stewards’) and the owners’ (principals’) interests are aligned and the stewards’ main focus is on maximizing corporate performance.\textsuperscript{324}

\textsuperscript{322} See, for further references, ARTHURS/BUSENITZ, p. 152.
\textsuperscript{323} See DAVIS/SCHOORMAN/DONALDSON, p. 24; ARTHURS/BUSENITZ, p. 154.
\textsuperscript{324} See DONALDSON/DAVIS, p. 51; FOX/HAMILTON, p. 69; DAVIS/SCHOORMAN/DONALDSON, p. 24.
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2.1.2 Underlying Assumptions and Key Messages

The stewardship theory examines relationships based on different, broader behavioral assumptions than the agency theory. It assumes that, with increasing satisfaction of the agents’ needs, extrinsic economic considerations become less important in driving behavioral patterns. The stewardship theory focuses on situations in which stewards are primarily motivated by intrinsic non-materialistic factors such as achievement, self-esteem, recognition, self-actualization, and sense of belonging. These rewards follow, for instance, from achieving a certain goal, successfully mastering a difficult task or handling a thorny problem, completing inherently challenging work, enhancing the firm’s performance or reputation, and/or from demonstrating responsibility and authority. Stewards derive greater utility from behaving cooperatively than from acting self-interestedly. From the principal’s perspective, stewards are, by nature, collectivist, pro-organizational, trustworthy, and sufficiently motivated to do a good job steering an organization. As in the agency theory, stewards are thought to behave rationally. However, they are assumed to be intrinsically motivated to act in line with the principal’s interests. As a result, the principal’s behavior changes accordingly. Since agents are assumed to be trustworthy and to be working toward the good of the group, interaction with them is primarily intended to provide support and advice, not to monitor and control their behavior. Corporate governance structures have a trust-building, empowering function, rather than an oversight, supervisory or controlling function.

2.1.3 Application of Theory

Scholars use the stewardship theory to analyze a wide variety of relationships. Like the agency theory, it is often applied to the context of corporations and particularly to study the role and behaviors of boards of directors.

325 See DAVIS/SCHOORMAN/DONALDSON, p. 21.
326 See VELTE, p. 285.
327 See DAVIS/SCHOORMAN/DONALDSON, p. 28; ARTHURS/BUSENITZ, p. 154.
330 See ibid, p. 20.
331 See DONALDSON/DAVIS, p. 51.
333 See RÜDISSE, p. 51.
334 Including, inter alia, the analysis of corporate governance in cooperative societies and non-profit organizations, entrepreneur-venture capitalist relationships, and family firms. See, for further references, KLÖCKNER, p. 47.
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*Table 2: The agency and stewardship theories – a comparison (Source: based on Davis/Schoorman/Donaldson, p. 37; Velte, p. 287).*

#### 2.2 Application of Theory to Closely Held Companies

##### 2.2.1 Controlling Owner Family Perspective

Applied to the majority-minority shareholder context, the stewardship theory suggests that controlling shareholders, rather than being inclined to hide information and/or act against minority investors’ interests, actually have aligned interests with the latter and can be expected to promote their shared goals, the company’s economic success. If controlling shareholders are primarily concerned with the company’s success, they are unlikely to misappropriate corporate resources. Particularly, if having significantly contributed to their firms’ success over an extended period of time, they are likely to deeply identify with the company which, in turn,

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335 See Davis/Schoorman/Donaldson, p. 25.
serves to join self-esteem with corporate success. Family shareholders that give up a minority stake in their company to raise capital are still likely to feel that the company is their firm and to connect their sense of identity and self-esteem with the firm’s success. They take pride in running the firm successfully and continuing the family tradition. The company’s success not only drives their own fortunes, careers, and sense of pride and honor, but also that of their relatives and offspring. These factors, which reinforce family shareholders’ emotional commitment to the long-term success of the firm, along with their sense of family firm duty and loyalty are assumed to be stronger than the temptation to engage in opportunistic behavior for short-term gains. Moreover, to maintain the firm’s stability and support the firm’s long-term success, family shareholders are motivated to build trusted and enduring relationships with the minority investor. PEMIs are not only valued for the funds they provide, but also for their professional expertise, experience, ideas, and business contacts. From the lens of the stewardship theory, controlling shareholders actively engage PEMIs to contribute to corporate decision making and freely share information with them, rather than keeping them at arm’s length and outside of the decision-making loop.

2.2.2 Minority Investor Perspective

As a result of the aligned interests of the controlling shareholder and the PEMI, the minority investor’s primary focus shifts from monitoring and supervision to being a sparring partner, providing valuable input to strategic decisions and assuming an integrative role. From the stewardship theory lens, the negotiation for legal rights of voice, exit, and information loses significance since the controlling shareholder is assumed to actively initiate close interaction and professional cooperation with the minority investor, voluntarily reduce information asymmetries, and make corporate decisions in alignment with minority investor views and interests. In addition to mutual interests and goals, the parties’ relationship is based on trust, rather than control. Monitoring and incentivizing are not only considered unnecessary, but counterproductive as these activities are costly.

336 See DONALDSON/DAVIS, p. 51; DAVIS/SCHOORMAN/DONALDSON, p. 29. See, in detail on stewardship in family firms, EDDLESTON et al.
337 Similarly for venture capital, see ARTHURS/BUSENITZ, p. 157.
338 See LE BRETON-MILLER/MILLER, p. 1171.
339 See ibid, p. 1176.
340 See, with respect to the board of directors, HUNG, p. 106.
and create mistrust between the minority and controlling shareholders.\footnote{See DAVIS/SCHOORMAN/DONALDSON, p. 25 (“Indeed, control can be potentially counter-productive, because it undermines the pro-organizational behavior of the steward, by lowering his/her motivation.”); for further references, KŁOCKNER, p. 43 et seq.}

The stewardship theory holds that variations in stewards’ performance can be explained by the extent to which corporate governance structures empower and facilitate individual stewards to develop and carry out value-maximizing strategies.\footnote{See DONALDSON/DAVIS, p. 51.} The stewardship theory suggests that the PEMI can be comfortable in leaving the controlling shareholder autonomy with respect to corporate management because he/she can be trusted to use discretion to maximize firm value.\footnote{See DAVIS/SCHOORMAN/DONALDSON, p. 25.} On the other hand, the PEMI should be granted voice that enables and motivates to actively participate and share its professional expertise, experience, ideas, and business contacts.

### 2.3 Limitations

While embraced in many academic areas, the stewardship theory is not without criticism. Firstly, like the agency theory, the stewardship theory is criticized for failing to take account of the complexities of human nature by assuming that stewards behave rationally, and by overlooking the possibility of \textit{irrational actions}.\footnote{See ALBANESE/DACIN/HARRIS, p. 610; FRICK, § 3, N 133.} As a result, the theory is said to make wrong predictions about human behavior even when the parties’ interests are aligned. Furthermore, ARTHUR and BUSENITZ observe that “while agency theory paints a gloomy picture of the agent, the stewardship theory paints an excessively rosy picture of the steward.”\footnote{ARTHURS/BUSENITZ, p. 155.} Critics argue that the stewardship theory is normative in that it emphasizes what should be done without realistically considering how humans behave.\footnote{See TRICKER, p. 225.} For instance, if the minority investor, in line with the stewardship theory, trusts that the controlling shareholder will act in accordance with its interests and thus foregoes to monitor the steward’s activities, the PEMI risks a rude awakening if it finds the agent engaging in self-interested, opportunistic actions. PEMIs who ex ante, that is, in the pre-deal negotiations, do not know whether the controlling shareholders will behave like agents or stewards ex post, should rationally assume that they are agents to prevent being deluded or duped.\footnote{Equally, KŁOCKNER, p. 46.} Even if the stewardship theory holds that the two parties’ interests are aligned and that the steward will not engage in opportunistic behavior a further problem related to overreliance on trust

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\footnote{Equally, KŁOCKNER, p. 46.}
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arises if it turns out that the steward, rather than being *unwilling*, is *unable* to maximize firm value due to a lack of the necessary resources, abilities, knowledge, experiences, and the like. It is also conceivable that the parties both intend to act in the best interest of the firm, but fundamentally differ on how such value maximization is best attained. The minority investor’s monitoring activities not only serve the purpose of revealing opportunistic actions, but also help assess whether the decisions and actions of the executive organs help advance the firm in line with the minority investor’s vision. Voice allows the PEMI to change directions if need be.

3 Managerial Hegemony Theory

3.1 Basic Concept

3.1.1 Overview

The managerial hegemony theory looks at the *power play between the board of directors and executive management*. It argues that organizations are effectively run by professional managers. The board of directors is characterized as a “de jure, but not the de facto governing body of the organization.” Managers are assumed to perceive themselves as an elite group and are trained to behave in a superior, self-serving manner. The managerial hegemony theory shares many of the assumptions of the agency theory. However, while the agency theory studies the motives and forms of opportunistic behavior of managers as agents, the managerial hegemony theory focuses on how the board of directors enables managers to pursue self-interested objectives.

3.1.2 Underlying Assumptions and Key Messages

According to the managerial hegemony theory, the board of directors has neither a supervisory role (as assumed by the agency theory), nor a strategic role (as assumed by the stewardship theory), but rather that it “rubber stamps” the decisions that are made peremptorily by the professional managers. Boards, according to this theory, merely play a *confirmatory role*.

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348 See MACE, p. 98; HERMAN, p. 31, 52; RÜDISSER, p. 53 et seq.
349 STILES/TAYLOR, p. 18.
350 See TRICKER, p. 226.
351 See BUCHHOLZ/BROWN/SHABANA, p. 330. For such assumptions see Section II.B.1.1.2.
352 See ibid.
353 See HUNG, p. 107 et seq. Unless in situations of corporate crises, see LORSCH, p. 97 et seqq.
354 HUNG, p. 107; CLENDENIN, p. 61.
of supporting professional managers’ decisions.\textsuperscript{355} Like the agency theory, the managerial hegemony theory assumes a difference between the shareholders’ and managers’ interests.\textsuperscript{356} Boards are not a tool to balance these interests for a variety of reasons, including the fact that boards are de facto hand-picked by management and presented to shareholders for election. Board members are effectively dependent upon management’s backing if they want to continue their appointment.\textsuperscript{357} They are, hence unsuitable for supervising management performance and keeping managers in check. Moreover, as managers are in charge of the day-to-day operations, they have “intimate knowledge of the firm” resulting in an information advantage vis-à-vis the board of directors.\textsuperscript{358} Directors relying by and large on the information supplied by management are unlikely to be in a position to make independent judgments and decisions.

3.1.3 Application of Theory

The managerial hegemony theory is essentially already an application of the more general \textit{class hegemony theory} that applies the behavioral assumptions of elitist groups to corporate managers dominating boards of directors.

3.2 Application of Theory to Closely Held Companies

The investment situation examined in this dissertation does not quite conform to the contexts that the managerial hegemony theory generally examines. This study explores situations of closely held firms in which a limited number of shareholders, due to their sizable ownership stakes, have thorough knowledge of corporate matters and strong incentives to control the firm. They are closely involved in corporate decision making because they sit on the board of directors and/or carry out management functions themselves, and/or choose the personnel to perform such roles. Hence, it is not the management that de facto determines the composition of the board of directors, but the shareholders who, because of their involvement in corporate matters, have comprehensive access to information to judge the management’s performance and, if need be, replace self-serving managers. Nevertheless, the managerial hegemony theory can provide interesting insights if its assumptions and key findings on the director-manager

\textsuperscript{355} See MACE, p. 99 (“Approval by boards in most companies is perfunctory, automatic, and routine.”); DRUCKER, p. 628 et seq.

\textsuperscript{356} See STILES/TAYLOR, p. 19.

\textsuperscript{357} See \textit{ibid}, p. 18.

\textsuperscript{358} \textit{Ibid}; HUNG, p. 108.
relationship are applied in a somewhat different context: to the majority-minority-shareholder relationship in a closely held company. In this context, instead of external managers, the controlling shareholder is in a position to determine the quantity and quality of information that the minority investor receives. Moreover, the controlling shareholder de facto selects the minority investor, and may also determine the minority investor’s exit (e.g., through call options or drag-along rights\textsuperscript{359}). With insufficient insight into corporate matters and little de facto control, the minority investor is neither able to effectively monitor and partake in corporate decision making, nor to perform an advisory role. De jure, the minority investor may participate in voting and elections at a shareholders’ general meeting without, however, having any de facto say. The minority investor’s function is largely confined to providing financing. The managerial hegemony theory describes a vivid scenario of the minority investor’s de jure, but not de facto participation if his/her bargaining power ex ante is not used to negotiate for enhanced voice and access to information. This situation may be acceptable to purely passive financial minority investors, but hardly will it be acceptable to active PEMIs who do not want to defer to the majority shareholders or be at their mercy.

The question arises then as to what strategies and tools the managerial hegemony theory assumes the PEMI can use to play a greater role in corporate decision making. Like the agency theory, the managerial hegemony theory emphasizes the importance of implementing an effective disclosure system with clear guidelines, standards, and procedures that allow the minority shareholder to gain broad and deep knowledge about corporate affairs. Secondly, the theory suggests that in order to play an active role in corporate affairs, sitting on the board of directors may not be sufficient to enable active participation in and guidance of the firm which requires more presence in the firm so as to intelligently contribute to major decision making. Hence, the theory suggests that the PEMI must not only seek effective mechanisms to monitor and control the controlling shareholder, but equally focus on the third-party managers. The theory provides an explanation for why minority investors seek to influence the appointment of management personnel (e.g., via contractual agreements) and critical management decisions (e.g., via veto rights).

### 3.3 Limitations

Critics of the managerial hegemony theory point to the problems of obtaining access to board of directors to conduct research and of separating

\textsuperscript{359} For the term, see Section VI.A.2.1 and 2.2.
elitist behavior attributed to the class hegemony from behavior primarily
driven by a national culture. This criticism is equally applicable in this
context as the information publicly available on the private equity
investments is scarce. A further critique is that the demarcation between the
agency theory and the managerial hegemony theory is blurred.

4 Conclusion

The three theoretical concepts presented in this chapter – the agency, the
stewardship, and the managerial hegemony theory – provide insights into
the controlling shareholder-minority investor relationship in closely held
companies, along with their core motivations, interests, and concerns,
which have important practical implications.

The agency theory helps understand why conflicts of interest can arise
among different groups of owners and it raises awareness about sources of
potential oppression and tools that the PEMI can use to address this. The
theory emphasizes the importance of the PEMI to secure voice in corporate
decision making, gain comprehensive access to information, set up exit
options, set rules of conduct, effective governance structures and well-
planned incentive schemes to effectively monitor and control the majority
shareholder and management, and to mitigate hold-up problems. The
agency theory therefore provides one explanation for the myriad
institutional rules and regulations on corporate governance and the
complexity of shareholders’ agreements. However, the attempt to explain
the majority-minority shareholder relationship and the respective legal
arrangements chosen solely by referring to the agency theory is likely to be
incomplete. Focusing only on the conflict potential between majority and
minority shareholders is too narrow a view of the relationship between the
parties.

The stewardship theory provides insights into other behavioral motivations
that drive shareholders’ behavior. It draws a more harmonious picture of the
controlling shareholder-minority investor relationship and assumes that
their interests are principally aligned. The theory emphasizes that PEMI
involvement in corporate decision making is not to exercise control alone,
but to support the company’s management through its expertise, vision,
skills, and experience, and provide advice as a sparring partner.

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360 See TRICKER, p. 227.
361 Similarly, with further references, see TREZZINI, p. 49.
The *managerial hegemony theory* applied to the majority-minority shareholder context also recommends that minority investors negotiate ex ante for rights of information access and participation in decision making. Particularly, the theory points to the potentially limited role of board representation as a tool to protect PEMI interests and suggests seeking extended rights of participation in critical business decisions and to effectively influence management appointments.

Which of these theories is better suited to predict the parties’ behavior is hard to discern because human nature is complex as are the players’ personalities, values, and backgrounds. Typically, the agency theory is better suited to explain the minority investor’s behavior principally motivated by financial factors (return maximization). The stewardship theory effectively explains the behavior of family shareholders to whom non-financial factors, such as maintaining tradition, independence, reputation, and prestige may be equally important. In fact, depending on the personal characteristics and situational factors, controlling shareholders may sometimes act as stewards and sometimes as agents. Precisely because the controlling shareholder’s behavior is difficult to predict in advance, solely relying on stewardship governance mechanisms could fail miserably for the PEMI. Thus, DAVIS, SCHOOorman, and DONALDson view protection mechanisms proposed by the agency theory as “the necessary costs of insuring principal utility against the risks of executive opportunism.” In contrast, the stewardship theory suggests that too tight control discourages the stewards from behaving cooperatively and causes distrust between the parties which, in turn, is counterproductive to the minority investor’s interests. It follows that leaving the controlling shareholder and management a certain degree of discretion is desirable from the PEMI’s perspective. Hence, devising a suitable investment structure requires a fine balance between ensuring sufficient voice, and leaving the controlling shareholder and management enough discretion to be motivated to maximize firm value.

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362 *See Sánchez*, p. 4; *Le Breton-Miller/Miller*, p. 1171, 1187 (“the more a business and its primary executive actors are socially embedded in a family, the more likely will agency-based rationales dominate those of stewardship” and “Thus family business owners and executives who are more embedded in the family than the business will tend to reflect more parochial, and perhaps self-serving, family concerns, whereas owners more embedded in the business will reflect those business interests.”).

363 *See Davis/Schoorman/Donaldson*, p. 26 (“analogous to turning the hen house over to the fox”).

Part Two: Legal Framework and Tools
Part Two: Legal Framework and Tools

Part One examines the motivations, interests, and potential concerns of both controlling owner families and PEMIs. Possible conflicts of interest are identified and the risks associated with minority investments are outlined. Part Two of this dissertation presents various legal tools and arrangements to address these risks. In the context of shareholder behavior, the primary non-financial mechanisms for PEMIs to mitigate minority investor risks and to protect their interests commonly referred to in the economic and legal literature are:  

(i) enhance voice so that the PEMI can actively participate in corporate decision making and thereby change unsatisfying developments, and (ii) increase exit options so that the PEMI can readily abandon an unsatisfactory investment. (iii) A third tool discussed in this dissertation is access to information, which is a prerequisite for deciding on whether to pursue a voice or exit strategy. Yet, before analyzing the tools and arrangements related to these protection mechanisms, several introductory considerations are necessary.

III Introductory Considerations

A The Portfolio Company’s Business Form: AG versus GmbH

1 Overview

First and foremost, the PEMI’s voice and exit rights and structuring options available under Swiss corporate law are a function of the target company’s business form. The stock corporation is by far the most common structure for privately held companies in Switzerland. The Swiss Code of Obligations (CO) defines the stock corporation as “a company with its own company name whose predetermined capital (share capital) is divided into parts (shares) and whose liability is limited to the company’s assets”.  

The stock corporation model, as envisioned by Swiss lawmakers, is that of a company with a sizable share capital, whose shares are tradable, and held by a large number of small, anonymous, and frequently changing shareholders with limited influence. Yet, the law enables this stock

365 For these and other protection mechanisms, see Section II.B.1.2.2.
366 CO 620. The official text of the CO is written in German, French and Italian. For the purpose of this dissertation the English translation of the official text is based upon the work of the Swiss-American Chamber of Commerce. In detail on this definition, see DRUEY/GLANZMANN, § 7; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 1, N 2 et seqq.
corporation to be modified to meet the needs of closely held companies, to the extent that the protection of third parties (i.e., creditors and future shareholders) and public policy remain safeguarded.\textsuperscript{368} Given its nature as an \textit{all-purpose vehicle} and its practical relevance, the stock corporation, as defined by Swiss law, is at the heart of this study.

Yet, since its legal revision, which took effect on 1 January 2008, the Swiss \textit{GmbH} has become a \textit{valid alternative vehicle} for target companies in which PEMIs seek to purchase a minority position because it combines limited liability with potentially strong PEMI participation and control features and offers a comparatively greater degree of organizational flexibility than does the stock corporation. The GmbH is defined as a “person-oriented company with stated capital in which one or more persons or legal entities participate”.\textsuperscript{369} It was initially introduced in Switzerland in the 1930s based on the German model.\textsuperscript{370} For many years, it gained only limited acceptance in practice.\textsuperscript{371} At the end of 1991, Switzerland had 165,000 stock corporations compared to only 2,800 GmbHs.\textsuperscript{372} The situation changed in 1992 when the revised laws on stock corporations in the Swiss Code of Obligations came into effect, which introduced stricter requirements for stock corporations and rendered the GmbH an unexpectedly attractive alternative.\textsuperscript{373} Since then, the number of Swiss GmbHs has consistently increased, reaching 92,448 in 2006, reflecting an annual increase of 26% versus a 0.4% increase in stock corporations. As a result, the GmbH has developed from a “wallflower to the star of Swiss corporate law”.\textsuperscript{374} The sudden growth of GmbHs in the 1990s, combined with the fact that GmbH laws had been largely unchanged since 1936, prompted a need for GmbH

\textsuperscript{368} See HAYMANN, p. 17 et seqq.; BÄR, Aktuelle Fragen, 494. For examples of person-oriented structuring options, also see MEIER-HAYOZ/SCHLUEP/OTT, p. 302 et seqq.

\textsuperscript{369} CO 772 I and 775.

\textsuperscript{370} See BAUDENBACHER/SPITTLER, Basler Kommentar, CO 772, N 1; FORSTMOSER/PEYER/SCHOTT, p. 18, N 6 (“Retortenbaby”).

\textsuperscript{371} See BAUDENBACHER/SPITTLER, Basler Kommentar, CO 772, N 2; NATER, p. 9; FORSTMOSER, gestern/heute/morgen, p. 49.

\textsuperscript{372} See FORSTMOSER, gestern/heute/morgen, p. 49.

\textsuperscript{373} See ibid; also see MEIER-HAYOZ/ FORSTMOSER, § 16, N 679 (“Im Zuge der Aktienrechtsreform 1968/1991 wurde wohl zu wenig auf die Bedürfnisse dieser kleineren, personenbezogenen AGs Rücksicht genommen. In der Praxis hat dies dazu geführt, dass bei Gründung einer Körperschaft mit wirtschaftlicher Zielsetzung heute fast ausschliesslich die Rechtsform der GmbH verwendet wird.”); BAUDENBACHER/SPITTLER, Basler Kommentar, CO 772, N 1a; NUSSEBAUM/SANWAD/SCHUDEGGER, introduction, N 2 et seq.

\textsuperscript{374} MEIER-HAYOZ/ FORSTMOSER, § 18, N 162; FORSTMOSER/PEYER/SCHOTT, p. 19, N 8.
law updating. In 1995, the Swiss Federal Justice Department appointed a working group to prepare a revision of the GmbH laws and on 1 January 2008, the new GmbH laws came into effect, which led to yet another boost in popularity. Gaining ever more ground in practice, at the end of 2010, 124,826 GmbHs versus 189,515 stock corporations were registered in Switzerland, making it the second most common business entity in Switzerland.

### Figure 13: Increase in stock corporations and GmbHs

Although the legal considerations of this study focus on the stock corporation given its primacy, GmbH-related aspects, in light of its increasing practical relevance, are also touched upon, particularly when it provides more flexible structuring options than the stock corporation. Moreover, this section provides a brief overview of the key features of the GmbH. At the end of this dissertation, the features, advantages, and drawbacks of both the GmbH and the stock corporation are compared.

### 2 Characteristics of the GmbH

Although lawmakers tailored the Swiss stock corporation laws for larger companies and although the GmbH is typically chosen as a business form

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375 See Forstmoser, gestern/heute/morgen, p. 49; Baudenbacher/Speitler, Basler Kommentar, CO 772, N 1a; Nobell, Klein-AG, p. 794.  
376 See high single-digit annual increase of GmbHs registered in Switzerland versus low single-digit increase of stock corporations in Figure 13.  
377 See Chapter VII.  
378 See FN 367.
for smaller firms (i.e., firms with less than 250 employees), the GmbH is by no means simply the ‘little sister’ of the stock corporation only suitable for SMEs. The distinction between the stock corporation and the GmbH is not based on the company’s size – there are both small family-owned firms operating as a stock corporation and large firms operating as a GmbH – but based on the emphasis on person-oriented elements. The GmbH is a legal entity tailored for companies with concentrated ownership. It is therefore not quantitative, but qualitative elements that make the difference between these two corporate vehicles. The GmbH is a legal entity tailored for companies with concentrated ownership. It is therefore not quantitative, but qualitative elements that make the difference between these two corporate vehicles.

As a business form in-between that of the stock corporation and partnership, the GmbH is characterized by both capital-based and person-oriented features outlined in Table 3.
The GmbH is a corporate body with a pre-determined stated capital of at least CHF 20,000, divided into company shares with a nominal amount of a minimum of CHF 100 and issued at least at their nominal value. There is no maximum nominal capital cap.

The members of a GmbH have membership rights vis-à-vis the company, but they do not have control over its assets. Only the GmbH itself is entitled to its assets. Conversely, the company’s liability is limited to its assets only.

The members’ voting rights, profit and loss sharing, and received distributions are principally based on their respective equity interests.

In principle, membership is transferable and the death of a member is not a ground for dissolution.

By and large, the GmbH pursues economic objectives.

Capital-based features particular to the GmbH include, inter alia:

- Only ordinary capital increases exist, but not authorized or conditional capital increases as in the stock corporation because of the regularly limited number and proximity of the members, which are assumed to render more flexible forms of capital increases unnecessary.
- There are particularities concerning the reduction of stated capital.
- The company shares of a GmbH are not eligible for trading on a stock exchange.

See MEIER-HAYOZ/FORSTMOSER, § 18, N 26; cf. BAUDENBACHER/SPEITLER, Basler Kommentar, CO 772, N 9; KÜNG/HAUSER, § 1, N 2.

This minimum amount of stated capital is deliberately set below that of the stock corporation to also allow small companies to use the GmbH, see MEIER-HAYOZ/FORSTMOSER, § 18, N 37.

CO 773, 774, 777c I, 793. The nominal values of the company shares may be different provided that the company shares with the lowest nominal value have at least one tenth of the nominal value of the other company shares (CO 806 II). See BAUDENBACHER/SPEITLER, Basler Kommentar, CO 774, N 1; NUSSBAUM/SANWALD/SCHIEDEGGER, CO 774, N 2.

See BAUDENBACHER/SPEITLER, Basler Kommentar, CO 772, N 5; NUSSBAUM/SANWALD/SCHIEDEGGER, CO 772, N 3; KÜNG/CAMP, CO 772, N 6; NATER, p. 11.

CO 772 I, 794.

See CO 798 III, 806 I, 826 I.

CO 785 et seq., 808b I Sec. 4.

However, the pursuit of non-economic purposes is admissible, as well. See Federal Council report, BBI (2001), p. 3171; BAUDENBACHER/SPEITLER, Basler Kommentar, CO 772, N 5, 9, 37 et seq.; MEIER-HAYOZ/FORSTMOSER, § 18, N 8; NUSSBAUM/SANWALD/SCHIEDEGGER, introduction, N 20.

Cf. CO 781 for the GmbH and CO 650 (ordinary capital increase), CO 651 et seqq. (authorized capital increase), and CO 653 et seqq. (capital increase subject to a condition) for the stock corporation.

See FORSTMOSER/PEYER/SCHOTT, p. 48, N 120.

CO 782.
The GmbH cannot issue participation certificates since this would be perceived as incompatible with the person-oriented nature of a GmbH.\footnote{See MEIER-HAYOZ/STROMOSER, § 18, N 48.} It is, however, possible to issue profit sharing certificates.\footnote{CO 774a.}

### Person-oriented elements\footnote{In a person-oriented company, members’ positions are determined by their personalities and not (only) based on the capital they invest. See HANDSCHIN, personalistische GmbH, p. 57; MEIER-HAYOZ/SCHLEUPE; OTT, p. 301. Regarding the person-oriented features, see BAUDENBACHER/SPEITLER, Basler Kommentar, CO 772, N 9; MEIER-HAYOZ/STROMOSER, § 18, N 27; BOCKLI, GmbH-Recht, p. 7 et seq.; KÜNG/HAUSER, § 1, N 3.}

- All GmbH members are entered in the Commercial Register.\footnote{CO 791 I.}
- The GmbH is characterized by the principle of self-management whereby its members collectively manage the company, unless otherwise provided in the articles of association.\footnote{CO 809 I, 814. See BAUDENBACHER/SPEITLER, Basler Kommentar, CO 772, N 8; MEIER-HAYOZ/NOBEL, § 3, N 51; HANDSCHIN/TRUNIGER, § 14, N 15.} As a result, compared to the stock corporation, a level of the structural organization is omitted, that of the board of directors.
- The division of powers between the members and managing officers in a GmbH is less rigid than in a stock corporation. While in the latter, managerial powers of the board of directors may be neither transferred to nor withdrawn by the general meeting, the meeting of members in a GmbH may be reserved to approve certain fundamental managerial decisions.\footnote{See FORSTMOSER, gestern/heute/morgen, p. 53 et seq.}
- The GmbH’s articles of association may grant veto rights to selected individual members concerning particular decisions of the meeting of members.\footnote{CO 807. See TRUFFER/DUBS, Basler Kommentar, CO 807, N 1; HANDSCHIN/TRUNIGER, § 11, N 25; NATER, p. 100.}
- The members benefit from more extensive information rights relative to those of stock corporation shareholders, which correspond to the information rights of the stock corporation directors.\footnote{Compare CO 802 for the GmbH with CO 696 et seqq. (concerning shareholders) and CO 715a (concerning directors) for the stock corporation.}
- The comparatively higher level of involvement of GmbH members results in their being subject to a duty of loyalty\footnote{CO 803 I, II.} and, consequently, a duty of confidentiality, obliging members to safeguard business secrets and, if the articles of association so provide, to abstain from exercising competing activities.\footnote{CO 803 II i.c.w. CO 776a I Sec. 3.}
The GmbH’s articles of association may provide for obligations for members to make supplementary financial contributions and to provide ancillary performances.\textsuperscript{410} The transferability of a member’s interest is subject to restrictions.\textsuperscript{411} The GmbH laws provide for both the withdrawal and expulsion of a member.\textsuperscript{412} Moreover, the GmbH allows its members to request the dissolution of the company if based on a reason cited in the articles of association.\textsuperscript{413}

\begin{table}[h]
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\textbf{Table 3: Capital-based and person-oriented elements of the GmbH} & \\
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\section*{B Key Legal Documents}

Before examining what voice and exit rights and arrangements PEMIs can negotiate for to protect their interests (the material perspective), this section first outlines the principal documents to do so (the formal perspective). A general distinction must be made between structuring minority investments at the \textit{corporate level} and the \textit{contractual level}. At the corporate level, the \textit{articles of association} and \textit{organizational regulations} are key legal documents. Contractual voice and exit rights are typically found in \textit{shareholders’ agreements}. Before exploring individual structuring options, these principal legal documents are briefly described.

\section*{1 Articles of Association}

\subsection*{1.1 Term}

The articles of association are essentially the \textit{constitution} for both the stock corporation and the GmbH.\textsuperscript{414} They determine the company’s governance structure, stipulate the rights and duties of corporate organs and members, and determine the corporate decision-making process at the general meeting (meeting of members in a GmbH), among other organizational aspects.\textsuperscript{415}

\textsuperscript{410} CO 772 II, 776a I Sec. 1, 795 et seqq.
\textsuperscript{411} CO 786.
\textsuperscript{412} CO 822 et seqq. The articles of association may grant a right to withdraw from the company (CO 776a I Sec. 17). They may also provide for special grounds for the expulsion of a member (CO 776a I Sec. 18).
\textsuperscript{413} CO 821 I Sec. 1.
\textsuperscript{414} \textit{See SCHENKER, Basler Kommentar}, CO 626, N 1; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 7, N 2; ROTH PELLANDA, p. 87, N 165. With respect to the GmbH, \textit{see SCHENKER, Basler Kommentar}, CO 776, N 1.
\textsuperscript{415} \textit{See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 7, N 6.}
1.2 Enacting Body

The articles of association result from private and, within the limits of the law, autonomous shareholder negotiations. Adopting and amending the articles of association is among the inalienable powers of the general meeting. Generally, an amendment is approved by a majority of the votes represented at the general meeting. For certain important amendments, a qualified majority of at least two-thirds of the votes represented, and the absolute majority of the nominal value of shares represented, is required. Moreover, certain amendments require unanimous consent.

1.3 Legal Effect and Enforceability

The articles of association bind the company, its organs, and shareholders as if they personally signed the document. By acquiring shares of a stock corporation (or GmbH) after the initial adoption of the articles, the acquirer is bound by the articles even without expressly consenting to their terms or signing and executing a copy. The articles of association have primarily company internal effects since they neither entitle nor oblige third parties. Nevertheless, they may indirectly affect third parties, upon their publication in the Swiss Commercial Register, in that, for example, contracts in breach of the corporate purpose as set out in the articles of association are unenforceable.

Resolutions of the general meeting that violate the articles of association are challengeable by the board of directors or any shareholder even if a respective resolution is passed with a majority that would be sufficient for a respective amendment of the articles of association. If board members, executive managers, or any auditors

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416 See ibid, § 7, N 2. On the contractual character of the articles of association, see RUFFNER, Grundlagen, p. 157 et seq.
417 CO 698 II Sec. 1. In particular situations, the board of directors may also amend the articles of association. See DUBS/TRUFFER, Basler Kommentar, CO 698, N 15. With respect to the GmbH, CO 780, 804 II Sec. 1.
418 CO 703. With respect to the GmbH, CO 808.
419 CO 704 I. With respect to the GmbH, the second hurdle – the absolute majority of the nominal value of the company shares – relates to the entire share capital, rather than only to the shares represented (CO 808b).
420 See Section IV.D.3.1.2.3.
421 See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 7, N 3.
422 See ibid, § 7, N 9 (“Dritte werden … direkt nicht verpflichtet und in der Regel auch nicht berechtigt; sie können insbesondere auch nicht ihre richtige Anwendung durchsetzen.”).
423 CO 932. BÖCKLI, Aktiengesetz, § 1, N 613.
424 See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 7, N 8.
425 CO 706 I. With respect to the GmbH, CO 808c i.e.w. CO 706 I.
426 See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 10, N 1.
violate provisions of the articles, they can be held personally liable for any damages.\footnote{\textit{CO} 754 I and 755 I.}

### 1.4 Content

The articles of association generally comprise (i) \textit{mandatory provisions}, the absence of which the company’s registration in the Commercial Register will be refused\footnote{\textit{See B"auen/Bernet}, p. 13, N 26. For such content, \textit{see CO} 626. With respect to the GmbH, \textit{CO} 776.}, (ii) \textit{non-mandatory rules} changing the default statutory rules that must be included in the articles of association in order to become binding\footnote{\textit{See B"ockli, Aktienrecht}, § 12, N 358 \textit{et seq.}; \textit{Bauen/Bernet}, p. 148, N 421. With respect to the GmbH, \textit{CO} 776a II. \textit{See Schenker, Basler Kommentar}, \textit{CO} 776a, N 1 \textit{et seq.}; \textit{Nussbaum/Sanwald/Scheidegger}, \textit{CO} 776a, N 1 \textit{et seq.}}, and (iii) \textit{optional regulations}.\footnote{\textit{See Schenker, Basler Kommentar}, \textit{CO} 626, N 2; \textit{Meier-Hayoz/Forstmoser}, § 16, N 608; \textit{Bauen/Bernet}, p. 13, N 26. With respect to the GmbH, \textit{CO} 776a i, \textit{see Schenker, Basler Kommentar}, \textit{CO} 776, N 3.} Aspects falling into the first two categories must be inserted in the articles of association to become binding. A cross-reference to other corporate documents or shareholder resolutions is not permitted.\footnote{\textit{See Forstmoser/Meier-Hayoz/Nobel}, § 8, N 9.} Aspects falling into the third category are repetitions of statutory laws or rules that may also be stated in the organizational regulations or in shareholders’ agreements.\footnote{\textit{See Schenker, Basler Kommentar}, \textit{CO} 776, N 3; \textit{Nussbaum/Sanwald/Scheidegger}, \textit{CO} 776, N 1.}

### 1.5 Limitations

Shareholders’ freedom to devise the company’s constitution is limited by the \textbf{general principles of Swiss law}\footnote{Particularly the protection of basic personal rights (\textit{CO} 27 II), the corporate principle of equal treatment (\textit{see FN} 802), and the principle of objectivity (\textit{see FN} 801), \textit{see B"urgi, Minderheitschutz}, p. 68.} and \textbf{mandatory statutory provisions}. If a provision in the articles evidently contradicts mandatory law the officer of the Commercial Register must reject it.\footnote{\textit{See Forstmoser/Meier-Hayoz/Nobel}, § 7, N 20.} If the Commercial Register fails to do so the provision nevertheless is void.\footnote{\textit{See ibid}, § 7, N 21.}
2 Organizational Regulations

2.1 Term

Any corporate body may pass regulations that specify its internal organization and stipulate the rights and duties of its members.\textsuperscript{436} The Swiss Code of Obligations mentions the term \emph{organizational regulations}\textsuperscript{437} only in connection with the delegation of management and representation powers by the board of directors.\textsuperscript{438} Here, the term refers to regulations passed by the board of directors. Subsequent usage of the term \emph{organizational regulations} in this dissertation refers to regulations enacted by the board of directors in a stock corporation or by the GmbH’s managing officers. In substantiating and operationalizing the rather general and abstract articles of association based on the company’s specific needs and circumstances,\textsuperscript{439} and in determining the basic management structure, the respective powers and responsibilities of corporate bodies, particularly those of the board of directors and management, the organizational regulations are among the primary tools to ensure the company’s efficient and effective operation.\textsuperscript{440} Rather than a mere formal compulsory legal exercise, they are an important management tool.\textsuperscript{441}

2.2 Enacting Body

Regulations are generally enacted via a resolution of the authorized corporate body in relation to its respective sphere of activity in areas not regulated by law or the firm’s articles of association and not required to be regulated by the latter.\textsuperscript{442} The organizational regulations are enacted by the \emph{board of directors} as part of its non-delegable and inalienable duty to determine the company’s organization.\textsuperscript{443} The adoption of the organizational regulations is mandatory if management functions are delegated to

\begin{itemize}
\item See FORSTMOSER/MEIER-HAYOZ/NOBEL § 11, N 5; FORSTMOSER, \textit{Organisationsreglement}, p. 27.
\item In detail on the organizational regulations, see BÖCKLI, \textit{Aktienrecht}, § 13, N 321 et seqq.; MÜLLER/LIPP/PLÜSS, p. 64 et seqq.; HOMBURGER, \textit{Zürcher Kommentar}, CO 716b, N 736 et seq.; FORSTMOSER, \textit{Organisationsreglement}, p. 45 et seqq. (with a checklist of potential contents); ROTH PELLANDA, p. 100 et seqq., N 188 et seqq.
\item CO 716b I and II, 718 I and II.
\item See MÜLLER/LIPP/PLÜSS, p. 64.
\item See KRNETA, CO 716b, N 1724.
\item See ZWICKER, p. 55.
\item See “Determination of the Corporate Organization” in Section IV.D.2.1.
\end{itemize}
individual members or third parties. The board may amend, complement, or replace the organizational regulations at any time, with the majority of the votes cast at a board meeting, unless provided otherwise in the organizational regulations. Under Swiss corporate law, no further formal requirements must be observed when amending the organizational regulations. The general meeting is neither authorized to adopt the organizational regulations in lieu of the board of directors, nor permitted to reserve a right to approve any adoption or amendment of the organizational regulations devised by the board of directors. Attempting to do so would constitute an infringement on the board of directors’ non-delegable and inalienable duty to determine the firm’s organizational structure.

### 2.3 Legal Effect and Enforceability

The organizational regulations bind the board of directors and the persons entrusted with management duties. Legal scholars debate, however, the consequences if the board of directors disregards the organizational regulations, for example, if resolutions are passed by less than the majority required therein. WATTER and ROTH PELLANDA argue that the resolution is null analogous to a corporate board’s disregard of formal requirements. HOMBURGER dismisses nullity, at least if quorum and majority vote requirements are disregarded because neither important statutory laws nor provisions servicing public interests are infringed. PEMIs should require organizational regulation amendments to be subject to a quorum and/or qualified majority vote for its board representatives to obtain veto power against any unfavorable ex post changes by the controlling shareholder’s board representatives. However, in light of the scholarly debate as to the consequences of ignoring provisions in the organizational regulations, PEMIs cannot rely on the provisions in the organizational regulations implemented ex ante to last ex post and must reckon with ex post unfavorable changes initiated single-handedly by the controlling share-

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444 See HOMBURGER, Zürcher Kommentar, CO 716a, N 550; FORSTMOSER, Organisationsreglement, p. 30. With respect to delegation in a GmbH, organizational regulations are advisable, but not mandatory by law, see FN 1817.
445 See KRNETA, CO 716b, N 1723.
446 CO 713 I. With respect to the GmbH, CO 809 IV.
447 See WATTER/ROTH PELLANDA, Basler Kommentar, CO 716b, N 25; ROTH PELLANDA, p. 104, N 197.
448 See FN 1492.
449 See FN 1493.
450 See WATTER/ROTH PELLANDA, Basler Kommentar, CO 716b, N 25.
451 See WATTER/ROTH PELLANDA, Basler Kommentar, CO 716b, N 25 with reference to CO 16.
452 See, for further references, HOMBURGER, Zürcher Kommentar, CO 714, N 370 (“m.E. keinen Nichtigkeitsgrund”).
holder’s board representatives in control of the majority of the board seats. Hence, critical provisions should additionally be secured by other means such as via contractual agreements.

2.4 Content

If the board of directors chooses to delegate management functions based on a respective authorization in the articles of association, corporate law provides that the organizational regulations must set the company’s management structure, lay out the necessary positions, define duties, and regulate reporting.\(^{453}\) Such aspects only constitute the minimum content.\(^{454}\) In addition, the organizational regulations typically contain rules relating to the board’s internal organization (e.g., board committees), board members’ rights and duties\(^ {455}\) (e.g., concerning confidentiality, rules for abstaining from decision making, non-compete clauses,\(^ {456}\) compensation\(^ {457}\)), and procedures,\(^ {458}\) including administrative provisions on convening and holding board meetings (e.g., type of meetings, meeting intervals, invitation, agenda, meeting minutes\(^ {459}\)), rules on decision making (e.g., quorum and majority vote requirements, casting votes), the board information system and extended information rights of board members (e.g., reporting intervals, contents, providers of information),\(^ {460}\) provisions on the accounting system, financial controls, and financial planning (e.g., reporting period, responsibilities, reporting standards, KPIs and business ratios, principles of consolidation, business and liquidity planning, budgeting),\(^ {461}\) and provisions on the power to represent the company.\(^ {462}\) As

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\(^{453}\) CO 716b II.  
\(^{454}\) See BAUEN/VENTURI, § 3, N 359.  
\(^{455}\) On the duties, see BÖCKLI, Aktienrecht, § 13, N 331; MEIER-HAYOZ/FORSTMOSER, § 16, N 442; KRNETA, CO 716b, N 1755 et seqq.; HOMBURGER, Zürcher Kommentar, CO 716b, N 744.  
\(^{456}\) See KRNETA, CO 717, N 1911, 1756 et seq. Cf. BÖCKLI, Aktienrecht, § 13 N 613 (pointing out that the stipulation of a non-compete clause in the organizational regulations is only of relevance if it determines the board members’ duty of loyalty. To establish further obligations he recommends using contractual agreements backed by contractual penalties). Critically, ROTH PELLANDA, p. 102, N 191 (finding the inclusion of a non-compete clause in the organizational regulations problematic in view of the exclusive election authority of the general meeting).  
\(^{457}\) In detail, see BAUEN/VENTURI, § 3, N 372; ROTH PELLANDA, p. 102, N 191; KRNETA, CO 716b, N 1770 et seqq.  
\(^{458}\) See ibid, § 3, N 358.  
\(^{459}\) With more details, see KRNETA, CO 716b, N 1736 et seq.; ZWICKER, p. 57 et seqq.  
\(^{460}\) With more details, see ZWICKER, p. 62.  
\(^{461}\) With more details, see ibid, p. 60 et seqq.  
part of the ongoing major revision of corporate law, the Swiss Federal Council has proposed expanding the statutory requirements on the minimum contents of the organizational regulations including provisions on corporations’ internal organization and board committees, executive management rules including positions and respective tasks, reporting modalities, and critical matters that require the board of directors’ approval. Generally, the contents of corporations’ organizational regulations reflect the countless variations of organizing corporate activity. The board of directors must determine the precise content in view of the individual characteristic of the firm.

2.5 Limitations

The organizational regulations must neither infringe upon the general principles of law and mandatory statutory provisions nor the articles of association.

463 In the near future, Swiss companies will face several changes as part of the ongoing major revision of company and accounting legislation. On 21 December 2007, the Swiss Federal Council published the first Draft Legislation and report on the revision of company and accounting legislation in the Swiss Code of Obligations. The aim: to enhance shareholders’ position as the company’s owners and improve corporate governance, in particular, to establish more flexible rules on capital structures, modernize the rules on the general meeting, and replace outdated accounting legislation. The popular initiative against ‘fat cat’ salaries (gegen die Abzockerei) concerning excessive management compensation in exchange-listed companies led the Swiss Federal Council to extend its first draft legislation and to release a respective report on 5 December 2008. Both the revision of company and accounting legislation is debated in both the Council of States and the National Council. On 11 June 2009, the Council of States adopted resolutions concerning the Federal Council’s Draft Legislation. Aspects related to the initiative against fat-cat salaries were dealt with first and the Committee for Legal Affairs of the Council of States submitted an indirect counterproposal to the initiative against fat-cat salaries on 25 October 2010 to the Council of States. Given the uncertain outcome of the law’s revision in relation to the voice-related issues, only selective remarks on the forthcoming legislation are made in this dissertation. In the following, reference is made to the Draft Code of Obligations (D-CO), Draft Legislation, or Draft Law, which relates to the draft provisions of the Swiss Code of Obligations as adopted by the Swiss Federal Council in December 2007 and December 2008. Moreover, deviating resolutions as proposed by the Committee for Legal Affairs of the Council of States are referred to where relevant.

464 D-CO 716c II.

465 On the possible contents, see MÜLLER/LIPP/PLÜSS, p. 66; BÖCKLI/HUQUIN/DÉSÉMONTET, p. 79 et seq.; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 11, N 7 et seq.

466 For example, in small corporations the board of directors is seldom subdivided in committees; depending on the shareholder structure, quorum and/or qualified majority vote requirements may be advisable. See MÜLLER/LIPP/PLÜSS, p. 664.

467 See FN 433.

468 See ROTH PELLANDA, p. 98, N 183.
3 Contractual Agreements

3.1 Term

A key legal instrument to enhance the PEMI’s voice in corporate decision making and to secure exit rights are shareholders’ agreements. Shareholders’ agreements are contracts among two or more natural or legal parties where at least one party is currently or plans to be a shareholder of a company in which the shareholders specify their relationship with each other and stipulate certain rights and duties in connection with their shareholder status. Voting agreements, a typical aspect of such contracts, serve to coordinate the shareholders’ exercise of voice-related rights at the general meeting. Moreover, shareholder control agreements pertain to matters that fall within the board of directors’ powers allowing PEMIs to influence decision making at the board level, address aspects of board organization, and make arrangements regarding the company’s executive management. Agreements relating to these aspects are concluded either directly with board members or indirectly with the shareholders who commit to instruct their board representatives accordingly. Contractual agreements among GmbH members and with its managing officers also exist, although they are less vital given the GmbH members’ flexibility of implementing voice and exit arrangements at the corporate level. For details on the legal effects, enforceability, limitations, and assessment of shareholders’ agreements, see the discussion on voting agreements in Section IV.D.3.3.5 and on shareholder control agreements in Section IV.E.3.3.3.

469 See, for further references, HINTZ-BÜHLER, p. 6 et seq.
470 See LANG, p. 10.
471 The obligee does not need to be a shareholder.
473 Or has at least a claim in rem on the shares. See FORSTMOSER, Aktionärbindungsverträge, p. 364.
475 See ibid, p. 107, N 203.
3.2 Purpose

In a stock corporation, the shareholder’s sole obligation is to pay for the subscribed shares set at the time of the issue.\(^\text{476}\) The articles of association must not impose any further obligations on the shareholders, not even with the shareholders’ unanimous consent.\(^\text{477}\) Yet, particularly in family firms, shareholders often feel a need to institute additional shareholders’ obligations and other person-oriented elements beyond what is lawful in articles of association.\(^\text{478}\) Shareholders’ agreements are suitable for fulfilling such needs, thereby compensating for certain deficits arising from the capitalistic nature of the stock corporation, which does not consider the person-oriented characteristics of shareholders (i.e., their skills, expertise, and networks).

3.3 Content

Typical contractual agreements among shareholders include, inter alia, voting agreements, rules on corporate decision making, conflict resolution procedures, board representation rights, rights and duties to perform management functions or consulting services, rules on information exchange, duties of loyalty, confidentiality and non-compete clauses, financial obligations and guarantees, rules on the distribution of profits, explicit subscription rights and anti-dilution clauses, transfer restrictions, purchase, and exit rights.\(^\text{479}\)

\(^{476}\) CO 680 I.


\textit{See} FORSTMOSER, \textit{KMU}, p. 502 (“Diese gesetzlich zwingende Limitierung der Pflichten des Aktionärs auf die eine und ausschliesslich vermögensrechtliche Pflicht zur Liberierung wird den Erfordernissen einer personenbezogenen AG nicht gerecht, weder aus der Sicht des Gesellschafters noch aus derjenigen der Gesellschaft selbst.”); PFISTER, p. 13; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 141. \(^{478}\)

\textit{See} ROTHIEL/ERNI, p. 5; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 146; WEBER, \textit{HSG-Weiterbildungsstufe}, p. 27. \(^{479}\)
IV Voice

A Concept

HIRSCHMAN characterizes voice “as any attempt at all to change, rather than to escape from, an objectionable state of affairs”. The concept of voice is closely related to participation (in German, Mitbestimmung), which implies the sharing of voice to some extent with others in an organization. The legal and social science literature offers a wide variety of notions about, forms of, and reasons for participation, or voice. The following section provides an overview of different concepts of voice along with related terms.

1 De Jure and De Facto Voice

The PEMI’s voice is determined by both de jure and de facto means of influence. De jure voice refers to the PEMI’s participation in corporate decision making based on statutory laws and privately negotiated control rights and related arrangements. For example, de jure voice is conferred as the PEMI’s right to take part in the general meeting. Moreover, statutory de jure voice is determined by the investor’s voting right at the general meeting which, in principle, is proportionate to the nominal value of the shares held. De jure voice based on Swiss corporate law, does not, however, encompass any guarantee to materially influence corporate decision making, that is, the power to move the needle or even to control the outcome of decision making. The effect of de jure voice varies

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480 HIRSCHMAN, p. 30.
481 See RHINOW, p. 163. For instance, compare the Federal Council report, BBI (1973), p. 241 et seq. (in which the Swiss Federal Council uses Mitbestimmung as a generic term and subsumes the shareholder right to information and to participate in decision shaping and co-decision taking, in German, Mitspracherecht and Mitentscheidungsrecht). In comparison, see STAUFFACHER, p. 21 (using Mitwirkung instead of Mitbestimmung as a generic term and subsumes Mitsprache and Mitentscheidung).
482 See SPILLMANN, p. 249 et seq. RUFFNER, Grundlagen, p. 415 et seq., particularly FN 278 and p. 418 (referring to the significance of informal contacts with management).
483 See APEL, p. 83 (speaking of Mitbestimmungsrecht and using the term only if “eine formale Rechtsgrundlage und ein darauf beruhender Rechtsanspruch auf Einwirkung vorhanden sind, gleichviel, ob sich der Rechtsanspruch aus einem Gesetz, einer Verordnung, einem Vertrag (Tarifvertrag, Betriebsvereinbarung usw.) oder einer sonstigen rechtlich bindenden Abmachung ergibt.”); CUMMING, p. 4 (“Control rights refer to the allocation of rights to make decisions in respect to the venture.”).
484 See Section IV.D.3.1.1.
485 In APEL’s view, Mitbestimmung is to be differentiated from the less effective Mitwirkung. see APEL, p. 86 et seq. (“Auch die unmittelbar tätige Mitwirkung bei der Durchführung von Entscheidungen kann unbeschadet ihrer praktischen Wirksamkeit nicht als Mitbestimmung
considerably. It can relate to consultation at one end of the spectrum, to formal participation in corporate decision making without any de facto voice, to situations in which corporate resolutions cannot be passed against the will of anyone entitled to participate, and – at the other end of the spectrum – to situations in which decisions can be controlled (see Figure 14).\textsuperscript{486} Hence, different from exit, which is a binary means of protection (the Pemi either exits or stays in), voice is a gradual, more flexible instrument.\textsuperscript{487} As MEANS astutely points out, “voice is a political mechanism and need not be synonymous with control … its value lies in its nuance, as a means of shaping the goals of a close corporation to better accommodate the interests of all shareholders.”\textsuperscript{488}

\begin{figure}[h]
\centering
\includegraphics[width=0.8\textwidth]{shapes_of_voice.png}
\caption{Shapes of voice (Source: based on PICOT/DIETL/FRANCK, p. 235)}
\end{figure}

\textit{De facto voice} refers to a situation in which the respective parties can influence the outcome of the decision-making process and, as the case may be, assert their will against that the voice of others in a social relationship.\textsuperscript{489} While de jure voice can, but not always does, confer de facto voice, de facto voice can, but is not necessarily based on de jure voice (see soft factors in Section III.C). For example, private equity professionals may materially influence the decision-making outcome, even without respective legal decision-making rights, during personal discussions among shareholders and at board meetings, and other events where they can

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\textsuperscript{486} Im engeren Sinne gedeutet werden, ebenso wenig ein reines Kontrollrecht (Rechenschaftsbericht); denn von ihm geht eine unmittelbare Einwirkung auf Entscheidungen nicht aus.”).
\textsuperscript{487} Also called co-decision taking (in German, Mitbestimmung im engeren Sinne). See APEL, p. 84 (“Im Unterschied zu schwächeren Einwirkungsrechten kann von mitbestimmender Einflussnahme, d.h. also von Mitbestimmung im engeren Sinne, nur gesprochen werden, soweit Entscheidungen nicht wirksam werden können gegen den geschlossenen Willen der Mitbestimmungsberechtigten.”).
\textsuperscript{488} See HIRSCHMAN, p. 15.
\textsuperscript{489} See MEANS, p. 1233.
\textsuperscript{489} See WEBER, Grundbegriffe, p. 42.
\end{flushright}
convince other participants of a certain view, due to their expertise, persuasiveness, or threats of non-legal sanctions (so-called soft-steering).  

2 Ex Ante and Ex Post Voice

The PEMI can exercise voice during the four stages of decision making. Firstly, voice is used when initiating an institutionalized decision-making process. In the second stage, decision shaping, when various approaches and motions are evaluated (formally in meetings and informally in discussions outside of meetings) and the participants form their views, voice refers to the ability of influencing the opinions of other participants. Voice-related rights at this stage include the right to participate in discussions, to express oneself freely on agenda items, to submit motions related to the agenda items, to issue statements for protocol purposes, and to object to the attendance of unauthorized persons at formal meetings. Thirdly, voice relates to the ability to participate in decision taking, such as voting on a resolution representing the company’s will. Fourthly, once a decision is made, the question arises as to whether the PEMI is able to review, object to, and even reverse a decision taken (ex post voice). To this end, Swiss corporate law provides a range of possible instruments; for instance, the right to challenge resolutions, the right to petition the court for a declaration of nullity, and/or the right to initiate a special audit. Since these rights, as previously pointed out, do not represent preventive means of participation, they are not analyzed in detail in this dissertation.

490 See Spillmann, p. 250.
491 Also called decision making in a narrow sense.
492 CO 706 et seq.
493 CO 706b.
494 CO 697a et seqq.
495 See FN 28.
3 Passive and Active Voice

Assuming that the PEMI has de facto voice in corporate decision making at the general meeting, two further types of voice can be distinguished: passive voice and active voice. In case of passive voice (or negative control) the PEMI is in a position “to prevent the company from doing something,” that is, the PEMI can exercise veto power. Active voice (or positive control) refers to a situation in which the PEMI can control certain decisions independently.

4 Focus of This Dissertation

Most PEMIs focus on obtaining ex ante voice because they want to prevent the company from making poor decisions, rather than having to challenge a bad decision ex post, which is a trying, complex, and lengthy process. Moreover, PEMIs focus on de facto voice because only this kind of voice allows them to materially influence decision making. De facto voice based on extra-legal factors has advantages: it is very effective at enforcing PEMI interests and can promote trust between parties, and is therefore of major importance to PEMIs. However, this study focuses primarily on the legal

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496 Also called positive and negative control, see PEARCE/BARNES, p. 45.
497 PEARCE/BARNES, p. 45.
498 See HÜNERWADEL, p. 12 ("Kontrolle muss umfassender verstanden werden: Sie verkörpert die Entscheidungsmacht, welche letztlich über Geschäftspolitik und Rechtsbeziehungen von Gesellschaft und Unternehmen bestimmt.").
499 See SPILLMANN, p. 251.
Chapter IV: Voice

structuring options to enhance the PEMI’s de facto voice flowing from de jure voice. De facto voice, based on legal rights and arrangements, is an effective lever for PEMIs to use when they need to exercise pressure in cases of disagreements with majority shareholders or due to lack of cooperation of management as the threat of taking ‘the official path’ helps them to get certain informal demands met. Where the term voice is subsequently used in this dissertation, it relates not just to a discrete event, but an institutionalized process in which the PEMI can initiate corporate decision making, enjoy equal access to information relevant to business decisions, has the ability to actively participate in opinion shaping, and, depending on its voting power with respect to the particular matter, can materially influence the outcome of the decision-making process.

B Functions

1 Safeguarding Minority Investor Interests

In a world of transaction costs and as a result of the complex and long-term relationships among shareholders and between the shareholders and the company, corporate documents such as the articles of association and shareholders’ agreements are inherently incomplete and lack provisions on the myriad business situations and problems that can arise during the course of doing business. Inevitably, unforeseen and sometimes unlikely or unspecified situations not addressed in a corporate contract or the articles of association will arise that shareholders will need to address during the course of the investment. Voting, whether by the shareholders or the directors, is the key mechanism to address these contingencies. If the parties do not stipulate certain procedures for decision making, the power to decide follows from the voting mechanism as stipulated by statutory laws. The extent of how many rules and directions are stipulated in corporate documents and by contract and how much is resolvable by voting is a result of the balance between the flexibility to react to unforeseen changes in circumstances and the PEMI’s need for protection against moral hazard. From the minority investor’s perspective, the voting mechanism should

500 See ibid, p. 250.
501 See FN 192.
502 See FN 189.
503 See RUFFNER, Grundlagen, p. 136 (holding that incomplete contracts necessitate follow-up negotiations).
504 See EASTERBROOK/FISCHEL, p. 66 (“the right to vote is the right to make all decisions not otherwise provided by contract”) and p. 403 (“Voting exists in corporations because someone must have the residual power to act (or delegate) when contracts are not complete.”); RUFFNER, Grundlagen, p. 173.
enable the PEMI to effectively safeguard its interests, particularly in fundamental business decisions. Ex ante, that is, during the negotiations leading to a minority investment, underestimating the possibility of disagreements during the course of the investment can have dire consequences because the PEMI, locked in the investment, is forced to submit to the will of the controlling shareholder. A key reason for PEMIs to obtain voice is to gain the power to effectively protect their interests and strengthen their bargaining power ex post, particularly when unforeseen circumstances arise. It is therefore important that PEMIs understand the statutory voting mechanism prior to entering a minority investment and, if this mechanism is weak or unsuitable, PEMIs should explicitly negotiate for more effective mechanisms. If the parties agree to a voting mechanism in which, from the outset, the controlling shareholder is encouraged to behave cooperatively and to engage in open and constructive discussions in which the PEMI’s interests are adequately considered, such mechanism can serve as a precautionary measure and will reduce the probability of conflict.

2 Monitoring

A second important purpose of granting voice to PEMIs is based on the notion that voice enhances effective monitoring. Without viable voice or exit options, the PEMI is at the controlling shareholder’s mercy and, in view of this power imbalance, has little incentives to engage in costly monitoring activities. Conversely, the power to influence corporate decision making provides the PEMI with incentives to engage in active monitoring of the company’s performance and the actions of the executive managers in charge. As a result, monitoring no longer rests solely on the majority shareholder’s shoulders, but is shared with the minority investor which in turn enhances the overall control of the company. Thereby, the control deficit existing in many family firms and stemming from concentrated decision structures can be reduced.

3 Reduction of Agency Conflicts

From the PEMI’s perspective, voice does not only provide incentives to monitor the company’s executive organs, but is equally important with respect to keeping an eye on the controlling shareholder’s behavior (and those of the corporate organs nominated by him/her). If the PEMI’s voice is

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505 See BÜHLER, Leitlinien, p. 319.
strong enough to stop opportunistic behavior this can help to mitigate agency problems and reduce associated agency costs.  

4 Performance of Advisory Role

In addition to mitigating opportunistic behavior, voice permits PEMIs’ timely reaction if the business starts to head south (downside protection). Equally important is the function of voice as an upside protection tool enabling PEMIs to engage in corporate entrepreneurship and bring in their professional expertise, experience, ideas, and business contacts. A balanced distribution of de facto voice is in the interest of all shareholders not only because it offsets a control deficit that hinders many family firms and promotes a balance of interests, but also because it encourages the PEMI to engage in creative dialogue, exchange thoughts, bring in new ideas, and evaluate ongoing and potential projects, organizational structures, and processes, thereby creating conditions for deviating from well-traveled paths, stimulating corporate renewal, and enhancing the capacity for innovation. Moreover, granting the PEMI voice also has a signaling effect. For instance, the participation of a PEMI can become important when lenders assess the company’s creditworthiness. For a private equity investor’s commitment to increase the lender’s trust in the company’s management abilities, it is necessary for the PEMI to have de facto voice and not be ultimately subservient to the controlling shareholder.

C The Pillars of Voice

The PEMI’s voice rests on three pillars. The first pillar represents the legal framework, which includes the voice-related rights and standards as defined by corporate law. The second pillar, the privately negotiated voice-enhancing tools and arrangements, includes instruments that allow the parties to devise a participation concept individually tailored to fit the investment situation by addressing, inter alia, shareholders’ voting rights, information rights, the composition and operation of the board of directors and the executive management, related-party transactions, conflict resolution, etc. This pillar is the central focus of this dissertation and rests on the assumption that the parties are best positioned to design a suitable participation concept. The third pillar that influences the PEMI’s ability

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506 See RUFFNER, Grundlagen, p. 173; BAUMS, p. 111.
507 See BURKHALTER, KMU-Relevanz, N 20; TYLOR, p. 208.
508 This pillar also includes the courts, which play a central role in interpreting the law and completing contracts ex post.
509 See McCahery/VERMEULEN, p. 5.
to participate in corporate affairs rests on *soft factors*, the non-legal dynamics that influence the relationship between the Pemi and the controlling shareholder, including market forces, shared interests and objectives, mutual trust and respect, personal chemistry, appreciation of the business partners’ knowledge, skills, and experiences, and reputational incentives. Non-legal factors are key in governing the relationship between the controlling shareholder and the Pemi. Yet, circumstances may arise in which the Pemi’s *soft voice* is ineffective due to diverging interests (e.g., where strong incentives exist for the controlling shareholder to engage in opportunist behavior) and due to incongruent views between the majority shareholder and the Pemi (e.g., dissonances on the best strategy to maximize firm value). In these instances, the Pemi’s voice relies on the first two pillars. They confer de jure voice, that is, voice based on statutory laws and privately negotiated rights and arrangements, and significantly help protect the Pemi from majority shareholder oppression.\(^\text{510}\)

![Figure 16: Pillars of voice](image)

With these pillars, voice is exercised at different levels of the corporate hierarchy. By law, *stock corporations* follow a *tripartite governance structure* comprising the *general meeting of shareholders*,\(^\text{512}\) which appoints the *board of directors*, in charge of managing and representing the

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\(^{510}\) *Ibid*, p. 11.

\(^{511}\) A similar concept is used in a slightly different context by *McCahery/Vermeulen*, p. 4 et seq.

\(^{512}\) See *Dubs/Truffer, Basler Kommentar*, CO 698, N 2; *Von Borens/Stoffel/Webber*, p. 103, N 467; *Baun/Bernet*, p. 137, N 396; *Perakis*, p. 18 (calling the general meeting the “legislative forum of the company”).
company, and the auditors\textsuperscript{513} responsible for conducting an impartial audit of the firm’s financial accounts. In addition to these three statutory organs, further optional bodies may be created such as board committees and advisory boards.\textsuperscript{514} Moreover, the board of directors typically delegates the day-to-day operational management of the company to individual members (delegates, executive directors) or to third parties (officers, managers or a management board\textsuperscript{515}), thereby creating an additional corporate body.\textsuperscript{516} It follows that PEMIs can principally exert influence on company matters by exercising their voting rights at general meetings, by sitting on the portfolio company’s board of directors, board committees, and the advisory board, as well as by assuming management functions, even though the latter is seldom desired.\textsuperscript{517}

In a GmbH, the members together manage and represent the company unless otherwise provided in the articles of association.\textsuperscript{518} The articles of association can provide that the meeting of members appoints individual members or third parties as managing officers. If necessary, an impartial audit of the annual financial statements is carried out by the auditors.\textsuperscript{519} Moreover, further optional bodies (e.g., an advisory board) may be introduced.

\section*{D Minority Investor Voice at Shareholder Level}

As shareholder, the PEMI’s de jure voice in corporate decision making is determined by (i) the rights related to participation in the general meeting, (ii) the respective powers and responsibilities of the general meeting, (iii) the PEMI’s voting power in corporate decision-making processes, and (iv) further organizational aspects that do not necessarily confer voice but influence it. PEMIs can use these factors as levers to enhance their voice as shareholders. This section analyzes each factor, first by outlining the related statutory framework and illustrating the PEMI’s rights in the absence of any

\begin{itemize}
\item \textsuperscript{513} In the context of this dissertation, the rights and duties of auditors are neglected since neither the PEMI nor the majority shareholder may form part due to the statutory requirements as to the independence and professional qualifications of the auditors.
\item \textsuperscript{514} See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 20, N 34 et seqq.
\item \textsuperscript{515} CO 716b I. See BAUEN/BENET, p. 156, N 457.
\item \textsuperscript{516} See KNETA, CO 716, N 117; KOLLER, Grundgerüst, p. 802; FORSTMOSER, Organisationsreglement, p. 47 (stating that executive organs include the board of directors, the chairman of the board and possibly delegates of the board of directors, a third party executive management board, singular members thereof, and directors and managers of branch offices).
\item \textsuperscript{517} For reasons, see FN 144.
\item \textsuperscript{518} CO 809 I.
\item \textsuperscript{519} CO 818 I i.c.w. 727 et seqq.
\end{itemize}
privately negotiated arrangements. Next, the privately negotiable legal tools and arrangements available to enhance the PEMI’s voice are discussed.

1 Participation in the General Meeting

1.1 Statutory Framework

1.1.1 The Right to Attend

The general meeting is the platform for shareholders to participate in corporate decision making and exercise their voice.\textsuperscript{520} PEMIs have a right under Swiss corporate law to attend general meetings, irrespective of the size of their stakes.\textsuperscript{521} This right is frequently referred to as the formal right to vote.\textsuperscript{522} PEMIs may attend the general meeting if they are listed in the share register or authorized in writing by a shareholder in case of registered shares\textsuperscript{523} or upon proving possession of their shares in the case of bearer shares\textsuperscript{524}. In a GmbH, all members listed in the share register at a certain cutoff date\textsuperscript{525} are entitled to vote and to exercise voice-related rights.\textsuperscript{526}

1.1.2 The Right to Invitation

To be able to attend the general meeting in practice, the PEMI has certain ancillary rights such as the right to receive a timely invitation along with the agenda\textsuperscript{527} of the general meeting and associated motions.\textsuperscript{528} The board of directors also informs the shareholders that the annual report and the auditor’s report are available for inspection and that the shareholders are entitled to receive a copy of the related documents, upon request, in a timely manner.\textsuperscript{529} Moreover, the invitation should contain administrative details on the meeting’s procedure as well as voting rights and voting

\textsuperscript{520} See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 40, N 130.
\textsuperscript{521} See BAUEN/BERNET, p. 99, N 300. With respect to the GmbH, see TRUFFER/DUBS, Basler Kommentar, CO 806, N 3.
\textsuperscript{522} See SCHAAD, Basler Kommentar, CO 689, N 14; MEYER, Stimmrechtsvertreter, p. 7.
\textsuperscript{523} CO 689a I.
\textsuperscript{524} CO 689a II.
\textsuperscript{525} The cut-off date is either stated in the articles of association or based on an objectively justifiable decision of the managing officers. See HANDSCHIN/TRUNINGER, § 13, N 28; NATER, p. 52.
\textsuperscript{526} See NUSSBAUM/SANWALD/SCHIEDEGGER, CO 805, N 1.
\textsuperscript{527} The agenda is a list of items to be dealt with at the general meeting.
\textsuperscript{528} CO 700 I and II. With respect to the GmbH, see TRUFFER/DUBS, Basler Kommentar, CO 805, N 21; NATER, p. 47.
\textsuperscript{529} CO 696 I.
that only agenda items must contain the annual report and, as the case may be, the auditor’s report. 531

1.1.3 The Right to Call

The right to call a general meeting is critical to PEMIs as it enables them to actively initiate corporate decision making at the shareholder level without depending on the board of directors to do so. In principle, general meetings are called by the board of directors. 532 Shareholders (as individuals or as a group) also can commence the decision-making process by requesting to convene a general meeting if they represent, in aggregate, at least 10% of the firm’s capital. 533 Such a request must be made in writing and include details on the agenda items and the related motions. 534

1.1.4 The Right to Place Items on the Agenda

The power to influence the agenda is of utmost importance for the Pemi in that only agenda items properly placed on the agenda and transmitted to the

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530 See with further details BÖCKLI, Aktienrecht, § 12, N 99 et seq.; DUBS/TRUFFER, Basler Kommentar, CO 700, N 13; VON BÜREN/STOFFEL/WEBER, p. 110, N 510.

531 CO 699a.

532 CO 699 I. Similarly, the meeting of members in a GmbH are called by the managing officers (CO 805 I); HANDSCHIN, Swiss company law, p. 71.

533 CO 699 III. Moreover, the auditor, the liquidators and the representatives of bondholders (CO 699 I) as well as the general meeting itself have a right to convene a general meeting in the situations specified by law. See von Büren/Stoffel/Weber, p. 107 et seq., N 491 et seq.; BAUEN/BERNET, p. 142, N 408. Some corporate law scholars find, although not expressly stipulated by law, that shareholders together representing shares with a nominal value of CHF 1 million may also request the convening of a general meeting even if the aggregate nominal value is less than 10% of the share capital. In favor are Böckli, Aktienrecht, § 12, N 61; Dubs/Truffer, Basler Kommentar, CO 699, N 12; with respect to the GmbH, KÜNG/CAMP, CO 805, N 7. Of another opinion are von Büren/Stoffel/Weber, p. 110, N 506; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 23, N 26. The question is clarified in the Draft Legislation (see FN 463) where the threshold for the convening of a general meeting is explicitly stated as 10% of the share capital or of the votes, or shares with a nominal value of CHF 1 million in the case of privately held companies (D-CO 699 III Sec. 2). The board of directors must respond to such request within 60 days failing which the applicants may request the court to order the calling of the meeting (D-CO 699 V). With respect to the GmbH, CO 805 V Sec. 1, 2 i.c.w. CO 699 III. See TRUFFER/DUBS, Basler Kommentar, CO 805, N 9 et seqq.; NUSSBAUM/SANWALD/SCHIEDEGGER, CO 805, N 31; HANDSCHIN/ TRUNINGER, § 13, N 20 et seqq. The auditors, liquidators, the general meeting itself, and optional organs (if entitled by the articles of association) are also entitled to call the meeting of members (CO 805 I); see Truffer/Dubs, Basler Kommentar, CO 805, N 13 et seqq.

534 CO 699 III. See BÖCKLI, Aktienrecht, § 12, N 64; VON BÜREN/STOFFEL/WEBER, p. 109, N 506; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 23, N 18; TANNER, Beschlussfassung, p. 767. With respect to the GmbH, see Truffer/Dubs, Basler Kommentar, CO 805, N 11; NATER, p. 46.
shareholders can be discussed and voted upon.\textsuperscript{535} The agenda is generally determined by the board of directors.\textsuperscript{536} Shareholders who individually or together represent shares of an aggregate nominal value of CHF 1 million can also place an item on the agenda of a forthcoming general meeting.\textsuperscript{537} In addition, the board of directors may also accept motions or agenda items from shareholders not meeting such threshold.\textsuperscript{538} Such requests must be made in writing and include the motion(s) related to the respective agenda item.\textsuperscript{539}

Swiss corporate law does not specify when such requests should be submitted, only in good time to reasonably allow the directors to assess the request and place the requested item on the agenda, which is at least 20 days prior to the meeting date.\textsuperscript{540} Shareholders do not have a right to place

\textsuperscript{535} Motions cannot be validly decided without being on the agenda, except for the following cases: when the requirements for a plenary meeting are satisfied (CO 701), concerning motions for convening an extraordinary general meeting of shareholders, for the initiation of a special audit, for appointing auditors at the request of a shareholder (CO 700 III), for waiving the requirement for auditors to be present (CO 731 II), and for the entry of items on the agenda of the next general meeting, see BGE 121 III 420, E. 2a). Also see Böckli, Aktienrecht, § 12, N 71; Schaad, Basler Kommentar, CO 689, N 22; Baüen/Bernet, p. 99, N 300, FN 51; Meier-Hayoz/Forstmoser, § 16, N 376; Forstmoser/Meier-Hayoz/Nober, § 23, N 61. On the purpose of such provisions, see Brunner, p. 66 (mentioning the protection against unusual maneuvers by the board of directors or shareholders in which they take advantage of a scarcely frequented routine general meeting). With respect to the GmbH, CO 805 V Sec. 4 i.c.w. CO 700 III. On the importance of determining the agenda, see Trickner, p. 248.

\textsuperscript{536} See Watter/Rampini, p. 9 and 20; NOBER, Formelle Aspekte, p. 23.

\textsuperscript{537} CO 699 III. Although not expressly stipulated by law, prevailing opinion holds that shareholders representing at least 10% of the share capital may also request items to be placed on the agenda even if the nominal value of their combined shares is less than CHF 1 million. In favor of this view are Böckli, Aktienrecht, § 12, N 66; Dubs/Truffer, Basler Kommentar, CO 699, N 23; Baüen/Bernet, p. 100, N 302; Meier-Hayoz/Forstmoser, § 16, N 362; von Bürén/Stoffel/Weber, p. 191, N 920; Müller/Lipp/Plüss, p. 411; Hofstetter, Corporate Governance Report, p. 14; Watter/Maizar, p. 422; Bertschinger, Ausgewählte Fragen, p. 901 et seq.; NOBER, Switzerland, p. 319; NOBER, Formelle Aspekte, p. 24. Opposing this opinion is Kunz, Minderheitenschutz, § 11, N 144. According to the Draft Legislation (see FN 463), the request to place an item on the agenda can be made by shareholders whose share represents 2.5% of the share capital or votes, or whose shares hold an aggregate nominal value of CHF 250'000 in the case of privately held companies (D-CO 699a I Sec. 2). With respect to the GmbH, CO 805 V Sec. 2 i.c.w. CO 699 III.

\textsuperscript{538} See NOBER, Switzerland, p. 319.

\textsuperscript{539} CO 699 III. For further remarks on the requirements as to the content of the requested agenda items, see Böckli, Aktienrecht, § 12, N 67a; Dubs/Truffer, Basler Kommentar, CO 699, N 27 et. seq. and CO 700, N 11 et seq.

\textsuperscript{540} See Baüen/Bernet, p. 100, N 302; Forstmoser/Meier-Hayoz/NOBER, § 23, N 29. For proposals, see Böckli, Aktienrecht, § 12, N 69 (proposing a lead time of 20 to 25 days prior to sending the meeting notice to the general meeting or 40 to 50 days before the day of the general meeting); Dubs/Truffer, Basler Kommentar, CO 699, N 30 (finding a period of 45 days before the general meeting of large companies appropriate); Krneta, CO 716a, N 1432.
items on a general meeting agenda which is already called.\textsuperscript{541} Although the agenda items requested must be submitted together with the respective motions, such motions can be modified by the shareholders and supplemented at any time before or during the general meeting without giving prior notice.\textsuperscript{542} Moreover, discussions on other matters can take place without prior notice as long as they are related to corporate affairs and no resolutions are called for or passed.\textsuperscript{543}

1.1.5 The Right to Participate in Decision Shaping

The ability to participate in decision shaping is critical in that it allows PEMIs to draw attention to their interests and other considerations and thereby possibly influence the views of fellow shareholders. Physical attendance at general meetings is not equivalent to participating in the decision shaping process. To do so, PEMIs have a right to participate in discussions, to express themselves freely on agenda items provided an orderly conduct of the general meeting and a proper discussion is ensured\textsuperscript{544} to submit motions related the agenda items,\textsuperscript{545} to issue statements for protocol purposes, and to object to the attendance of unauthorized persons\textsuperscript{546},\textsuperscript{547}.

(mentioning a period of 50 days as an example). The Draft Legislation provides that the request must be submitted in writing at least 50 days prior to the general meeting (D-CO 699a III). The 50-day period generally leaves enough time to include the requested agenda items in the publication for the convening of the general meeting. However, it implies that the shareholders know about the date of the general meeting and the proposed agenda. In privately held companies where invitations for general meetings are oftentimes planned at shorter notice and the agenda items and associated motions appear in the invitation for the first time, such a period is difficult for the shareholders to meet. Moreover, shareholders may want to make a motion on an agenda item proposed by the board of directors prior to the general meeting and have it sent to fellow shareholders. \textit{See} GLANZMANN, \textit{Aktienrechtsrechtsrevision}, p. 675 (correctly pointing out that this need is not addressed by the wording of the Draft Legislation).

\textit{See} BÖCKLI, \textit{Aktienrecht}, § 12, N 68.


\textit{See} FORSTMOSER/MEIER-HAYOZ/NOBEL, § 23, N 66.


\textit{See} TRUFFER/DUBS, \textit{Basler Kommentar}, CO 805, N 3; NATER, p. 52.

\textit{See} TRUFFER/DUBS, \textit{Basler Kommentar}, CO 805, N 3; NATER, p. 52.
1.2  Assessment of Legal Status and Further Need for Protection

Table 4 summarizes the most important voice-related statutory rights concerning Pemi participation in general meetings and shows the respective shareholdings required to obtain such rights under Swiss corporate law. It illustrates the extent to which these rights provide PEMIs with de facto voice and their resulting level of protection.

<table>
<thead>
<tr>
<th>Voice-Related Right</th>
<th>Required Shareholding</th>
<th>Impact on Pemi De Facto Voice</th>
<th>Assessment of Protection</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to attend GMs</td>
<td>Irrespective of size of shareholding</td>
<td>Provides basis for, but no de facto voice itself</td>
<td>√</td>
</tr>
<tr>
<td>Right to receive a formal invitation, the agenda &amp; associated motions for GMs</td>
<td>Irrespective of size of shareholding</td>
<td>Provides basis for, but no de facto voice itself</td>
<td>√</td>
</tr>
<tr>
<td>Right to call a GM</td>
<td>≥ 10% of share capital (or, debated, ≥ CHF 1 million nominal value)</td>
<td>Provides basis for, but no de facto voice itself</td>
<td>Protection only if shareholding ≥ 10% of share capital (or ≥ CHF 1 million nominal value)</td>
</tr>
<tr>
<td>Right to include items on GM agenda</td>
<td>≥ CHF 1 million nominal value (or, according to prevailing opinion, ≥ 10% of share capital)</td>
<td>Provides basis for, but no de facto voice itself</td>
<td>Protection only if shareholding ≥ CHF 1 million nominal value (or ≥ 10% of share capital)</td>
</tr>
<tr>
<td>Right to participate in decision shaping at the GM (participate in discussions, express opinions, submit motions, issue statements &amp; object to unauthorized attendance)</td>
<td>Irrespective of size of shareholding</td>
<td>Potential for de facto voice if shareholders form their combined will at the GM &amp; are open to discussion</td>
<td>Theoretically granted by law, but de facto depends on circumstances</td>
</tr>
</tbody>
</table>

*Table 4: Rights of participation in general meetings*
Since PEMIs, as shareholders, are by law entitled to attend the general meeting irrespective of the size of their shareholdings and have ancillary rights that enable them to do so, such as the right to receive a formal invitation, the meeting agenda, and the associated motions, there is no need for further contractual protection in this regard. The PEMI’s right to request that a general meeting be called is necessary to initiate an official discussion and decision making on particular items within the powers of the general meeting. PEMIs may need to negotiate for special arrangements if they fall short of the threshold of 10% of the share capital (or of CHF 1 million) required to call a general meeting and to place items on the agenda. With respect to participation in decision shaping at the general meeting, Swiss corporate law entitles PEMIs to do so irrespective of the size of their shareholdings. Whether this kind of de jure voice translates into de facto voice depends on whether their fellow shareholders are open to discussion and actually form their opinions on issues during lively discussions at the general meeting, that is, whether decision shaping actually happens at the general meeting or prior to this. In reality, views and opinions are oftentimes shaped in private discussions prior to the general meeting. Opinion shaping at the general meeting, however, cannot be dictated by law. The same considerations apply analogously to related issues at GmbHs.

1.3 Legal Structuring Options

By and large, PEMIs’ participation in the general meetings as shareholders is secured by law, thus, there is little need for privately negotiated arrangements in that regard. Only if falling short of the statutory thresholds to initiate decision making at the general meeting and to place items on the agenda may the investor want to negotiate for lower thresholds to be stated in the articles of association.

2 Scope of Minority Investor Voice at the General Meeting

2.1 Statutory Framework

The importance of participating in the general meeting with respect to the PEMI’s overall voice in corporate decision making is a function of the

548 See FN 533 and FN 537.
549 See BÖCKLI, Revisionsfelder, p. 746; SPILLMANN, p. 180; FORSTMOSE, Meinungsaussersungsrechte, p. 126. With respect to the GmbH, see NATER, p. 53.
550 See FN 1298.
decisions made at the general meeting, which, in turn, depend on the body’s powers. The matters decided by the general meeting based on the statutory division of powers between a company’s organs determine the objective scope of the PEMI’s potential de jure voice in corporate decision making as a shareholder.\textsuperscript{551}

The general meeting is vested with responsibilities of fundamental importance to the company. The mandatory provisions of the Swiss Code of Obligations confer the following \textit{inalienable powers} to the general meeting: (i) \textit{internal regulation} (adoption and amendment of the articles of association, including the corporate purpose), (ii) \textit{determination of personnel resources} (election and removal\textsuperscript{552} of members of the board of directors and the auditors\textsuperscript{553}), (iii) \textit{supervision} (approval of the annual report, annual financial statements, and consolidated financial statements, and the discharge of the board of directors members), and (iv) \textit{determination of the share capital} (including the amount of dividends for shareholders and the board of directors’ shares in profits).\textsuperscript{554} In these core areas, the general meeting is considered \textit{exclusively authorized}; that is, it is unlawful for the general meeting to delegate any responsibility to the board of directors or a shareholder subcommittee via the articles of association or a resolution. Moreover, the general meeting can pass resolutions on matters authorized by law\textsuperscript{555} or by the articles of association.\textsuperscript{556}

The scope for incorporating additional corporate matters in the articles of association on which the general meeting shall decide is fairly limited due to the so-called \textit{principle of parity} (\textit{Paritätsprinzip}). Pursuant to this principle, each of the three legally required corporate bodies (the general meeting, the board of directors, and the auditors) has its own sphere of non-
delegable and inalienable powers which, in principle, cannot be transferred to any other body and must not be encroached upon by any other body.\textsuperscript{557} In a Swiss stock corporation, the board of directors is in charge of managing the firm, and establishing the business strategies, not the shareholders \textit{(principle of third-party management)}.\textsuperscript{558}

The principle of parity also applies to Swiss GmbHs in that the meeting of members and the managing officers each have certain non-delegable and inalienable powers determined by corporate law.\textsuperscript{559} Yet, the meeting of members’ list of inalienable powers is more extensive than that of the general meeting in a stock corporation because there is no governance level between the members and the managing officers.\textsuperscript{560} In addition, the GmbH’s meeting of members decides on further items set out by Swiss corporate law,\textsuperscript{561} the GmbH’s articles of association,\textsuperscript{562} and submitted by the managing officers.\textsuperscript{563}

\textsuperscript{557} In detail on the principle of parity, see KAMMERER, p. 65 \textit{et seqq}. (“Die Paritätstheorie weist den einzelnen Organen ihre jeweiligen Kompetenzen vollständig, eindeutig und verbindlich zu und verbietet insbesondere der Generalversammlung, in Zuständigkeitsbereiche des Verwaltungsrates einzudringen. Solche Eingriffe dürfen auch nicht statutarisch oder vertraglich vorgesehen werden.”); BÖCKLI, \textit{Aktienrecht}, § 12 N 3 and § 13, N 286 (criticizing the term); DUBS/TRUFFER, \textit{Basler Kommentar}, CO 698, N 8; WATTER/ROTH PELLANDA, \textit{Basler Kommentar}, CO 716a, N 1 (relativizing); BAUEN/BERNET, p. 136 N 394; MEIER-HAYOZ/FORSTMOSER, § 16, N 353; VON BÖREN/STOFFEL/WEBER, p. 103, N 470; ROTH PELLANDA, p. 219, N 448; KRNÉTA, CO 716, N 1142; MEIER-SCHATZ, \textit{Kompetenzbereich}, p. 264, with further references to legal experts in FN 3 and 4; HOMBURGER, \textit{Zürcher Kommentar}, CO 716a, N 514; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 20, N 10 \textit{et seqq}


\textsuperscript{559} See GASSER/EFFECTENBERGER/STÄUBER, \textit{Orell Füssli Kommentar}, CO 804, N 2; TRUFFER/DUBS, \textit{Basler Kommentar}, CO 804, N 9; WATTER/ROTH PELLANDA, \textit{Basler Kommentar}, CO 810, N 1 and CO 811, N 5; MEIER-HAYOZ/FORSTMOSER, § 18, N 107; FORSTMOSER/PEYER, p. 399; NATER, p. 20 \textit{et seqq}, 148. Since the meeting of members in a GmbH has more possibilities of intervening in management decisions in comparison to the general meeting in a stock corporation, certain legal scholars speak of a \textit{relative parity principle} with respect to the GmbH, see NATER, p. 166; OLIVAR PASCUAL/ROTH, p. 472.

\textsuperscript{560} For largely equivalent powers, see CO 804 II Sec 1-5, 7 and 16. While the meeting of members may remove managing officers appointed by it at any time, it must not, different from the general meeting, remove managing officers who have obtained their position by law (self-management) or via the articles of association. These managing officers may be removed by requesting the court to do so (CO 815 I and II). For additional powers, see, e.g., CO 776a I Sec. 3, 6, 10, 11, 17, and 18; CO 804 II Sec. 6-15, 17, 18. See KRATZ, \textit{Handkommentar}, CO 804, N 8; SIEFERT/FISCHER/PETRIN, CO 804, N 5; NATER, p. 123; BÖCKLI, \textit{GmbH-Recht}, p. 23 \textit{et seq}; KÖHLER, p. 136.

\textsuperscript{561} E.g., CO 781 I and 782 I (decisions on increases or reductions of the stated capital); CO 804 III (appointments of the executive directors, holders of procurement, and the commercial mandate holders. This right may, however, be conferred to the managing officers via the articles of association); CO 809 III (election of the chair of the management); CO 822 II (approval of withdrawal of a member if neither a valid reason nor a basis in the articles of association is fulfilled), see NATER, p. 144 \textit{et seqq}. 

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Part Two: Legal Framework and Tools

2.2 Assessment of Legal Status and Further Need for Protection

In a GmbH, the members, by default, manage the company together. Yet, PEMIs hardly ever seek to be involved in the day-to-day management and are likely to favor delegation to managing officers (family members or third parties). On the other hand, active PEMIs typically do not want to cede their invested capital entirely to other members or third parties and want to maintain a say in important corporate decisions. In a stock corporation, if not represented on the board of directors, the PEMI may want to modify the division of powers so that more decisions are decided upon or at least approved by the general meeting in which the PEMI participates. Therefore, the question arises whether there are ways to adapt the statutory division of powers between the corporate organs in a stock corporation (and a GmbH) – a question which is amongst the most contentious topics in corporate law.

2.3 Legal Structuring Options

When analyzing the division of powers between the general meeting and the board of directors in a stock corporation, a distinction can be made between the assumption of powers by and the transfer of powers to the general meeting. In case of an assumption of powers, the general meeting assumes a certain power that normally falls into the realm of the board of directors. Conversely, in case of a transfer of powers, the board of directors decides to transfer certain powers to the general meeting. With respect to the scope of powers transferred, a distinction can be made between transferring the entire decision-making authority and merely...

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562 CO 776a I Sec. 10. E.g., CO 790 (keeping of the share register), CO 795a (calling of supplementary financial contributions); CO 809 II Sentence 3 (if applicable, approving the appointment of a natural person to carry out the function of managing officer on behalf of a legal entity or commercial undertaking); CO 810 III (determining the powers of the chair of the management). See NATER, p. 146 et seq.
563 CO 804 II Sec. 18.
564 CO 809 I.
565 See FN 144.
566 For terminology with varying degrees of meaning across the legal literature, see SIBBERN, p. 230 et seq.; KAMMERER, p. 128 et seq. (differentiating between (i) a true delegation of powers to subordinate organs; (ii) a delegation of powers to the general meeting; (iii) the granting of an approval right to the general meeting where the board of directors seeks approval by the general meeting for a particular proposal; (iv) an assumption of board powers by the general meeting via the articles of association, and (v) the general meeting’s usurpation of powers of singular matters from the board of directors without a basis in the articles of association).
567 See WATTER/ROTH PELLANDA, Basler Kommentar, CO 716, N 4; MÜLLER; Verwaltungsratskompetenzen, p. 785. With respect to the GmbH, see NATER, p. 185.
granting an approval right. In case of the latter, the authorized organ can either approve or reject a proposal without, however, being able to determine or change the content of the proposal.

2.3.1 Assumption of Powers by the General Meeting

As a result of the mandatory division of powers, the general meeting of a stock corporation must not assume any of the board of directors’ non-delegable and inalienable powers via the articles of association. With regard to matters outside the non-delegable and inalienable powers of the board of directors on which it decides based on its statutory presumption of default authority, legal scholars debate whether Swiss corporate law leaves room for an assumption of powers by the general meeting via the articles of association. BERTSCHINGER argues in favor of the theory of parallel management authority maintaining that all delegable management decisions by law also fall within the powers of the general meeting and, hence, may be assumed by the general meeting. More restrictive is BÖCKLI who finds it allowable if the articles of association submit matters that do not pertain to management activities to the general meeting for decision. MEIER-SCHATZ and KRNETA believe that due to the board of directors’ statutory presumption of default authority, the statutory division of powers does not allow the general meeting to decide on routine matters that are out of its sphere of authority. By exception, despite the overall limited ability to shift responsibility from the board of directors to the general meeting, the general meeting can assume management powers in

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568 In German Kompetenzdelegation and Beschlussdelegation. See NATER, p. 185; SIBBERN, p. 231; MÜLLER, Verwaltungsratskompetenzen, p. 785.
569 See DUBS/TRUFFER, Basler Kommentar, CO 698, N 8b; WATTER/ROTH PELLANDA, Basler Kommentar, CO 716, N 6.
570 Prevailing expert opinion, see, inter alia, BÖCKLI, Aktienrecht, § 13, N 293; WATTER/ROTH PELLANDA, Basler Kommentar, CO 716, N 4, 6; KRNETA, CO 716, N 1154 et seq., 1161; BERTSCHINGER, Arbeitsteilung, § 4 N 250; HOMBURGER, Zürcher Kommentar, CO 716a, N 517 et seq.; MEIER-SCHATZ, Zusammenarbeit, p. 826.
571 According to such presumption of authority, the board of directors decides on all matters that are not assigned by law or by the articles of association to the general meeting (CO 716 I).
572 Decisions pursuant to CO 716 I.
573 BERTSCHINGER, Generalversammlung, p. 317 et seq., 329 (stating that a shift of powers in management aspects to the general meeting must inevitable result in corporate liability); BERTSCHINGER, Arbeitsteilung, § 4, N 270. See also WATTER/ROTH PELLANDA, Basler Kommentar, CO 716, N 4.
574 BÖCKLI, Aktienrecht, § 13, N 290.
575 MEIER-SCHATZ, Kompetenzbereich, p. 266 (except in emergency situations in which the corporation is without administration). Equally, KRNETA, CO 716, N 1153, 1146, SIBBERN, 232 with further references on legal expert opinion in FN 9; ROTH PELLANDA, p. 250, N 517.
pathological cases such as when the board of directors is unable to act.\textsuperscript{576} In essence, the shareholders’ structuring options to broaden the general meeting’s influence on corporate management are fairly limited.\textsuperscript{577} With respect to particular corporate decisions, the shareholders’ statutory scope and potential avenues of influence are as follows:

Strategic decisions. Strategic business decisions are part of the board of directors’ ultimate management responsibility and therefore fall within its exclusive authority.\textsuperscript{578} The articles of association do not allow the general meeting to decide on issues such as the purchase or sale of investments, decisions regarding expansion abroad or on setting up subsidiaries provided that such decisions are compatible with the corporate purpose.\textsuperscript{579} Nevertheless, the general meeting still retains certain options for influencing strategic decisions. Strategic decisions that effectively result in a change of the corporate purpose call for a change of the articles of association, which the general meeting must consider and vote upon.\textsuperscript{580} In effect, by formulating the purpose narrowly and confining the firm’s operations to a particular business as delineated in the articles of association, the general meeting can prevent the board of directors from undertaking major extensions of corporate activities, without the general meeting’s approval.\textsuperscript{581} In addition, corporate transactions such as mergers, demergers, and transformations require the shareholders’ consent.\textsuperscript{582} Furthermore, the general meeting can influence management to a certain extent via its authority to decide on matters relating to the share capital, the reserves, and the distribution of profits. If, for example, a capital increase is

\textsuperscript{576} See MEIER-SCHATZ, Kompetenzbereich, p. 266; SIBBERN, p. 239, FN 43; FORSTMOSER, Eingriffe, p. 177.

\textsuperscript{577} Very little room is also acknowledged by BÖCKLI, Aktienrecht, § 12, N 33 et seq.; SCHAAD, Basler Kommentar, CO 689, N 31; TANNER, Zürcher Kommentar, CO 698, N 138 et seq.; APPENZELLER, p. 32. Cf. also DREWY/GLANZMANN, § 12 N 15 (“Es fragt sich somit, was die verbleibende Relevanz der Bestimmung in OR 698,2 Ziff. 6 sei … In der Tat bleibt nicht viel übrig. Ein Beispiel ist die Beanspruchung der Genehmigungskompetenz beim Erwerb vinkulierter Aktien (OR 685a, 1) in der statutarischen Vinkulierungsordnung.”).

\textsuperscript{578} CO 716a I Sec. 1. See RUFFNER, Grundlagen, p. 182; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 30, N 68; MEIER-SCHATZ, Kompetenzbereich, p. 268.

\textsuperscript{579} CO 626 Sec. 2 i.e.w. CO 698 II Sec. 1 and CO 704 I Sec. 1. See DUBS/TRUFFER, Basler Kommentar, CO 698, N 15a. With respect to the GmbH, see NATER, p. 125.

\textsuperscript{580} For example, the withdrawal to holding activities and the sale of a production facility to third parties can constitute a change of the corporate purpose. See BGE 100 II 384 (E. 2b). See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 30, N 69; BÖCKLI, Kernkompetenzen, p. 42; FORSTMOSER, Organisationsreglement, p. 21; MEIER-SCHATZ, Zusammenarbeit, p. 826.

\textsuperscript{581} See WATTER/ROTH PELLANDA, Basler Kommentar, CO 716a, N 4; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 35; SPIERMANN, p. 156; O’NEAL/THOMPSON, § 3.13.

\textsuperscript{582} Mergers (ML 18 I Sec. a), demergers (ML 43 II), and transformations (ML 64 I Sec. c). For the GmbH, mergers (ML 18 I Sec. c), demergers (ML 43 II), and transformations (ML 64 I Sec. c).
necessary to finance a certain strategy, the implementation of the strategy depends effectively on the consent of the general meeting, which must approve the necessary capital increase.\textsuperscript{583} The shareholders’ indirect influence on management also results from the right of the general meeting to elect and remove the board of directors.\textsuperscript{584}

**Personnel decisions.** The board of directors makes decisions regarding the company’s management personnel.\textsuperscript{585} The general meeting elects only the board members and is not authorized to appoint or approve the appointment of any other executive management personnel.\textsuperscript{586} It follows that a Pemi, who is not represented on the corporation’s board of directors has no direct influence, based on statutory law, to appoint management. The situation differs for the GmbH, where the meeting of members not only appoints the managing officers, if the articles so provide, but also executive directors, the holders of procuration, and the commercial mandate holders unless such right is conferred on the managing officers.\textsuperscript{587}

**Corporate organization.** The board of directors determines the company’s organization.\textsuperscript{588} The general meeting cannot itself adopt or amend the organizational regulations or reserve a respective approval right in the articles of association or via resolution.\textsuperscript{589} Yet, the general meeting can exert some degree of influence on the firm’s organization via (i) the

\textsuperscript{583} See WATTER/ROTH PELLANDA, Basler Kommentar, CO 716a, N 4; KRNETA, CO 716, N 1150. With respect to the GmbH, see NATER, p. 150.

\textsuperscript{584} See HOMBURGER, Zürcher Kommentar, CO 716a, N 520; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 30, N 70; MEIER-SCHATZ, Zusammenarbeit, p. 828. With respect to the GmbH, see NATER, p. 150.

\textsuperscript{585} CO 716a I Sec. 4. See BÖCKLI, Aktienrecht, § 13, N 357 et seq. ("Die Generalversammlung kann weder durch Statutenbestimmung noch durch Einzelbeschluss die Wahlbefugnis des Verwaltungsrates so ‘kanalisieren’, dass … die Ernennung der Genehmigung der Generalversammlung unterstellt würde. … Der Gedanke, die Generalversammlung könne unterhalb der Ebene der obersten Geschäftsführung, d.h. im Bereich der mittleren Kader, eigenständig und an Stelle des Verwaltungsrates leitende Mitarbeiter berufen und abberufen, ist abzulehnen."); KUNZ, Annahmerverantwortung, p. 96 ("Insbesondere ist es ihr [der Generalversammlung] untersagt, bestimmte Personen, seien sie Dritte oder Verwaltungsratsmitglieder, in die Geschäftsleitung zu beordern oder dieselben von dort abzuberufen."); also see WATTER/ROTH PELLANDA, Basler Kommentar, CO 716b, N 4; KAMMERER, p. 150; HOMBURGER, Zürcher Kommentar, CO 716b, N 734; TRIGO TRINDADE, p. 176; MEIER-SCHATZ, Zusammenarbeit, p. 825; FORSTMOSER, Eingriffe, p. 171 and 175. Of another opinion, apparently only HIRSCH, p. 12, 15 (holding that the general meeting may appoint members of the executive management).

\textsuperscript{586} See KRNETA, CO 716, N 1155; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 30, N 67; APPENZELLER, p. 23; MEIER-SCHATZ, Zusammenarbeit, p. 825; FORSTMOSER, Eingriffe, p. 175 et seq.

\textsuperscript{587} CO 804 III.

\textsuperscript{588} See Section IV.D.2.1.

\textsuperscript{589} See FN 1492.
election of board members,\textsuperscript{590} (ii) the decision on the number of board seats in the articles of association,\textsuperscript{591} (iii) reserving the right to appoint the chairman of the board in the articles of association,\textsuperscript{592} and (iv) withdrawing the chairman’s casting vote\textsuperscript{593}. (v) Further influence may be exerted via the statutory authorization of the delegation of management tasks. For example, the general meeting can force the board of directors to run the business itself by refusing to grant authorization for any delegation of tasks. Moreover, a number of legal scholars find that the general meeting can allow for delegation of management functions only if delegated to board members or only to independent third parties, thereby preventing the chairman of the board to function as CEO (called \textit{joint leadership}).\textsuperscript{594} NOBEL finds it even permissible if the articles of association require a mandatory delegation of the executive management functions (i.e., a mandatory implementation of a quasi-dualistic governance model).\textsuperscript{595} In addition to personnel limitations, the articles of association can stipulate functional limitations by allowing a partial delegation of management functions, in which particular management functions may be delegated,

\textsuperscript{590} In a GmbH via appointing the managing officers and, in addition, other executive functions (executive directors, the holders of procuration, and the commercial mandate holders).

\textsuperscript{591} \textit{See} KRNETA, CO 716, N 1149; KAMMERER, p. 87; FORSTMOSER, Eingriffe, p. 174. In a GmbH via determining the number of managing officers, \textit{see} NATER, p. 152.

\textsuperscript{592} CO 712 II. \textit{See} NOBEL, KMU, p. 330. The chairman in a GmbH, by law, is appointed by the meeting of members (CO 809 III). Yet, the power may also be delegated to the managing officers. \textit{See} FN 1784.

\textsuperscript{593} CO 713 I. \textit{See} NOBEL, KMU, p. 330; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 30, N 65. With respect to the GmbH, CO 809 IV.

\textsuperscript{594} \textit{See} BÖCKLI, Aktienrecht, § 13, N 525; WATTER/ROTH PELLANDA, Basler Kommentar, CO 716b, N 4 (but not ROTH PELLANDA); KUNZ, \textit{Annahmeverantwortung}, p. 94 et seq.; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 29, N 28, FN 5 (“Recht zur Delegation nur an Verwaltungsratsmitglieder, nicht aber an Dritte”); equally FORSTMOSER, Eingriffe, p. 173; MEIER-SCHATZ, Zusammenarbeit, p. 825. In contrast, other legal scholars characterize the determination of the firm’s organization as the sole responsibility of the board of directors and reject any personnel limitations of delegation by the general meeting. \textit{Cf.} strictly, ROTH PELLANDA, p. 242, N 499; MÜLLER/LIPP/PLÜSS, p. 146, FN 399; BERTSCHINGER, \textit{Generalversammlung}, p. 325 (“kann sie [die Generalversammlung] letztlich nicht verhindern, dass diese Person nach ihrer Wahl auch die Position des chief executive officer übernimmt.”); HOMBURGER, \textit{Zürcher Kommentar}, CO 716b, N 734 (“Lassen die Statuten Delegation zu, ist der VR … zur ‘Festlegung der Organisation’ ausschliesslich zuständig.”); TRIGO TRINDADE, p. 176 (“l’assemblée ne peut plus choisir l’organisation de son conseil et opter pour un modèle dualiste … ou un modèle à l’américaine … ou encore le modèle de l’administrateur-délégué.”).

\textsuperscript{595} NOBEL, \textit{Monismus}, p. 26; NOBEL, KMU, p. 330. Differently, BÖCKLI, Aktienrecht, § 13, N 449a, 536 (finding a mandatory delegation unlawful); equally ROTH PELLANDA, p. 241 et seq., N 498 et seq.; KRNETA, CO 716b, N 1635; MÜLLER, \textit{Arbeitnehmer}, p. 492 et seq.; HUNGERBÜHLER, p. 11; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 29, N 28. \textit{Cf.} also MÜLLER/LIPP/PLÜSS, p. 146 (finding that the board of directors must not be obliged to delegate management, but a respective duty may follow from the board’s responsibility to ensure an efficient organization of the firm).
while the remaining tasks must be carried out by the board of directors.\textsuperscript{596} The articles of association may also require that certain individual transactions be approved by the board of directors.\textsuperscript{597}

Financial management. The board of directors is the only body that determines the accounting system, financial controls, and financial planning. The general meeting cannot reserve itself an approval right in these functions. However, the general meeting is tasked with approving the annual report, annual financial statements, and consolidated financial statements and with determining the firm’s share capital (determination of shareholder dividends and the board of directors’ share in profits, and capital increases).\textsuperscript{598} Moreover, BERTSCHINGER finds that the general meeting is entitled to require the board of directors to apply certain generally accepted accounting standards.\textsuperscript{599}

2.3.2 The General Meeting’s Obligatory Approval Requirement

A stock corporation’s general meeting must neither assume decision making power on matters as discussed above, nor require the board of directors to seek its approval in these matters.\textsuperscript{600} By exception, its involvement is conceivable with respect to business decisions if board members’ personal interests conflict with those of the company.\textsuperscript{601} The Draft Legislation\textsuperscript{602} as proposed by the Swiss Federal Council provides shareholders with more flexibility in determining the division of powers in that it allows the articles of association to provide that certain board of directors’ decisions be subject to general meeting approval.\textsuperscript{603} The general

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\textsuperscript{596} See BÖCKLI, Aktienrecht, § 13, N 525; WATTER/ROTH PELLANDA, Basler Kommentar, CO 716b, N 4 (but not ROTH PELLANDA); MÜLLER/LIPP/PLÜSS, p. 146; KRNETA, CO 716b, N 1637; KUNZ, Annahmeverantwortung, p. 93 et seq., 100; KAMMERER, p. 86, 150; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 29, N 28, FN 5; MEIER-SCHATZ, Zusammenarbeit, p. 825; FORSTMOSER, Eingriffe, p. 173, 177. In contrast, ROTH PELLANDA, p. 242, N 499 (rejecting functional limitations).

\textsuperscript{597} See MÜLLER/LIPP/PLÜSS, p. 146; MEIER-SCHATZ, Zusammenarbeit, p. 825.

\textsuperscript{598} CO 698 III and IV. See Section IV.D.2.1.

\textsuperscript{599} BERTSCHINGER, Arbeitsteilung, § 4, N 255; BERTSCHINGER, Ausgewählte Fragen, p. 905.

\textsuperscript{600} Prevailing expert opinion, see FN 570. In contrast, MÜLLER, Verwaltungsratskompetenzen, p. 786 et seq. (finding granting an approval right, but not a transfer of entire board duty, lawful, even those falling under CO 716a).

\textsuperscript{601} See BGE 127 III 332 (E. 2b); WATTER, Basler Kommentar, CO 718, N 21; MÜLLER, Arbeitnehmer, p. 497; very reluctantly, BÖCKLI, Aktienrecht, § 13, N 647 et seqq. In contrast, ROTH PELLANDA, p. 178 et seq., N 357 (arguing that the general meeting can only be involved in case of a conflict of interest in the sense of a consultative resolution and only if no other director authorized to consent is available).

\textsuperscript{602} See FN 463.

\textsuperscript{603} D-CO 627 Sec. 14 i.c.w. D-CO 716b. Many authors argue against such partial deviation from the parity principle in Swiss stock corporation law, for example, BÖCKLI, Aktienrecht, § 13,
meeting’s decision to place such provisions in the articles of association is subject to a qualified majority vote. The approval itself is subject to the ordinary majority vote requirement unless provided otherwise in the articles of association. The Draft Law essentially confers a veto right to the general meeting rather than allowing a complete transfer of the respective task. It follows that the general meeting in a stock corporation can only accept or deny, but not modify, the proposed decision. Moreover, the scope of matters subject to authorization of the general meeting is limited. With the exception of decisions concerning ultimate management responsibility (e.g., decisions on significant investments, business expansion, strategic alliances) and the determination of the corporate organization (e.g., amendments of certain provisions in the organizational regulations), decisions falling within the board’s non-delegable and inalienable powers cannot be subject to the approval of the general meeting. The authorization of the general meeting does not limit the board of directors’ liability. However, the general meeting approval can effectively release the board of directors from liability if the directors supply the shareholders with reliable and sufficient information with respect to the decision to be approved. From the PEMI’s perspective, the increased flexibility in determining the division of powers would be

N 295d et seqq.; Nachbesserungen, p. 359 (characterizing the revision as a “spontane Eingebung der letzten Stunde”. He criticizes the proposal by referring to the lack of a duty of loyalty of shareholders, shareholders’ insufficient information, board of directors’ incapability of making decisions, inconsistencies in substance, and the risk of shareholders becoming de facto organs); KUNZ, Neuerungen, p. 13 (advocating for abandoning, the proposed revision); GLANZMANN, Aktienrechtsrevision, p. 678. In contrast, DUBS, Genehmigungsbeschluss, p. 174 (“Der Vorschlag ... ist zu begrüßen;” “Flexibilisierung der aktienrechtlichen Kompetenzordnung”); VOGL/SCHIWOW/WIEDMER, p. 1372 et seq. (“besonders in kleineren Gesellschaften ... bestehen zum Teil aufgrund von Aktionär-bindingverträgen schon heute Genehmigungsvorbehalte ...; es leuchtet nicht ein, warum eine Gesellschaft solche Vorbehalte nicht statutarisch absichern können soll.”).

D-CO 704 I Sec. 9.
CO 703.

See Böckli, Aktienrecht, § 13, N 295a; Watter/Roth Pellanda, Basler Kommentar, CO 716, N 6; DUBS, Genehmigungsbeschluss, p. 161, 163.


See DUBS, Genehmigungsbeschluss, p. 164.

Namely, 716a I Sec. 3-7. D-CO 716b I sentence 2.
D-CO 716b III.

welcome. However, it is highly uncertain that such draft provisions will materialize given that the Council of States has rejected such an option.\textsuperscript{612} The principle of parity also applies to GmbHs.\textsuperscript{613} Yet, Swiss corporate law allows the articles of association of GmbHs to require managing officers to submit certain decisions to the meeting of members for approval.\textsuperscript{614} The approval is granted by the absolute majority unless the articles of association provide otherwise.\textsuperscript{615} Such provisions in the articles of association do not represent a delegation of powers to the meeting of members, which is allowed only to approve or reject a decision submitted by the managing officers.\textsuperscript{616} In effect, such provisions in the articles of association represent veto rights.\textsuperscript{617} The request for approval of specific decisions must be initiated by the managing officers, who must already have resolved upon the matter.\textsuperscript{618} According to a number of legal scholars, the meeting of members is allowed to amend the decision and approve a modified version thereof for practical reasons and in light of the admissibility of self-management by the meeting of members.\textsuperscript{619} TRUFFER and DUBS, on the other hand, reject any possibility of modification.\textsuperscript{620} NATER allows only for modification by the meeting of members for duties or issues outside the non-delegable and inalienable duties of the managing officers.\textsuperscript{621} In case of doubt, the PEMI should not count on the possibility of modification. Moreover, approval requirements can only be stipulated in view of certain singular decisions\textsuperscript{622} which, according to a number of legal provisions in the articles of association which would require all decisions relating to the non-delegable and inalienable duties to be approved by the meeting of members. See WATTER/ROTH PELLANDA, Basler Kommentar, CO 810, N 5; SIFFERT/

\textsuperscript{612} Council of State resolution as of 11 June 2009. Also cf. KUNZ, Evolution, p. 157, FN 32.
\textsuperscript{613} See FN 559.
\textsuperscript{614} CO 776a I Sec. 11, 804 II Sec. 17, 811 I Sec. 1.
\textsuperscript{615} See WATTER/ROTH PELLANDA, Basler Kommentar, CO 811, N 7.
\textsuperscript{617} See WATTER/ROTH PELLANDA, Basler Kommentar, CO 811, N 2; MEIER, p. 312 et seq.; FORSTMOSER/PEYER, p. 401; OLIVAR PASCUAL/ROTH, p. 470; BOCKLI, GmbH-Recht, p. 32 (“Einspruchsrecht”).
\textsuperscript{618} See MEIER, p. 315; FORSTMOSER/PEYER, p. 429; KÜNG/CAMP, CO 811, N 4; FORSTMOSER, Festschrift Böckli, p. 561.
\textsuperscript{619} See WATTER/ROTH PELLANDA, Basler Kommentar, CO 811, N 2 (acknowledging that in such case the managing officers are not obliged to implement the modified resolution); NATER, p. 175 et seq., 178; FORSTMOSER/PEYER, p. 431, 433; WOHLMANN, Positionierung, p. 133.
\textsuperscript{620} DUBS/TRUFFER, Basler Kommentar, CO 804, N 43; with respect to the stock corporation, see DUBS, Genehmigungsbeschluss, p. 161.
\textsuperscript{621} NATER, p. 176 et seq.
\textsuperscript{622} Inadmissible
authors, must be of elevated importance to the company. The respective decisions subject to approval must be precisely and concretely outlined in the articles of association; general clauses must be avoided. What remains highly contentious, and is much discussed among legal scholars, is whether approval rights may also be introduced concerning the non-delegable and inalienable powers of the managing officers. One sector of legal scholars argues in favor of such a possibility based on where the legal provision is placed within the corporate law framework, the nature as a veto right (and not the transfer of authority), and the person-oriented characteristic of the GmbH. Other scholars exclude the non-delegable and inalienable powers of the managing officers from the scope of application of approval rights. BÖCKLI, holds the latter opinion, but sees an exception in decisions concerning the organization of the firm. In addition, TRUFFER and DUBS see certain exceptions concerning questions related to the accounting system, the financial controls, and financial planning, singular decisions relating to the ultimate management responsibility, and to the supervision of persons entrusted with parts of the management. The legal controversy may be resolved by the ongoing revision of corporate law. The Draft Legislation expressly provides that, of the non-delegable and inalienable duties of the managing officers of a GmbH, only decisions concerning the ultimate management responsibility and the determination of the corporate organization

FISCHER/PETRIN, CO 811, N 3; FORSTMOSER/PEYER, p. 402 et seq.; BÖCKLI, GmbH-Recht, p. 32 et seq.; NATER, p. 169.

See WATTER/ROTH PELLANDA, Basler Kommentar, CO 811, N 8; BÖCKLI, GmbH-Recht, p. 32 ("gegen Entscheidungen, die über den gewöhnlichen Geschäftsbetrieb hinausgehen").

See SIFFERT/FISCHER/PETRIN, CO 811, N 3; NUSSBAUM/SANWALD/SCHIEDEGGER, CO 811, N 3; FORSTMOSER/PEYER, p. 402 et seq.; NATER, p. 169 et seq.

CO 811 is seen as a first exception to the non-delegable and inalienable powers of the managing officers in CO 810 II. See WATTER/ROTH PELLANDA, Basler Kommentar, CO 811, N 7; HANDSCHIN, GmbH, p. 11; FORSTMOSER/PEYER, p. 401.

See MEIER, p. 315.

See NATER, p. 173 et seq.; FORSTMOSER/PEYER, p. 401.

See GASSER/EGGENBERGER/STÄUBER, Orell Füssli Kommentar, CO 811, N 4; WATTER/ROTH PELLANDA, Basler Kommentar, CO 810, N 5; CO 811, N 7; SIFFERT/FISCHER/PETRIN, CO 811, N 3; MEIER-HAYOZ/FOSTMOSER, § 18, N 110, 116; FORSTMOSER/PEYER/SCHOTT, p. 37, N 67; NATER, p. 173 et seq.; HANDSCHIN, GmbH, p. 23. Cf. also NUSSBAUM/SANWALD/SCHIEDEGGER, CO 810, N 5, but CO 811, N 3.

See HANDSCHIN/TRUNINGER, § 13, N 5, § 14, N 9; KOLLER, GmbH, p. 244. Cf. OLIVAR PASCUAL/ROTH, p. 472 (only allowing singular decisions in the context thereof).

BÖCKLI, GmbH-Recht, p. 32, FN 151.

CO 810 II Sec. 3.

CO 810 II Sec. 1.

CO 810 II Sec. 4.

TRUFFER/DUBS, Basler Kommentar, CO 804, N 45.

See FN 463.

See “ultimate management responsibility” in Section IV.D.2.1.
structure may be required to be submitted to the meeting of members for approval.

The meeting of members’ approval does not limit the managing officers’ liability as the latter are still shaping the decision subject to approval. The rule seeks to prevent liability-relevant decisions to be transferred to the meeting of members to the detriment of third parties. Conversely, the members who have approved a certain decision submitted by the managing officers, will no longer be entitled to commence liability proceedings with respect to the approved decision (analogous to releasing the managing officers), provided that the managing officers supplied reliable and sufficient information. A contentious issue discussed among legal scholars is whether the meeting of members is liable for their authorization. A number of legal scholars find that by authorizing decisions submitted by the managing officers, the individual members become de facto organs and are therefore generally liable. On the other hand, some argue that the qualification as a de facto organ follows at best from a member’s personal behavior, but not the casting of votes in the meeting of members as such. Only if a member exercises decisive influence on the formation of the company’s will and effectively influences the course of business, is he/she at risk of being held liable as a de facto organ.

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637 See “determination of the corporate organization” in Section IV.D.2.1.
638 D-CO 811 II i.c.w. CO 810 II Sec. 3-7 and III; see Federal Council report, BBI (2007), p. 1727.
639 CO 811 II i.c.w. CO 827.
640 See FORSTMOSER/PEYER, p. 429; FORSTMOSER, Festschrift Böckli, p. 560 et seq.
641 See WATTER/ROTH PELLANDA, Basler Kommentar, CO 811, N 16; NUSSBAUM/SANWALD/SCHIEDEGGER, CO 811, N 7; KÜNG/CAMP, CO 811, N 4.
643 CO 812 I. See FORSTMOSER/PEYER, p. 430.
644 See WOHLMANN, Positionierung, 133 et seq.; in case of strategic decisions, BLANC, p. 226 et seq.; in case of an obligatory approval clause also VON PLANTA, l’organisation, p. 73; potentially in case of modification, MEIER, p. 315, FN 152.
645 See TRUFFER/DUBS, Basler Kommentar, CO 804, N 47; WEBER, Basler Kommentar, CO 811, N 18; SIFFERT/FISCHER/PETRIN, CO 811, N 11; BÖCKLI, GmbH-Recht, p. 35 et seq.; NATER, p. 182; MEIER, p. 315.
646 See WEBER, Basler Kommentar, CO 811, N 18; SIFFERT/FISCHER/PETRIN, CO 811, N 11. Similarly, also NATER, p. 182; FORSTMOSER/PEYER, p. 433 et seq.; BÖCKLI, GmbH-Recht, p. 36.
2.3.3 Delegation of Powers to the General Meeting

Legal scholars agree insofar as the board of directors cannot delegate any of its explicitly non-delegable and inalienable powers upward to the general meeting.\(^{647}\) Outside the non-delegable and inalienable duties, BERTSCHEINGER finds that under the law, the board can transfer delegable management functions upward.\(^{648}\) In his view, the upward delegation results in a limitation of the directors’ corporate liability (but the board’s liability remains for providing a sound information basis for the respective decisions), and a respective shareholders’ liability.\(^{649}\) Other authors reject any form of transfer, not even with regard to generally delegable management powers.\(^{650}\) Legal scholars of this opinion argue that the requirements for a lawful delegation\(^{651}\) are not met in cases of transfers of powers to the general meeting.\(^{652}\) Moreover, some scholars argue that the board of directors is principally better suited than the general meeting to manage the company due to its full access to information, its ostensible management skills, and smaller size, which enable well-informed, timely,

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\(^{647}\) Prevailing expert opinion, see BÖCKLI, Aktienrecht, § 13, N 449a; N 453 et seq.; WATTER/ROTH PELLANDA, Basler Kommentar, N 716, N 6; BÄUEN/BERNET, p 136, N 394; VON BÜREN/STOFFEL/WEBER, p. 106, N 482; KRNE, TO, CO 716, N 1159; HOB Burger, Zürcher Kommentar, CO 716a, N 524 et seq.; RUFFNER, Grundlagen, p. 181 et seq. Of different opinion, MÜLLER, Verwaltungsratskompetenzen, p. 786 et seq. (finding even a delegation of non-delegable and inalienable duties of the board of directors lawful). With respect to the GmbH, see WATTER/ROTH PELLANDA, Basler Kommentar, CO 810, N 5; TRUFFER/DUBS, Basler Kommentar, CO 804, N 12; NUSSBAUMER/SANWALD/Scheidegger, CO 804, N 5; NATER, p. 23; KÜNG/HAUER; § 13, N 2.

\(^{648}\) Theory of parallel management authority, see FN 573; BERTSCHEINGER, Arbeitsteilung, § 4, N 269 (“Die Delegation von Geschäftsführungsentscheiden an die Generalversammlung ist sowohl im Organbereich ausserhalb von Art. 716a Abs. 1 OR als auch bei Nichorgan- aufgaben von Rechts wegen möglich.”); BERTSCHEINGER, Ausgewählte Fragen, p. 906. Similarly, WATTER/ROTH PELLANDA, Basler Kommentar, CO 716, N 6; KUNZ, Minderheitsenschutz, § 12, N 128 (finding a delegation of decision-making authority lawful in case of important matters and decisions other than the non-delegable duties of the board of directors pursuant to CO 716a). Cf. also MÜLLER/LIPP/LÜSS, p. 137 (finding a delegation of decision-making authority lawful only in exceptional cases with respect to fundamental decisions such as particularly risky investments or large real estate transactions. They recommend a basis in the articles of association).

\(^{649}\) BERTSCHEINGER, Generalversammlung, p. 329; BERTSCHEINGER, Aufgabenteilung, § 4, N 277. Also see WATTER/ROTH PELLANDA, Basler Kommentar, CO 716, N 6.


\(^{651}\) See Section IV.E.5.1.5.1.

\(^{652}\) See MEIER-SCHATZ, Zusammenarbeit, p. 825 et seq. (arguing that the delegation of management functions must be set out in the organizational regulations together with a description of the required positions, details on the duties and reporting which, in his view, seems impossible in relation to the general meeting); equally FORSTMOSER, Eingriffe, p. 172.
and cost-efficient decisions. Loss of motivation and initiative as well as the negative effects on the board of directors’ bargaining position vis-à-vis third parties, given the impending Sword of Damocles of a corrective action of the general meeting, are also counter-arguments to delegating board of directors’ tasks to the general meeting. The inadmissibility of an upward delegation also results from the rules on corporate liability, namely the principle of the internal interplay of power and responsibility. Finally, some scholars argue that a differentiation between the non-delegable and inalienable powers and other management tasks is flawed and the results of such transfer would be organizationally unsustainable. Conversely, in a GmbH, where the members are subject to a duty of loyalty, NATER finds the upward delegation of management duties to the meeting of members lawful.

2.3.4 The General Meeting’s Facultative Approval

While the stock corporation laws do not allow for the possibility of the general meeting’s facultative approval, the GmbH’s articles of association may provide that the managing officers are allowed to submit certain decisions to the meeting of members for approval. In such cases, the act of seeking approval is facultative because it is at the managing officers’

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653 See SIBBERN, p. 233 (acknowledging that such arguments referring to size and structure of shareholders must be put into perspective); ROTH PELLANDA, p. 251, N 518. Similarly, BÖCKLI, Aktienrecht, § 13, N 445 et seq.
654 See SIBBERN, p. 233; ROTH PELLANDA, p. 40, N 68.
655 See SIBBERN, p. 233.
656 Scholars argue that since shareholders (different than the board members) are not bound by a duty of loyalty, their influence in areas of corporate management results in a release from liability to the detriment of third parties. The board of directors could then evade its responsibilities in the delegable areas every time a situation became critical and/or when faced with a difficult decision by submitting the question to the general meeting for a decision, see BÖCKLI, Aktienrecht, § 13, N 455; KRNETA, CO 716, N 1161. Alternatively, if the board of directors would remain fully liable the result would be a liability for third party actions, see BÖCKLI, Aktienrecht, § 13, N 447; ROTH PELLANDA, p. 250, N 517; MEIER-SCHATZ, Zusammenarbeit, p. 825 et seq. Finally, it should be pointed out that the board of directors would find it difficult to observe its obligation to practice due care in selecting, instructing, and supervising the recipient in the event of delegation of management tasks to the general meeting, since determining the identity of the persons and their individual capabilities is difficult in practice, see SIBBERN, p. 236; ROTH PELLANDA, p. 250, N 517; FORSTMOser, Eingriffe, p. 172; similar concerns are also mentioned by FORSTmoSER/MEIER-HAYoZ/NOBEL., § 30, N 71 et seq.
657 See SIBBERN, p. 239, FN 43 with reference to BÖCKLI, Aktienrecht, § 13, N 444 (“Es wäre geradezu widersinnig, wenn die obersten Strategie-, Organisations- und Personalentscheide in der Gesellschaft der Einmischung der Generalversammlung entzogen wären, diese aber unterhalb dieser Ebene doch wieder die Geschäfte der Gesellschaft führen könnte.”).
658 CO 803. See NATER, p. 189.
659 CO 811 I Sec. 2.
discretion whether to submit a certain question to the meeting of members. Conversely, the meeting of members may freely decide whether it wants to resolve upon the matter or abstain. Other than in case of an obligatory approval requirement, matters subject to facultative approval must not be specified in the articles of association; reference to the possibility of seeking approval of the meeting of members is sufficient. Regarding whether approval can also be obtained on matters that fall within the non-delegable and inalienable powers of the managing officers and liability consequences, considerations of the obligatory approval requirement apply analogously. One controversy in this area is the legal effect of an approval of the meeting of members. While some scholars assume the legal effect to be binding for the managing officers, others consider it non-binding, that is, the managing officers may still choose to act differently, despite the meeting of members’ wishes. The former view is held by the author of this dissertation since otherwise there would be no material difference between facultative approvals and consultative resolutions.

2.3.5 Consultative Resolutions

A consultative resolution is a statement of the general meeting (the meeting of members in a GmbH) on a specific transaction of the board of directors’ (managing officers’) realm of responsibilities. The board of directors may request the general meeting for a consultative resolution at any time during the general meeting, also within the scope of the board of directors’ non-delegable and inalienable duties, and without a basis in the articles of

660 See WATTER/ROTH PELLANDA, Basler Kommentar, CO 811, N 12; SIFFERT/FISCHER/PETRIN, CO 811, N 6; NUSSBAUM/SANWALD/SCHEIDEGGER, CO 811, N 6; FORSTMOSER/PEYER, p. 401; NATER, p. 171.
661 For further references, See FORSTMOSER/PEYER, p. 401 et seq., 431.
662 See FORSTMOSER/PEYER, p. 403; NUSSBAUM/SANWALD/SCHEIDEGGER, CO 811, N 6; GASSER/EGGENBERGER/STÄUBER, Orell Füssli Kommentar, CO 811, N 6; WATTER/ROTH PELLANDA, Basler Kommentar, CO 811, N 12; NATER, p. 171.
663 See Section IV.D.2.3.2.
664 See FORSTMOSER/PEYER, p. 402; FORSTMOSER, Festschrift Böckli, p. 560; SIFFERT/FISCHER/PETRIN, CO 811, N 7; NATER, p. 192 et seq.
665 See TRUFFER/DUBS, Basler Kommentar, CO 804, N 50.
666 See BERTSCHINGER, Ausgewählte Fragen, p. 905 (maintaining that consultations do not require prior entry on the agenda of the general meeting); equally, KUNZ, Evolution, p. 166. In contrast, SIBBERN, p. 240 (recommending to stipulate in the articles of association or the organizational regulations a duty to put consultations on the agenda). Moreover, a contentious issue discussed is whether a consultation of the general meeting in relation to a board matter can also take place upon request of a shareholder. On the question, see SIBBERN, p. 241 (supporting this option since a free expression and exchange of opinions can hardly be prevented); differently HORBER, Konsultativabstimmung, p. 106.
association. Although such consultative resolutions, particularly in closely held companies, may be de facto binding for the board of directors, these resolutions only have the character of an opinion and do not carry decision-making powers, that is, they serve the board of directors merely as a guideline and are not an obligation. The definitive decision remains with the board of directors. Therefore, consultative resolutions neither represent a delegation nor an unlawful intervention of the general meeting in the board of directors’ powers. An approval by the general meeting generally does not discharge the board of directors from its responsibilities for the acts put in place. Yet, the consenting shareholders can no longer assert liability claims against the board of directors that result from transactions that negatively affect the company, unless the board of directors provides the general meeting with incorrect or unsuitable information upon which it makes its decision.

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667 Prevailing expert opinion, see, inter alia, BÖCKLI, Aktienrecht, § 12, N 42, 58a et seqq.; DUBS/TRUFFER, Basler Kommentar, CO 698, N 8a; WATTER/ROTH PELLANDA, Basler Kommentar, CO 716b, N 11; VON BÜREN/STOFFEL/WEBER, p. 106, N 483; HOMBURGER, Zürcher Kommentar, CO 716a, N 526; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 30, N 72; with further references, SIBBERN, p. 240; ROTH PELLANDA, p. 252 et seq.; BÖCKLI, Kernkompetenzen, p. 41; BERTSCHINGER, Ausgewählte Fragen, p. 905; BERTSCHINGER, Arbeitsteilung, § 4, N 252; FORSTMOSER, Gestaltungsfreiheit, p. 260, FN 36; FORSTMOSER, Eingriffe, p. 176; KUNZ, Evolution, p. 165 (allowing only consultative resolutions on factual matters, not personnel-related questions).


669 Prevailing expert opinion, see, inter alia, DUBS/TRUFFER, Basler Kommentar, CO 698, N 8a; WATTER/ROTH PELLANDA, Basler Kommentar, CO 716b, N 11; VON BÜREN/STOFFEL/WEBER, p. 106, N 483; SIBBERN, p. 240 et seq.; ROTH PELLANDA, p. 253, N 523; KRNETA, CO 716, N 1162; BERTSCHINGER, Arbeitsteilung, § 4, N 252; HOMBURGER, Zürcher Kommentar, CO 716a, N 526; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 30, N 72; KAMMERER, p. 130 et seq.; FORSTMOSER, Eingriffe, p. 173, 176. With respect to the GmbH, see SIEFFERT/FISCHER/PETRIN, CO 811, N 7 (“Stimmungsbarometer”); FORSTMOSER/PEYER, p. 402; NATER, p. 192.

670 See DUBS/TRUFFER, Basler Kommentar, CO 698, N 8; APPENZELLER, p. 23.

671 See, inter alia, DUBS/TRUFFER, Basler Kommentar, CO 698, N 8a; with further references, BERTSCHINGER, Arbeitsteilung, § 4, N 252; BERTSCHINGER, Ausgewählte Fragen, p. 905; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 30, N 72.

672 See WATTER/ROTH PELLANDA, Basler Kommentar, CO 716b, N 11; KRNETA, CO 716, N 1163; in detail also SIBBERN, p. 242 et seqq. Critically, BÖCKLI, Aktienrecht, § 12 N 58b (“Ein derartiger Verlust der Klagebefugnis kann indessen nur in Fällen eintreten, wo ein anderer Entscheid unter Art. 2 ZGB geradezu stossend wäre, denn der Aktionär hat nicht im Rechtssinn seine körperschaftliche Einwilligung gegeben.”). With respect to the GmbH, see FORSTMOSER/PEYER, p. 402, FN 63; NATER, p. 192.

673 See WATTER/ROTH PELLANDA, Basler Kommentar, CO 716, N 6; KAMMERER, p. 130 et seq.
2.3.6 Assessment of Legal Structuring Options

As McCAHERY and VERMEULEN correctly point out, the transfer of corporate decision making powers to ‘a team of specialists’ (the board of directors and executive managers) reduces the bureaucratic costs associated with collective decision making. The issue from the PEMI’s perspective is that such delegation results in monitoring costs given the risk that directors and managers engage in opportunistic behavior that can harm PEMI interests. In situations in which the PEMI is not represented on the board of directors, but nevertheless wants to participate in certain fundamental corporate decisions that by law are in the board of directors’ purview, prevailing law provides little room for changing the division of powers between the general meeting and the board of directors. Yet, PEMIs, in the shareholder capacity, may be involved in matters of corporate management via non-binding consultative resolution. Moreover, influence may be exerted through shareholders’ agreements and shareholder control agreements with directors. Nevertheless, the most effective tool is certainly representation on the board of directors.

The GmbH provides much more flexibility with respect to the division of powers among the meeting of members and managing officers. The articles of association may provide for a mandatory and/or facultative submission for approval of certain managing officers’ decisions to the meeting of members. These instruments give members a voice concerning important business decisions (e.g., decisions on significant investments, purchase or sale of important assets, incurrence of debt, appointment and remuneration of key management personnel). As a result, PEMIs in their capacity as GmbH members can obtain greater voice on corporate management. It must be noted, however, that such procedures make corporate decision making more time-consuming and costly. Hence, they are rarely appropriate for ordinary management decisions.

3 Minority Investor Voting Power at the General Meeting

3.1 Statutory Framework

The PEMI’s voting power – the extent to which the PEMI, in exercising voting rights, can influence and possibly even control the outcome of...
resolutions of a stock corporation’s general meeting (or of a GmbH’s meeting of members) depends on (i) the size of the PEMI’s capital investment, (ii) the associated voting rights, (iii) the quorum and majority vote requirements for passing a resolution, along with (iv) factual aspects such as the distribution of votes among many or only a few shareholders, the type of shareholders (e.g., family shareholder, private equity investor) and their interests, and the level of presence of shareholders at the general meeting.\textsuperscript{677} Factual aspects are taken as a given in this analysis.

3.1.1 The Minority Investor’s Capital Investment and Associated Voting Rights

The shareholder’s voice in a stock corporation is based on his/her financial investment and not based on personal features.\textsuperscript{678} As a result, it is the financial investment, measured in terms of the aggregate nominal value\textsuperscript{679} of the shares owned in proportion to the total share capital,\textsuperscript{680} that determines the PEMI’s share of votes at the general meeting \textit{(one-share-one-vote principle)}\textsuperscript{681} or \textit{par value principle}\textsuperscript{682}.\textsuperscript{683} This principle is based on the notion that an individual shareholder’s capital investment and his/her related influence on corporate policy and decision making should correlate;\textsuperscript{684} that is, the higher the aggregate nominal value of the PEMI’s shares (and the higher the financial risk), the greater its number of votes.

\textsuperscript{677} Cf. similarly BURKHALTER, Einheitsaktien, p. 66.

\textsuperscript{678} See BAUEN/BERNET, p. 87, N 277; FORSTMOSER, Aktionärbindungsverträge, p. 361.

\textsuperscript{679} The nominal value of shares is the total amount the shareholder has undertaken to pay in full, even though he/she may have only partly paid up this amount. While bearer shares may only be issued if the full nominal value is paid up (CO 683 I), registered shares may be issued upon payment of at least 20% of their nominal value (CO 632 I), in total at least CHF 50,000 (CO 632 II). See LÄNZLINGER, Basler Kommentar, CO 692, N 3; BAUEN/BERNET, p. 56, N 179 et seq. and p. 97, N 297.

\textsuperscript{680} The share capital is the sum of the nominal values of the shares, see BAUEN/BERNET, p. 56, N 175.

\textsuperscript{681} The one-share-one-vote principle stipulates that each share entitles shareholders to one vote. Literally understood, voting shares fall within such definition. The predominant view is, however, that voting shares are precisely not compatible with the one-share-one-vote principle which refers to the equivalence between aggregate nominal value of shares held and voting rights obtained. See NOBEL, KMU, p. 338 (“worunter das Gegenteil von dem verstanden wird, was wir aus Art. 693 Abs. 1 OR kennen, nämlich Nennwertvariation und ‘jede Aktie eine Stimme’.”); BÖCKLI, Aktienrecht, § 4, N 128; BAUMANN, p. 133; GEHRER, p. 149; RUFFNER, Aktive Grossaktionäre, p. 263; BURKHALTER, Einheitsaktien, 25 et seq.; with further references, VON SALIS, Gestaltung, p. 49, FN 221. In contrast, KUNZ, Minderheitenschutz, § 1, N 156 (finding the one-share-one-vote principle materialized in CO 693 I).

\textsuperscript{682} NOBEL, Switzerland, p. 323. In German, Kapitalbeteiligungsprinzip, Grundsatz der beteiligungsproportionalen Stimmkraft, Prinzip der Kapitalbezogenheit, Nennwertprinzip, soviel Kapital – soviel Rechte. See RÖTHLSBERGER, p. 32 et seq.

\textsuperscript{683} CO 692 I. With respect to the GmbH, CO 806 I, see HANDSCHIN, Gesellschaftsanteile, p. 90.

\textsuperscript{684} See BURKHALTER, Einheitsaktien, p. 28.
However, provided the *minimum voting right*\(^{685}\) is observed, the company may deviate from this principle by, for instance, issuing voting shares \(^{686}\) or participation certificates, \(^{687}\) or by introducing a voting cap \(^{688}\). While Swiss corporation law permits the issuing of shares of different nominal values, it does not allow the granting of multiple voting rights per share, or shares with the same nominal value, but different voting power.\(^{689}\) In contrast, the GmbH can legally issue shares of the same nominal value, but with different voting power according to a number of legal scholars.\(^{690}\)

The right to vote encompasses the right to vote for resolutions on all matters that fall within the powers of the general meeting as defined by law and the articles of association and to elect the board members and the auditors.\(^{691}\)

As shareholders of a stock corporation, PEMIs may exercise their voting rights freely to best serve their interests.\(^{692}\) Swiss law governing stock corporations does not mandate the shareholders to abstain from voting in cases of conflicts of interest. In a GmbH, members, in principle, also exercise their voting rights freely.\(^{693}\) Other than the shareholders in a stock corporation, they are, however, bound by a duty of loyalty.\(^{694}\) The GmbH members are obliged to consent to pressing resolutions in the company’s interest if the resolutions are not unreasonable.\(^{695}\) Moreover, GmbH members, principally entitled to voting under Swiss corporate law, must abstain from voting concerning certain resolutions in which conflicts of interest between the company and the affected members typically arise.\(^{696}\) Legal scholars continue to debate whether members have a duty to abstain from voting in cases of conflicts of interest other than the conflicts enumerated in the law.\(^{697}\) PEMIs may vote in person or by proxy; the proxy

\(^{685}\) CO 692 II. With respect to the GmbH, CO 806 I sentence 2.

\(^{686}\) See Section IV.D.3.3.1.

\(^{687}\) See Section IV.D.3.3.2. Not possible in the GmbH, see FN 832.

\(^{688}\) See Section IV.D.3.3.3.

\(^{689}\) See FN 758.

\(^{690}\) Ibid.

\(^{691}\) See BÖCKLI, *Aktienrecht*, § 12, N 134; SCHAAD, *Basler Kommentar*, CO 689, N 20. In a GmbH, the second element only applies if the articles of association provide that the meeting of members elects the managing officers.

\(^{692}\) See Section IV.D.4.1.

\(^{693}\) See NATER, p. 29.

\(^{694}\) See Section IV.D.4.1 and FN 1210.

\(^{695}\) See KÖHLER, p. 289; NATER, p. 102.

\(^{696}\) For such resolutions, see FN 1216.

\(^{697}\) See TRUFFER/DUBS, *Basler Kommentar*, CO 806a, N 2 (concluding from CO 806a e contrario that the member must not be excluded from voting with regard to any other matter); NUSSBAUM/SANWALD/SCHIEDEGGER, CO 806a, N 4; JANSSON/BECKER, *Berner Kommentar*, CO 808, N 16; BÖCKLI, *GmbH-Recht*, 26. In contrast, finding that the articles of association may stipulate further situations in which the members are excluded from voting, are SIFFERT/FISCHER/PETRIN, CO 806a, N 6; HANDSCHIN/TRUNIGER, § 13, N 75, KÜNG/CAMP,
does not need to be a shareholder, unless the articles of association provide otherwise.698

3.1.2 Quorum and Majority Vote Requirements for Shareholder Decisions

3.1.2.1 Basics of Resolution Requirements

In order for corporate bodies to validly pass resolutions, two types of requirements can be set up: (i) quorum requirements, which stipulate the minimum level of attendance for a meeting to be quorate, and (ii) majority/minority vote requirements, which stipulate the number of votes necessary to pass a resolution.699 Both types of requirements can be structured in a variety of ways depending on (i) the measuring unit, (ii) the required threshold, and (iii) the basis for calculating such threshold.700

Measuring unit. Theoretically, possible measuring units for both the quorum and majority vote requirements are the nominal value of the shares held, the number of shares held, or the number of shareholders.701 Majorities based on the nominal value and the numbers of shares are effectively equivalent if each share is of the same nominal value.702

Calculation basis. The resolution threshold required to pass a resolution can be calculated based on all votes outstanding, the votes represented at the respective meeting, the votes cast, or the yes and no votes cast.703 Except...
for in the latter two cases, abstentions from voting are counted as no votes,\textsuperscript{704} thus true abstentions are not possible.\textsuperscript{705} Quorum requirements must be calculable before the respective meeting and therefore cannot be based, for instance, on votes represented at the meeting or votes cast.

Resolution thresholds. Resolution thresholds can come in the form of a minority or majority. There are relative (or simple), absolute, and qualified majorities. A relative majority is based solely on votes cast and requires more yes votes than no votes.\textsuperscript{706} An absolute majority requires more than half of the votes represented. A qualified majority requires an even higher ratio of the measuring unit.\textsuperscript{707} The highest qualified majority is unanimous consent.

Example. Of 100 votes outstanding, 51 are represented at the general meeting; 40 are cast for a particular resolution. Of those, 15 are yes votes, 10 no votes, and 15 blank ballots. The absolute majority is not achieved if the majority is calculated based on all votes outstanding (which would require 51 yes votes). Also, the absolute majority is not achieved if the majority is calculated based on the votes represented at the meeting (which would require 26 yes votes). If the majority is based on votes cast, the absolute majority is still not achieved since blank votes count as no votes.\textsuperscript{708} Only if a relative majority calculated based on yes and no votes is stipulated, is the resolution passed (15 yes votes versus 10 no votes).

3.1.2.2 Quorum Requirements

Except for the plenary meeting,\textsuperscript{709} Swiss corporate law does not require a quorum to be present at the general meeting to pass resolutions.\textsuperscript{710} Even if only a small percentage of the total shareholder capital is represented at the general meeting, it is quorate and resolutions may be passed and elections carried out provided that the respective majority vote requirements are met.\textsuperscript{711} For example, assuming shareholders representing 20\% of the share

\begin{footnotesize}
\begin{enumerate}
\item See MEIER-HAYOZ/FORSTMOSER, § 16, N 377; BAEU/BERNET, p. 148, N 421; with further details, TANNER, Quoren, § 2, N 57.
\item Except for non-appearance or leaving the room. See TANNER, Beschlussfassung, p. 770; ZÄCH/SCHLEIFFER, p. 264.
\item See DUBS/TRUFFER, Basler Kommentar, CO 703, N 6; TANNER, Beschlussfassung, p. 769.
\item See TANNER, Quoren, § 2, N 42.
\item Ibid, § 4, N 89.
\item And, in a GmbH, the qualified majority vote requirement (CO 808b), see NUSSBAUM/SANWALD/SCHLIEDEGG, CO 808, N 1.
\item See DUBS/TRUFFER, Basler Kommentar, CO 703, N 2; BAEU/BERNET, p. 149, N 432. With respect to the GmbH, see TRUFFER/DUBS, Basler Kommentar, CO 808, N 2; NATER, p. 90.
\item CO 703.
\end{enumerate}
\end{footnotesize}
capital attend the general meeting and votes are allocated in proportion to
the nominal value of the shares, resolutions on ordinary matters may be
passed by an absolute majority of the votes represented at the meeting; that
is, by the votes allocated to the shares representing 10% of the total share
capital plus one vote. Equally, stock corporation laws do not stipulate a
quorum requirement with respect to *important resolutions.* 

In contrast, important resolutions voted upon in a *GmbH* meeting of members are
subject to an *indirect quorum requirement*, meaning the consent of at least
two-thirds of the votes represented and the absolute majority of the *entire*
share capital associated with exercisable voting rights. 

Hence, members with a combined share of more than 50% of the firm’s total share capital
must be present at the meeting of members in order for important decisions
(as defined by law) to be passed.

### 3.1.2.3 Majority Vote Requirements

Depending on the issue to be resolved, Swiss corporate law stipulates
different resolution thresholds for voting procedures, both in case of stock
corporations and *GmbH*.

**Absolute majority vote requirement for ordinary resolutions.** Unless the law
or the articles of association provide otherwise, shareholders’ resolutions
are passed and elections carried out by the absolute majority of the votes
allocated to the shares represented at the general meeting. 

As a result, a shareholder holding half of the votes represented plus one vote (in case of
an even number of votes, or plus half a vote in case of an uneven number,
respectively) can solely decide on routine matters without requiring voting
support of other shareholders.

**Qualified majority vote requirement for important resolutions.** Certain
resolutions of the general meeting defined as important by law require a
qualified majority vote comprising both at least two-thirds of the votes

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712 CO 704 I.
713 CO 808b I. *See NUSSBAUM/SANWALD/SCHEIDEGGER, CO 808, N 1.
714 CO 808b.
715 CO 703. Shares represented at the general meeting that are not entitled to a vote are not
included in calculating the majority. *See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 26. D-
CO 703 provides for a majority vote requirement based on the votes cast instead of the votes
allocated to shares represented at the general meeting. See GLANZMANN, Aktienrechts-
revision, p. 676 (endorsing the revision because abstentions are no longer counted as no
votes). The same absolute majority vote requirement applies to ordinary resolutions of the
GmbH (CO 808).
716 *See BÖCKLI/BÜHLER, Grenzen, p. 41.
717 Decisions listed in CO 704 I.
represented at the meeting and the absolute majority of the nominal value of the shares represented.\textsuperscript{718} The second hurdle is relevant if the articles of association provide for voting shares.\textsuperscript{719} In a GmbH, the qualified majority for important resolutions requires at least two-thirds of the votes represented at the meeting of members and the absolute majority of the entire share capital (not only to the nominal value of the shares represented at the meeting).\textsuperscript{720} Swiss corporate law provides an exhaustive\textsuperscript{721} list of matters subject to a qualified majority vote of the general meeting, including resolutions (i) to alter the corporate purpose, (ii) to create voting shares, (iii) to restrict the transferability of registered shares, (iv) to create and increase authorized or conditional share capital, (v) to increase capital out of equity, against in-kind contributions, or to acquire assets, and to grant special benefits, (vi) to limit or withdraw pre-emptive rights, (vii) to relocate the company’s registered office, and (viii) to approve the dissolution of the company.\textsuperscript{722} In a GmbH, the meeting of members votes on the same subject matter\textsuperscript{723} and, in addition, it approves (i) the assignment of company shares or the recognition of a transferee as a member entitled to vote, (ii) activities of members and managing officers in breach of their duty of loyalty or the prohibition to compete (if the articles of association so provide),\textsuperscript{724} (iii) it decides on filing an action with the court for the expulsion of a member for valid reasons, and (iv) the expulsion of a member for a reason stated in the articles of association.\textsuperscript{725}

\textsuperscript{718} CO 704 I. D-CO 704 I provides for both at least two thirds of the votes cast and the absolute majority of the nominal value of the shares represented.

\textsuperscript{719} See DUBS/TRUFFER, Basler Kommentar, CO 704, N 3; MEIER-HAYOZ/FORSTMOser, § 16, N 379; TANNER, Quoren, p. 349 et seq. With respect to the GmbH, see TRUFFER/DUBS, Basler Kommentar, CO 808b, N 2.

\textsuperscript{720} CO 808b I.

\textsuperscript{721} See ibid; TREZZINI, p. 263; NOBEL, Switzerland, p. 323.

\textsuperscript{722} As part of the ongoing revision of corporate law, the list of resolutions requiring a qualified majority vote pursuant to D-CO 704 I is expanded and will newly include, according to the proposal of the Swiss Federal Council, resolutions on the pooling of listed shares, on capital increases with contributions by set-off, the introduction of a capital band, the conversion of participation certificates into common shares, provisions in the articles concerning a venue of the general meeting abroad, and the adoption of provisions in the article of associations requiring decisions of the board of directors to be approved by the general meeting. The latter was dismissed by the Council of States in its resolution as of 11 June 2009.

\textsuperscript{723} CO 808b I Sec. 1, 2, 3, 5, 6, 10, 11. In a GmbH, however, there is only an ordinary capital increase.

\textsuperscript{724} Otherwise the consent of all members is required (CO 803 III).

\textsuperscript{725} CO 808b I Sec. 4 (in this case, the facilitation of the majority vote requirement is deemed admissible by TRUFFER/DUBS, Basler Kommentar, CO 808b, N 8), 7, 8, 9.
Unanimous consent. In exceptional cases, the unanimous consent of the shareholders in a stock corporation is required by law. The law distinguishes between (i) absolute unanimity where holders of 100% of the shares outstanding must consent to a motion and (ii) relative unanimity where the consent of holders of 100% of the shares represented at the general meeting is required. For instance, absolute unanimity is required for revoking the profit-making purpose of the company, for holding a plenary general meeting in which all shareholders meet without observing the formal rules for calling a meeting, for waiving the limited audit and the merger report in small and medium-sized companies, and for pooling shares into those with higher nominal value. Relative unanimity is required for waiving the participation of the firm’s auditors at the general meeting (or the meeting of members in a GmbH). In addition, the GmbH laws provide for absolute unanimity for introducing veto rights subsequent to incorporation and for allowing members to engage in activities that violate the duty of loyalty or, if applicable, the prohibition to compete.

3.1.2.4 Veto Rights

Firstly, with regard to the resolutions for which the law requires unanimous consent (see section above), PEMIs have a veto right and can block respective decisions (passive voice). Secondly, as holders of preferred shares or participation certificates they have veto rights on resolutions that adversely affect their preferential rights unless otherwise stated in the articles of association. Similarly, in a GmbH, consent of the members affected, in addition to the absolute majority vote, is required for the subsequent introduction or the extension of obligations for members to make supplementary financial contributions or to provide ancillary perfor-

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726 Since voting in the general meeting must not be based on the one-shareholder-one-vote principle, provisions which require the consent of all shareholders must be interpreted as requirements of the consent of all votes, see TANNER, Quoren, § 2, N 54.
727 CO 706 II Sec. 4. With respect to the GmbH, CO 808c i.c.w. CO 706 II Sec. 4.
728 CO 701 I. With respect to the GmbH, CO 805 V Sec. 5 i.c.w. CO 701 I.
729 Provided that the company is entitled to a limited audit (CO 727) and has less than 10 full-time employees on an annual average (727a II). With respect to the GmbH, CO 818 I i.c.w. CO 727a II.
730 ML 14 II. Here, SMEs are defined in ML 2e.
731 CO 623 II.
732 CO 731 II. With respect to the GmbH, CO 818 I i.c.w. CO 731 II.
733 CO 607 II.
734 CO 803 III. Provided that the articles of association do not provide that the approval of the meeting of members shall be sufficient.
735 See Section IV.A.3.
736 CO 654 II, III and CO 656f IV. In the GmbH, CO 799 i.c.w. CO 654 II, III for preferred company shares; there are no participation certificates in a GmbH.
Thirdly, regarding resolutions subject to a qualified majority vote (under corporate law or the articles of association), the PEMI who owns enough votes to block the respective resolutions from being passed has de facto veto power. In the case of the qualified majority as defined by law, the PEMI has veto power if it owns more than one-third of the votes represented. Apart from these cases, Swiss stock corporation law does not allow the introduction of ad personam veto rights in the articles of association for the benefit of all or certain shareholders. Ad personam veto rights may be obtained only via contractual agreements. In contrast, Swiss GmbH law expressly states that the articles of association may establish ad personam veto rights for the benefit of members against certain resolutions of the meeting of members (but not directly against those of the managing officers). Veto rights are a distinct person-oriented element of the GmbH as they are not associated with company shares, but with the entitled members and therefore cannot be transferred. Veto rights granted to all members are similar in effect to requirements of unanimous consent.

**Figure 17: Requirements for passing resolutions – structuring options**
### 3.2 Assessment of Legal Status and Further Need for Protection

Table 5 provides an overview of the most important statutory rights concerning the minority investor’s voting power at the general meeting and an assessment thereof.

<table>
<thead>
<tr>
<th>Voice-Related Right</th>
<th>Required Shareholding</th>
<th>Impact on PEMI De Facto Voice</th>
<th>Assessment of Protection</th>
</tr>
</thead>
</table>
| Right to vote for resolutions & elect corporate bodies | • Minimum voting right of one vote irrespective of shareholding  
• Beyond: par value principle | Potential for de facto voice depends on quorum & majority vote requirements & factual aspects (e.g., attendance of the GM).  
Veto power (passive voice) if  
• controlling > 1/3 of votes represented for important resolutions  
Control (active voice) if  
• controlling > 50% of votes represented for ordinary resolutions  
• controlling 2/3 of votes represented & > 50% of nominal value of shares represented | By law, if all shareholders attend the GM, the PEMI has:  
• no control rights (no active voice)  
• no veto rights against ordinary resolutions (no passive voice)  
• maybe veto rights against important resolutions  
• veto rights against resolutions requiring unanimous consent  
• veto rights against resolutions adversely affecting preferential rights if holding preferred shares or participation certificates |

Table 5: Minority investor voice at the general meeting

With the principles of *majority rule*\(^{746}\) and of *centralized control*, a private equity investor holding less than the absolute majority of the votes has

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\(^{746}\) In corporate law, the majority rule, which is based on the shareholders’ equity interests, aims to insure the firm’s *functionality*; in contrast, the majority rule in public law aims to
effectively hardly any de facto voice in corporate decision making if facing a controlling shareholder who can dictate corporate policy through his/her control of the board of directors. Where decisions of the general meeting are by law subject to a qualified majority vote, the PEMI may have passive voice, but only if holding more than one third of the votes represented at the general meeting.

The *par value principle* is rooted in the concept that shareholder rights of participation proportionally increase with their equity interests.\(^747\) However, a higher equity stake and therefore more votes does not automatically translate in more de facto voting power in a closely held firm with a majority shareholder who controls the absolute majority of the stock and has the power to make 100% of the decisions.\(^748\) Thus, it follows that the size of equity stakes and de facto voice are not linear.\(^749\) The basic concept that decisions are made by those who later bear the consequences of such decisions, in terms of both profit and losses,\(^750\) does not hold from a de facto perspective. PEMIs fully bear the economic consequences of decisions made by controlling shareholders without de facto voice.\(^751\) In the absence of viable exit options, PEMIs are at the mercy of majority shareholders, particularly in the case of a falling out between the two. The Swiss Federal Supreme Court has acknowledged the de facto powerlessness of minority shareholders stating that by becoming a minority shareholder, the investor is perfectly aware (or should be) that the will of the majority rules, and that the minority shareholder is at the mercy of the majority shareholder.\(^752\)

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\(^747\) See Section IV.D.3.1.1.

\(^748\) Cf. Illig, p. 286.

\(^749\) Cf. Groner, p. 143 et seq.

\(^750\) See Gerster, p. 40.

\(^751\) See Krネタ, CO 716, N 1078.

\(^752\) BGE 99 II 55 (E. 4b: “Mit dem Eintritt in die Gesellschaft unterwirft der Aktionär sich bewusst dem Willen der Mehrheit und anerkennt, dass diese auch dann bindend entscheidet, wenn sie nicht die bestmögliche Lösung trifft und ihre eigenen Interessen unter Umständen denjenigen der Gesellschaft und einer Minderheit vorgehen lässt.”).
Figure 18: Capital commitment and de facto voice are not linear!

Where decisions of the general meeting are, by law, subject to a qualified majority requirement, the PEMI may have passive voice, but only if it holds more than a third of the votes represented. Moreover, stock corporation law has no quorum requirements. Hence, even if the PEMI holds more than one-third of the votes important resolutions can still be passed if the PEMI is not attending or not represented at the general meeting.\footnote{See DUBS/TRUFFER, Basler Kommentar, CO 704, N 17; MEIER-HAYOZ/FORSTMOSER, § 16, N 381; ZACH/SCHLEIFFER, p. 265.} In a GmbH, there are also no quorum requirements applicable to ordinary decisions.\footnote{Decisions other than those listed in CO 704 I.} Important decisions of the GmbH meeting of members are, however, subject to an indirect quorum requirement in that the consent of at least two-thirds of the votes represented and the absolute majority of the \textit{entire} share capital associated with exercisable voting rights is required. Yet, with owning less than 50\% of the equity by definition,\footnote{See Section II.A.3.1.} this quorum requirement is not a protection for PEMIs.

3.3 Legal Structuring Options

In attempting to increase their voting power at the general meeting and achieve a more balanced distribution of corporate control, PEMIs may employ various legal tools that are discussed in this section. As noted, the PEMI’s voting power is determined by the size of its capital investment, the associated voting rights, quorum and majority vote requirements for passing a resolution, along with factual aspects.

Assuming a certain minority stake, the PEMI’s relative voting power as a shareholder in a stock corporation, which by law corresponds to the nominal value of its shares in relation to the total share capital,\footnote{See Section IV.D.3.1.1.} may be
increased by tools that allocate voting power disproportionately amongst shareholders, such as (i) voting shares or that diffuse the controlling shareholder’s voice via (ii) participation certificates and (iii) voting caps. (iv) The PIMI’s voting power may also be enhanced via voting agreements. (v) Moreover, de facto voice can be enhanced via suitable quorum and majority vote requirements in the articles of association. The same instruments can be used to enhance the PIMI’s voice in the meeting of members in a GmbH, except for the use of participation certificates.

3.3.1 Voting Shares

3.3.1.1 Legal Concept

Swiss stock corporation law does not allow for shares with multiple votes or with voting power, but of no nominal value. However, voting power in excess of what would be proportional to the nominal value of shares is indirectly conferred by so-called concealed voting shares. Each of these shares entitles its holder to one vote, but bears a lower nominal value than other shares. Such effect can be achieved by creating more than one class of shares with different nominal values and stipulating, in the articles of association, that each share (irrespective of its nominal value) entitles its holder to one vote at the general meeting. As a result, the shareholder’s voting power is based on the number of shares owned (one vote per share) rather than their aggregate nominal value. Since voting shares yield more

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757 Also called shares with privileged voting rights or super-voting shares.

758 So-called open voting shares (in German, offene, echte oder direkte Stimmrechtsaktien). See BÖCKLI, Aktienrecht, § 4, N 131; LÄNZLINGER, Basler Kommentar, CO 693, N 1; BAUEN/BERNET, p. 58, N 184, FN 46; MEIER-HAYOZ/FORSTMOSER, § 16, N 273; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 101; BÜRGI, Zürcher Kommentar, CO 693, N 11 et seq.; BAUMANN, p. 133; RÖTHLISBERGER, p. 41 et seq.; GERSTER, p. 11 et seq., 64 et seq.; VON SALIS, p. 141. In a GmbH context, a number of legal scholars argue in favor of the admissibility of open voting shares, e.g., GASSER/EGGENBERGER/STÄUBER, Orell Füssli Kommentar, CO 806, N 3; KÜNG/CAMP, CO 806, N 1; NATER, p. 97; BÄHLER, p. 56. Against open voting shares are TRUFFER/DUBS, Basler Kommentar, CO 806, N 1, 8.

759 See BAUEN/BERNET, p. 53, N 175.

760 See BAUEN/BERNET, p. 58, N 184, FN 46. In German, verdeckte, unechte oder indirekte Stimmrechtsaktien, verdecktes Pluralstimmrecht, see LÄNZLINGER, Basler Kommentar, CO 693, N 1; BAUMANN, p. 134; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 100; KRATZ, Möglichkeiten, § 9, N 46. For a different terminology, see GERSTER, p. 12.

761 See GERSTER, p. 115 (“Nennwertdifferenzierung”).

762 See BURKHALTER, Einheitsaktien, p. 71 (“Stückstimmprinzip”); GERSTER, p. 115 (“Stückstimmrechtsklausel”).

voting power per unit of nominal value, a shareholder can obtain more votes by investing a given amount of capital in the class of shares with a lower nominal value.\textsuperscript{764} Thus, holders of such class of stock are said to enjoy privileged, disproportionately high\textsuperscript{765} or super-\textsuperscript{766} voting rights.\textsuperscript{767}

In a stock corporation (not a GmbH\textsuperscript{768}), voting power disproportionate to equity participation can also be achieved by issuing different classes of shares, for example, registered shares and bearer shares with the same nominal value with \textit{registered shares not fully paid up},\textsuperscript{769} and bearer shares issued upon payment of the full nominal value\textsuperscript{770}.

Given that the law requires only a minimum contribution of 20\% of their nominal value for registered shares,\textsuperscript{772} the voting power vis-à-vis bearer shares can be quintupled, that is, the maximum ratio of \textit{voting leverage} is 1:5.\textsuperscript{773} By not paying in full, the shareholder can acquire more shares with a certain monetary investment and hence obtain more votes since votes are based on the nominal value of shares rather than the actual monetary investment.\textsuperscript{774} Moreover, because the de facto voting privilege of partially paid-up registered shares also takes effect if the law requires a majority of the nominal value of shares for passing resolutions at the general meeting, the effect of not fully paid up registered shares is even broader in scope than that of voting shares.\textsuperscript{775} However, the holders of registered shares remain liable to fund the remaining amount.\textsuperscript{776}

\subsection*{3.3.1.2 Purpose}

In closely held companies, voting shares are commonly used as an instrument to preserve the existing shareholders’ influence and to form

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{764} Assuming the shares of all classes are fully paid up. See DUBS/TRUFFFFER, \textit{Basler Kommentar}, CO 703, N 4; MEIER-HAYOZ/FORSTMOSER, § 16, N 273; HUGUENIN JACOBS, p. 144.
\item \textsuperscript{765} See NOBEL, \textit{Switzerland}, p. 324.
\item \textsuperscript{766} See GORDON, \textit{Ties that bond}, p. 4.
\item \textsuperscript{767} See BOHRER, § 8, N 294; BAUMANN, p. 135.
\item \textsuperscript{768} In a GmbH, the company shares are issued at least at their nominal value (CO 774 II).
\item \textsuperscript{769} Also called \textit{improper, unreal, pseudo voting shares}, see BÜRGI, \textit{Zürcher Kommentar}, CO 693, N 15; GERSTER, p. 102.
\item \textsuperscript{770} CO 683 I.
\item \textsuperscript{771} See LÄNZLINGER, \textit{Basler Kommentar}, CO 693, N 8; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 102 \textit{et seq.}; RÖTHLISBERGER, p. 42; KRAATZ, \textit{Möglichkeiten}, § 9, N 46; VON SALIS, p. 51.
\item \textsuperscript{772} CO 632 I.
\item \textsuperscript{773} See GEHRER, p. 103.
\item \textsuperscript{774} OR 692 I. See GERSTER, p. 101; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 102.
\item \textsuperscript{775} See GERSTER, p. 103.
\end{itemize}
\end{footnotesize}
leadership heavyweights. Voting shares effectively allow existing shareholders to raise additional capital without losing control. In family firms, family members actively involved in corporate affairs typically use voting shares to exercise relatively greater influence in corporate decision making than passive shareholders. In light of these typical functions, it is often assumed that voting shares are held by the controlling shareholder and used to concentrate control. However, the use of voting shares relevant in this analysis is quite the opposite: voting shares can be used to protect PEMIs by diffusing the controlling shareholder’s de facto absolute voting power. Voting shares allow for a democratization of corporate decision making by allowing PEMIs to exert greater influence on corporate decisions.

Example. A minority investor owning 20,000 shares of a total of 100,000 common shares (20%) with a nominal value of CHF 100 each (CHF 10 million total) will be outvoted under the majority rule by the controlling shareholder holding the remaining shares and will thus have no de facto influence on corporate matters. However, if the PEMI invests the same capital (CHF 2 million) in a separate class of shares with a nominal value of CHF 40 each, the PEMI obtains 50,000 votes representing 38.5% of the total votes (50,000 / (80,000 + 50,000)). As a result, the PEMI has de facto veto power in votes on important resolutions.

3.3.1.3 Legal Nature

While certain scholars of the older doctrine have characterized voting shares as preferred shares, current understanding in academia and
jurisprudence is that voting shares do not represent a subcategory of preferred shares, but rather an entirely separate category of shares since preferred shares are shares with exclusively, or at least primarily, financial preferences and not voting preferences. The question is relevant insofar as it determines, for example, the procedure to be followed when removing voting shares.

3.3.1.4 Introduction

Formally, voting shares are introduced in the initial articles of association via unanimous consent. Subsequently, voting shares can be created by introducing the one-vote-per-share rule for shares with different nominal values that are already outstanding. Otherwise, categories of shares with different nominal values must be created via a capital increase or a reduction in the nominal value of part of the shares, a stock split, or the pooling of some of the shares. The creation of voting shares requires an amendment of the articles of association, which the general meeting must vote upon with a qualified majority vote. However, what transactions qualify as creation and are hence subject to the majority vote participation in liquidation proceeds, to preemptive rights in the case of the issue of new shares (CO 656 II) and other financial preferences, see MEIER-HAYOZ/FORESTMOSER, § 16, N 270; FORSTEMOSER/MEIER-HAYOZ/NOBEL, § 41, N 26.

On the question whether preferred shares, in addition to financial privileges, may also combined with privileges of participation, see GERSTER, p. 98 et seq. (affirming with respect to participation rights other than the right to vote); equally BURKHALTER, Einheitsaktien, p. 77. Of another opinion, see BÖCKLI, Aktienrecht, § 4, N 150; RÖTHLISBERGER, p. 54; TANNER, Quoren § 7, N 180. With references to further legal scholars, see Vogt/Liebi, Basler Kommentar, CO 654-656, N 1 et seq.; Liebi, § 1, N 203 et seq. Cf. also FORSTEMOSER/MEIER-HAYOZ/NOBEL, § 41, N 26 (stating that shares with both financial and voting privileges are preferred shares and voting shares at the same time). The Zurich Commercial Court decided that the privileges may only relate to financial rights, see the decision of the Commercial Court of Zurich of 6 February 1995, SJZ, No. 91, 1995, p. 198 et seq.; similarly also the decision of 31 October 1989, ZR, No. 88, 1989, p. 228.

For a detailed overview of the prevailing expert opinion, see LIEBI, § 1, N 203; VON BÜREN/STOFFEL WEBER, N 276 et seq.; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 41, N 26, 30; HÖRBER, Sonderversammlung, p. 24; NOBEL, Formelle Aspekte p. 21 et seq.; VON SALIS-LÜTOLF, Finanzierungsverträge, § 7, N 503.

On the removal of voting shares, see Section IV.D.3.1.6.

See SCHENKER, Basler Kommentar, CO 629, N 4, 6; BAUMANN, p. 134; RÖTHLISBERGER, p. 34, FN 65; GERSTER, p. 112 et seq; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 117.

In German, Stimmrechtsprinzip (see FN 762). To be distinguished from the one-share-one-vote rule reflecting the par value principle (see Section IV.D.3.1.1).

See GERSTER, p. 115; TANNER, Quoren § 7, N 190.

See GERSTER, p. 115.

The consolidation of shares requires the approval of the affected shareholder (CO 623 II).

See RUFFNER, Grundlagen, p. 580; TANNER, Quoren § 7, N 161 et seqq.

CO 693 I. With regard to the GmbH, CO 806 II.

704 I Sec. 2. With regard to the GmbH, CO 808b I Sec. 2.
requirement is contentious among scholars and practitioners. From the PEMI perspective, the issue of voting shares used to enhance its relative voting power, in practice, requires the controlling shareholder’s consent in any case. Ex ante, the controlling shareholder may consent to issue voting shares to the PEMI to seal the investment deal with the PEMI. During the course of the investment, however, once the PEMI is locked in, the question as to which majority vote requirement is applicable becomes relevant. Two cases can be distinguished. Firstly, the PEMI controls one-third or less of the votes represented at the general meeting. In such case, irrespective of which major vote requirement applies, the controlling shareholder controls the decision on whether to issue additional voting shares, which poses a risk that the PEMI’s voting power granted ex ante could be diluted ex post. Secondly, the PEMI who controls at least one-third plus one of the

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797 According to one view, the qualified majority vote requirement is intended as a protection of the company against a hasty and ill-considered abrogation of the par value principle. Therefore, the qualified majority vote requirement must be observed if voting shares are created for the first time. See BÖCKLI, Aktienrecht, § 12, N 370; DUBS/TRUFFER, Basler Kommentar, CO 704, N 8; GERSTER, p. 151; RUFFNER, Grundlagen, p. 580. Whether the qualified majority vote requirement also applies in case of subsequent creations of additional voting shares is answered differently. While GERSTER, p. 151 et seq. rejects this, such view is supported by BÖCKLI and RUFFNER who apply the qualified majority vote requirement if a further class of shares is introduced with an additional voting privilege (e.g., voting leverage of 10, instead of 5) or in case the voting privilege of the existing classes of voting shares is enhanced by a disproportionate stock split, increase or reduction of share capital that changes the ratio of the aggregate nominal values in favor of the voting shares. However, only an ordinary majority vote is required if additional voting shares are created provided that, relatively, the voting rights remain unchanged, see BÖCKLI, Aktienrecht, § 12, N 371; RUFFNER, Grundlagen, 582 et seq.; see also LÄNZLINGER, Basler Kommentar, CO 693, N 6. Other legal scholars maintain that – whether in case of a first-time or subsequent creation of voting shares – the qualified majority vote requirement must be observed if, and only if, the existing shares disproportionally loose voting power because, in their view, the statutory qualified majority vote requirement protects each shareholder’s legal status. Only the ordinary majority vote requirement pursuant to CO 703 is applicable if all classes are proportionally increased, if the existing shares are split equally or if in case of a capital increase all existing shares are converted into voting shares. See RÖTHLISBERGER, p. 58 et seq.; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 38, incl. FN 16, N 118; KRATZ, Möglichkeiten, § 9, N 49; TANNER, Quoren, § 7, N 150, 159. See also BGE 116 II 525 (E. 3d: “Dies führt im vorliegenden Fall einer Kapitalerhöhung mit konsekutiver Ausgabe von Stimmrechtsaktien zum Ergebnis, dass ein qualifiziertes Quorum … nicht notwendig ist, sofern dadurch die Rechtsstellung der bisherigen Aktionäre keine durch Privilegierung einer Aktienkategorie bewirkte Beeinträchtigung erfährt,”) E. 4a: “Eine Beeinträchtigung wird nicht bereits dadurch ausgeschlossen, dass das Bezugsrecht der bisherigen Aktionäre proportional zu ihrem Aktienbesitz gewahrt ist. Entscheidend ist vielmehr, ob bei Nichtausübung des Bezugsrechts die relative Stimmkraft des bisherigen Aktionärs überproportional geschmälert wird oder nicht. Dies ist beispielsweise der Fall, wenn ausschliesslich neue Stimmrechtsaktien oder solche zum bisherigen Verhältnis der mehreren Aktienkategorien überproportional ausgegeben werden, nicht dagegen, wenn die bisherigen Proportionen unverändert bleiben sollen.”) and the Commercial Court of Zurich of 31 October 1989, ZR, No. 88, 1989, p. 230 et seq.).
votes represented at the general meeting has de facto veto power against any threatening ex post changes of the voting rights structure provided the qualified majority applies. If, however, the absolute majority applies because the company already has voting shares outstanding, the minority shareholder again would be unable to prevent the subsequent issue of voting shares. To be safe, the PEMI should request ex ante that the articles of association clearly state that any issue of voting shares is subject to the statutory qualified majority vote in case the PEMI controls at least one-third plus one of the votes, or a respective higher majority vote in case the investor controls less votes. Alternatively, the separate consent of the shareholders of each class may be required.

From a material perspective, the creation of voting shares at the time of incorporation is not subject to any further requirements. For a subsequent introduction of new voting shares, the following principles must be observed: lawfulness, objectivity, equal treatment, and the prohibition of abusing the law.

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798 Assuming that the PEMI controls the absolute majority of a class of shares.

799 See GERSTER, p. 113; KRATZ, Möglichkeiten, § 9, N 49.

800 The principle of lawfulness requires compliance with mandatory laws and the articles of association (CO 706 II Sec. 1).

801 The principle of objectivity requires each revocation or restriction of shareholder rights to be objectively justified by proper reasons. The revocation or restriction must be (i) in the interest of the company; VON SALIS mentions examples of corporate interests – the preserving of competitiveness, ensuring continuity, independence and unity, protection from competition and speculative elements, requirements of the capital market, increased productivity, rationalization, and turnover; see VON SALIS, p. 15 et seq.; (ii) necessary to achieve the objective pursued, i.e., the revocation or restriction of shareholder rights is objectively indispensable and inevitable in order to meet the company’s interests, see VON SALIS, p. 17; (iii) carried out with consideration, i.e., in such a way that it results in the least possible disadvantages for those whose rights are restricted, see GERSTER, p. 121; FORSTOMOSER/MEIER-HAYOZ/NOBEL, § 25, N 25; VON SALIS, p. 18 et seq.; DUBS/TRUFFER, Basler Kommentar, CO 706, N 13 (subsuming the principle of exercising rights with consideration under the prohibition of unjustified differential treatment). On the principle, see also PELLI; MEYER-HAYOZ/FORSTOMOSER, § 16, N 150; NUSSBAUM/VON DER CRONE, p. 144; MEIER-HAYOZ/ZWEIFEL, p. 383 et seqq. For case law, see BGE 121 III 219 (E. 1d.cc); BGE 117 II 290 (E. 4e.bb); (iv) proportional, that is, the revocation or restriction of shareholder rights requires a comparison of the effect of the revocation or restriction with the intended purpose, see VON SALIS, p. 15 oder 20. With respect to the GmbH, see TRUFFER/DUBS, Basler Kommentar, CO 806, N 2.

802 The principle of equal treatment requires that differential treatment must be justified by the corporate purpose (CO 706 II Sec. 3), to be understood as the corporate interests. See HUGUENIN JACOBS, p. 39, FN 62; FORSTOMOSER/MEIER-HAYOZ/NOBEL, § 25, N 27; VON SALIS, p. 35. On the principle of equal treatment particularly in the context of voting shares, see KRATZ, Möglichkeiten, § 9, N 54; FORSTOMOSER/MEIER-HAYOZ/NOBEL, § 24, N 119. Of note is that any introduction of voting shares which results in an unequal impairment of the shareholders’ relative voting power must be an appropriate means to achieve a goal justified by the corporate purpose (706 II Sec. 3). Cf. HUGUENIN JACOBS, p. 154 (finding that
3.3.1.5 Limitations

The issue of voting shares is subject to a number of limitations. Apart from the limitations that flow from the material requirements discussed above, voting shares must be fully paid-up registered shares.\textsuperscript{805} To avoid creating a significant gulf between the shareholders’ cash-flow and voting rights, the nominal value of the voting shares must not be less than one-tenth of the nominal value of the common shares (the individual shares, not classes).\textsuperscript{806} Hence, the maximum ratio of voting leverage is 1:10.\textsuperscript{808} By investing a given amount of capital in voting shares the Pemi may obtain voting power up to ten times higher than if purchasing common shares.\textsuperscript{809} Moreover, for certain decisions, the law requires the voting power to be based on the nominal value rather than the number of shares. Such decisions include the differential treatment with regard to voting rights may be justified if the shareholders who receive less voting power relative to their capital investment are compensated with preferences shares).

\textsuperscript{803} CC 2 II. See the decision of the Swiss Federal Supreme Court of 19 August 2008, 4A.205/2008 (E. 4.1: “Une décision prise par la majorité sera abusive au sens de l'art. 2 al. 2 CC si elle n'est pas justifiée par des motifs économiques raisonnables, si elle lèse manifestement les intérêts de la minorité et si elle favorise sans raison les interest particuliers de la majorité.”); BGE 125 III 257 (E. 2c: “Ihr Absatz 2 setzt mit dem Verbot des Rechtsmissbrauchs der formalen Rechtsordnung eine ethische materielle Schranke, lässt scheinbares Recht dem wirklichen weichen, wo durch die Betätigung eines behaupteten Rechts offenbares Unrecht geschaffen und dem wirklichen Recht jeder Weg zur Anerkennung verschlossen würde”). See BÖCKLI/BÜHLER, Grenzen, p. 59 (stating that there is no generally accepted definition of abuse of rights and that such a definition will likely never exist). Legal experts have developed categories of abuses of rights which help put the vague concept into concrete terms. On the categories, see HONSELL, Basler Kommentar, CC 2 N 37 et seqq., relevant are, in particular, useless exercise of rights (N 38 et seqq.), blatant discrepancy of interests (N 41 et seqq.), and inconsistent behavior (N 43 et seqq.). Even though CC 2 II is a concept of independent significance, the cases falling under this provision regularly already fall under provisions of corporate law that substantiate the general principles of law named. However, CC 2 II may be invoked if no other principle of corporate law is violated. See VON SALIS, p. 37; VON BÜREN/STOFFEL/WEBER, N 861; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 25, N 17, § 39, N 103 et seqq.; also cf. BGE 102 II 265 (E 2: “dass Tatbestände von Rechtsmissbrauch denkbar sind, die das Gebot der Gleichbehandlung aller Aktionäre nicht verletzen. Damit kann der Gleichbehandlungsgrundsatz nicht lex specialis zu Art. 2 ZGB im Aktienrecht sein. Er konkretisiert lediglich Art. 2 ZGB im Aktienrecht, vermag aber die Berufung auf das Rechtsmissbrauchsverbot nicht vollständig zu decken.”). See BÖCKLI, Aktienrecht, § 4, N 138; LÄNZLINGER, Basler Kommentar, CO 693, N 5; NOBEL, Switzerland, p. 324. With respect to the GmbH, CO 806 II sentence 2.

\textsuperscript{804} BAUMANN, p. 135; with further references, RÖTHLISBERGER, p. 63 et seqq.; GEHRER, p. 156; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 119.

\textsuperscript{805} CO 693 II Sentence 1. Company shares in the GmbH are issued at least at their nominal value (CO 774 II).

\textsuperscript{806} CO 693 II Sentence 2. See BÖCKLI, Aktienrecht, § 4, N 138; LÄNZLINGER, Basler Kommentar, CO 693, N 5; NOBEL, Switzerland, p. 324. With respect to the GmbH, CO 806 II sentence 2.

\textsuperscript{807} Defined as the nominal value of the shares with privileged voting rights to the nominal value of common shares, see BOHNER, § 8, N 294.

\textsuperscript{808} See BOHNER, § 8, N 294; BAUMANN, p. 135; BÖCKLI, Aktienrecht, § 4, N 138.

\textsuperscript{809} Assuming the common shares are fully paid up.
election of auditors, the appointment of experts to review management or specific parts thereof, a shareholders’ vote on a special audit, and the vote on the initiation of an action for responsibility. With regard to important resolutions as defined in corporate law, the influence of voting shares is levelled out because such resolutions can be passed only by at least two-thirds of the votes represented and the absolute majority of the nominal value of the shares represented. In none of these cases does the PEMI, with a minority stake in the share capital, gain the ability to control resolutions even if it holds voting shares that would enable majority vote control.

3.3.1.6 Removal

If the PEMI’s voice is enhanced via voting shares the PEMI should ensure that its voting privilege cannot be withdrawn without adequate compensation. With the exception of the minimum voting right and subject to certain formal statutory requirements, privileged voting rights may be withdrawn or restricted, against the will of the affected shareholders. The formal statutory requirements for a withdrawal or limitation of voting privileges have been subject to heated controversy among legal scholars.

Legal scholars who argue that voting shares are preferred shares assert that a special meeting of holders of the impaired voting shares must consent to this. Yet, as indicated, according to prevailing expert opinion voting shares are an entirely separate category of shares and, hence, the general meeting decides on the withdrawal or limitation of voting privileges. With regard to the applicable resolution requirement, opinions among legal scholars are divided. One group argues in favor of a simple majority.
Other legal scholars apply the qualified majority vote requirement. RÖTHLISBERGER, who distinguishes between typical and atypical situations, suggests that in typical situations, holders of voting shares are sufficiently protected against an overruling by holders of common shares in that their voting privileges de facto cannot be withdrawn without the consent of the holders of a majority of voting shares. In such cases, a simple majority vote is sufficient. However, in atypical situations, when holders of voting shares control or can effectively exercise only a minority of the votes, these holders cannot effectively protect themselves against unfavorable amendments that would change their voting privileges, as the case may be, not even if the qualified majority vote requirement applies. Therefore, the consent (by absolute majority) of a special meeting of holders of voting shares is needed in addition to the statutory majority vote requirement.

To avoid any uncertainty on this issue and to protect themselves against later disadvantageous amendments of their voting privileges, PEMIs should seek (prior to investing) to insert a provision in the articles of association that would require a high majority vote (reflecting the PEMI’s voting power at the general meeting which would effectively allow the PEMI to block a respective resolution) to withdraw or amend voting shares, or else require the separate consent of a special meeting of the holders of impaired shares with voting privileges.

In a material regard, the same legal principles as discussed in context of the creation of voting shares apply. In particular, the interests in a withdrawal or amendment of the voting privileges must be of sufficient intensity vis-à-vis the interests of the holders of impaired voting shares in maintaining their voting privileges.

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820 See BÖCKLI, Aktienrecht, § 4, N 146; BÖCKLI, Stimmrechtsaktionen, p. 27. Reference is also made to the so-called Siegwart rule, see Section IV.D.3.3.3.6, see BURKHALTER, Einheitsaktien, p. 333; RUFFNER, Grundlagen, p. 585 et seq.
821 See RÖTHLISBERGER, p. 78 et seq. This argument is referred to as the “self-protection potential of voting shares,” see RUFFNER, Grundlagen, p. 582. For an example, see BÖCKLI, Stimmrechtsaktionen, p. 27.
822 See RUFFNER, Grundlagen, p. 585 with reference to HAFTER, p. 27.
823 See RÖTHLISBERGER, p. 84.
824 Cf. RUFFNER, Grundlagen, p. 560, 584.
825 See Section IV.D.3.3.1.4.
826 See BURKHALTER, Einheitsaktien, p. 327; GERSTER, p. 193.
3.3.1.7 Assessment of Legal Tool

From the PEMI’s perspective, voting shares are a suitable legal tool to enhance its voting power in general meeting decision making. Voting shares can eliminate the controlling shareholder’s absolute voting power at closely held firms’ general meetings with stable majorities, which can lead to more balanced power sharing.827 However, a number of caveats must be considered. Firstly, voting shares can complicate a target company’s capital structure. In the case of various share classes, the capital structure can become opaque, which can be negative in view of a targeted IPO.828 Secondly, voting shares may fall into undesirable hands if transferred to third parties who may use their voting privileges to exercise querulous influence and destabilize the company. Thirdly, the voting privilege associated with voting shares is generally effective across a broad range of decisions and less suitable as an instrument to enhance the PEMI’s voice concerning particular general meeting decisions only. For these reasons, before creating voting shares, their effects must carefully be examined, also from the perspective following the PEMI’s exit.

To mitigate these drawbacks, the voting privileges may be limited in terms of content. For example, voting privileges can be fully or partly suspended with regard to resolutions to be defined by stipulating majority vote requirements based purely on capital or based on both votes and capital.829 Voting privileges can also be made subject to time limits.830 In view of the PEMI’s exit plans, an undesirable distribution of votes ex post can be avoided by inserting appropriate restrictions on the transferability of shares in the articles of association or by granting the non-transferring share-

827 For this reason, the proposal that some legal voices have made to abolish voting shares is rejected by this author. Equally arguing against abolishing voting shares, BÖCKLI/HUGUENIN/DESSEMONTET, p. 157; HOFSTETTER, Corporate Governance Report, p. 27 (“The market success of heterogeneous capital structures gives strong reason to suspect that the different voting rights for capital investors may be an efficient solution.”); BURKHALTER, Einheitsaktien, p. 42 et seq. (“Es würde schlicht dem liberalen Geist der von einer hohen privatautonomen Dispositionsfreiheit geprägten Grundordnung des schweizerischen Aktienrechts widersprechen, wollte man den Spielraum der Titelstrukturgestaltung mit einem solchen Erfordernis derart massiv beschränken.”); RUFFNER, Grundlagen, p. 538 (“Die in der Praxis zu findende Vielfalt legt vielmehr den Schluss nahe, dass optimale Kapital- und Stimmrechtsstrukturen von den spezifischen Charakteristiken der einzelnen Gesellschaft abhängig sind.”); RUFFNER, Aktive Grossaktionäre, p. 269. In favor of abolishing de lege ferenda is AMSTUTZ, Macht und Ohnmacht, p. 95. The abolition of voting shares is currently not part of the ongoing revision of corporate law.

828 Cf. also WEBER, Rechtsprobleme, p. 56.

829 See GERSTER, p. 165 et seq.

830 See in detail GERSTER, p. 14 et seq., 165 et seq.
holders purchase rights (e.g., a right of first offer, of first refusal or a call option). \(^{831}\)

3.3.2 Participation Certificates \(^{832}\)

3.3.2.1 Legal Concept

Participation certificates carry the same cash-flow rights as shares, \(^{833}\) but by mandatory law \(^{834}\) confer no voting rights, and, unless provided otherwise in the articles of association, no associated rights \(^{835}\) \(^{836}\). They are issued against a capital contribution and have a nominal value. \(^{837}\)

3.3.2.2 Purpose

Participation certificates are used in situations in which shareholders seek to increase the firm’s equity capital, such as to expand the business, but do not want to lose control. \(^{838}\) In family firms, participation certificates are typically given to certain members so as to share in the risks and rewards of the business, but without granting voting rights. \(^{839}\) The use of participation certificates relevant in this study is quite the opposite: the issue of participation certificates held by the controlling shareholder as a means for enhancing the PEMI’s de facto voice in corporate decision making. By issuing participation certificates, the holders of common shares gain voting power relative to the company’s entire capital and enjoy an indirect voting privilege. \(^{840}\)

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\(^{831}\) See Section VI.A.

\(^{832}\) See Section VI.A.

\(^{833}\) In a GmbH, the issue of participation certificates is not possible. See HESS/RAMPINI/SPILLMANN, Basler Kommentar, CO 774a, N 1 \(et seqq\); NUSSBAUMER/SANWALD/SCHIEDEGGER, CO 774a, N 1 \(et seqq\); HANDSCHIN, \(GmbH\), p. 16; FORSTMOSER, \(GmbH\)-Recht, p. 61.

\(^{834}\) CO 656f. In case of several classes of shares, participation certificates must at least rank equal to the least privileged class (CO 656f I). See BÖCKLI, Aktienrecht, § 5, N 19.

\(^{835}\) See BÖCKLI, Aktienrecht, § 5, N 44; HESS/RAMPINI/SPILLMANN, Basler Kommentar, CO 656a, N 4; BAUMANN, p. 140.

\(^{836}\) CO 656a I, 656c I. The right to call a general meeting, the right to attend, the right to information and inspection, and the right to submit motions (CO 656c II). Cf. BÖCKLI, Aktienrecht, § 5, N 62 (also mentioning the right to representation at the board of directors).

\(^{837}\) See HESS/RAMPINI/SPILLMANN, Basler Kommentar, CO 656a, N 1; BAUEN/BERNET, p. 59, N 194; MEIER-HAYOZ/FORSTMOSER, § 16, N 332; GEHRER, p. 104.

\(^{838}\) See BÖCKLI, Aktienrecht, § 4, N 10; GERSTER, p. 106; also see BAUMANN, p. 141.

\(^{839}\) See MEIER-HAYOZ/FORSTMOSER, § 16, N 339.

\(^{840}\) See GEHRER, p. 104.
3.3.2.3  Legal Nature

Although formally not a type of share, participation certificates are in effect non-voting shares.\footnote{See BÖCKLI, Aktienrecht, § 5, N 13.}

3.3.2.4  Introduction

Participation certificates are created via implementation in the articles of association.\footnote{See ibid; VON BÜREN/STOFFEN/WEBER, N 231; HOFSTETTER, Corporate Governance Report, p. 24; RÖTHLISBERGER, p. 56. The term is, however, deliberately avoided in order to uphold the par value principle, see DRUEY/GLANZMANN, § 10, N 4; BAUMANN, p. 138.} Formally, participation certificates are introduced in the initial articles of association via unanimous consent. Subsequently, they are created via a capital increase, conversion of shares into participation certificates, or via a stock split, each of which the general meeting must decide upon.\footnote{CO 656a I i.c.w. Art. 627 Sec. 9; see VON BÜREN/STOFFEL/WEBER, p. 52; KRATZ, Möglichkeiten, § 9, N 113.} The majority vote requirement depends on the respective creation method and whether preemptive rights are withdrawn. In case of an ordinary capital increase from contributions in cash and maintaining the preemptive rights the absolute majority vote requirement applies.\footnote{See BAUMANN, p. 138 et seq.} Every other form of a capital increase is subject to a qualified majority vote.\footnote{See ibid, p. 138; HUGUENIN JACOBS, p. 142.} The preemptive rights may be withdrawn only for valid reasons (e.g., takeover of an enterprise, participation of employees) and no one shall be advantaged or disadvantaged without proper reason.\footnote{An authorized or conditional increase of capital; an increase of capital out of equity, against in-kind contributions, or to acquire assets, and to grant special benefits; see BÖCKLI, Aktienrecht, § 5, N 21; BAUMANN, p. 138 et seq.} The creation of participation certificates via conversion of common shares is rare.\footnote{CO 656g I i.c.w. CO 704 I Sec. 4, 5 and 6. See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 46, N 65 i.c.w. § 52, N 19 et seqq.; BAUMANN, p. 138 et seq.; HUGUENIN JACOBS, p. 142.} A withdrawal of the minimum voting right requires the unanimous consent of all holders of impaired shares.\footnote{CO 652b II. See BÖCKLI, Aktienrecht, § 5, N 71.} Participation certificates can also be created via a two-for-one-type of stock split, that is, a stock split into one share of a lower nominal value and one (or more) participation certifi-
The general meeting decides upon the stock split with an absolute majority.\footnote{\textit{BAUMANN}, p. 139; \textit{FORSTMOSER/MEIER-HAYOZ/NOBEL}, § 43, N 49.}

From a material perspective, the creation of participation certificates at the time of incorporation is not subject to any further requirements.\footnote{\textit{BAUMANN}, p. 139; \textit{FORSTMOSER/MEIER-HAYOZ/NOBEL}, § 43, N 49. Of another opinion, \textit{Böckli, Aktienrecht}, § 5, N 30 (demanding the consent of impaired shareholders because the shareholder status is inviolable also in the sense that those who have chosen to participate as shareholders must not be forced to participate via shares and participation certificates).} In case of a subsequent introduction, the principles of lawfulness,\footnote{See \textit{GERSTER}, p. 113.} objectivity,\footnote{See \textit{FN 801}.} equal treatment,\footnote{See \textit{FN 802}.} and the prohibition of abusing the law\footnote{See \textit{FN 803}.} must be observed.

### 3.3.2.5 Limitations

The issue of participation certificates must comply with the limitations flowing from the material requirements discussed above. Moreover, participation capital can exist with, not instead of, share capital,\footnote{CO 623 II i.e.w. CO 703. See \textit{BAUMANN}, p. 139; \textit{FORSTMOSER/MEIER-HAYOZ/NOBEL}, § 43, N 49.} and cannot exceed twice the amount of the share capital.\footnote{CO 656a II; 651 II Sec. 2, and 653a (the total nominal value by which the share capital may be increased – as authorized or subject to a condition – shall not exceed half of the current share capital).} Hence, at least one-third of the equity providers must be eligible to vote at the general meeting.\footnote{See \textit{BAUMANN}, p. 140.} If the participation capital is the highest possible amount, the shareholders’ voting power effectively triples relative to their capital investment.\footnote{See \textit{HUQUEIN JACOBS}, p. 143.} In addition, the general limitations of capital increases also apply to increases in participation capital.\footnote{CO 656b I. See, with further references, \textit{BÖCKLI, Aktienrecht}, § 5, N 42; \textit{HESS/RAMPINI/SPILLMANN, Basler Kommentar}, CO 656b, N 1a; \textit{FORSTMOSER/MEIER-HAYOZ/NOBEL}, § 46, N 24. According to the Draft Legislation, this maximum threshold does not apply to companies whose participation certificates are publicly listed (D-CO 656b).} By mandatory law, participation certificates do not confer a right to vote. Provisions in the articles of association which conditionally confer a right for participants to
vote with the shareholders in certain extraordinary situations are null and void.\textsuperscript{863}

3.3.2.6 Removal

If the PEMI’s voice is enhanced by diluting the controlling shareholder’s voting power via participation certificates, the PEMI should seek protection against the controlling shareholder converting his/her participation certificates into shares and thereby gaining voting power ex post. In practice, holders of participation certificates can convert their certificates into shares either by a capital increase from the resources that become available from the reduction of participation capital to zero,\textsuperscript{864} or – in a more contentious practice – by direct conversion into shares based on a provision in the articles of association similar to that for the conversion of registered shares into bearer shares and vice versa.\textsuperscript{865} 866 The majority vote requirement for the general meeting to remove or convert participation certificates is also controversial, with some authors arguing in favor of an absolute majority vote and some in favor of a qualified majority vote.\textsuperscript{867} The Draft Legislation\textsuperscript{868} provides for a qualified majority for the conversion of participation certificates into shares.\textsuperscript{869} To protect the PEMI’s voting power from being diluted if the controlling shareholder decides to convert his/her participation certificates into shares, the PEMI can ask (prior to investing) to insert a provision in the articles of association that requires a high majority vote for conversion that effectively necessitates the PEMI’s

\textsuperscript{863} See BÖCKLI, \textit{Aktienrecht}, § 5, N 44.

\textsuperscript{864} Favored by BÖCKLI, \textit{Aktienrecht}, § 5, N 22 and ZINDEL/ISLER, \textit{Basler Kommentar}, CO 652d, N 5.

\textsuperscript{865} CO 622 III. In favor of a direct conversion are LEDERER/KÄCH, p. 47 \textit{et seq.}, see also GRONER, p. 168 \textit{et seq.}

\textsuperscript{866} See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 46, N 70 \textit{et seq.}

\textsuperscript{867} In favor of absolute majority, BÖCKLI, \textit{Aktienrecht}, § 5, N 29 \textit{et seq.} (finding a special meeting of the participants is generally not required unless stated otherwise in the articles of association, except where the participation certificates are converted into non-listed registered shares with restricted transferability). In agreement with regard to requiring a special meeting are FORSTMOSER/MEIER-HAYOZ/NOBEL, § 46, N 69 \textit{et seq.} However, they argue in favor of a qualified majority of the general meeting not only if new shares are issued due to a withdrawal of preemptive rights from the existing shareholders, but also for a simple conversion of shares. In the context of this dissertation, the controlling shareholder will most likely control the decision on the conversion of his/her participation certificates into shares, unless a qualified majority is applied and the PEMI owns more than a third of the votes represented.

\textsuperscript{868} See FN 463.

\textsuperscript{869} D-CO 704 I Sec. 6.
consent. Alternatively, the separate consent of the shareholders of each class may be stipulated.

### 3.3.2.7 Assessment of Legal Tool

In the context of publicly listed corporations, the importance of non-voting participation certificates has been declining since the late 1980s.

Reasons for this trend include, inter alia, the revised rules on participation certificates in the Swiss Code of Obligations that came into effect in 1992 and the trend toward simplifying capital structures. Moreover, participation certificates have been subject to criticism in light of good corporate governance as a means to allow shareholders to control the company with a relatively limited capital outlay. However, in private closely held Swiss firms, participation certificates remain a useful tool. In essence, participation certificates are an alternative to voting shares in terms of controlling decision making, and can be used in addition or instead of voting shares. Moreover, if voting shares were abolished, as some scholars advocate de lege ferenda (but which lawmakers are not currently considering), participation certificates could gain importance.

### 3.3.3 Voting Caps

#### 3.3.3.1 Legal Concept

Voting caps are provisions set out in the articles of association of a stock corporation (or a GmbH) that limit the number of votes that a

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870 Assuming that the Pemi controls the absolute majority of a class of shares.
871 See BÖCKLI, Aktienrecht, § 5, N 9; KUNZ, Einheitsaktie, p. 27.
872 On the trend toward unitary shares, see HESS/RAMPINI/SPILLMANN, Basler Kommentar, CO 656a, N 1a; MEIER-HAYOZ/FORSTMOSER, § 16, N 339; GEHRER, p. 64; BURHALTER, Einheitsaktien, p. 3 et seq.; RÖTHLISBERGER, p. 23 et seq.; GERSTER, p. 186 et seq.
873 For the term, see MÄNTYSAARI, The Law of Corporate Finance, p. 326 et seqq.
874 See GEHRER, p. 150, FN 578.
875 Cf. BÖCKLI, Aktienrecht, § 5, N 10.
876 See FN 827.
877 Of course, abolishing voting shares would make little sense if participation certificates were not abolished at the same time, see BÖCKLI, Aktienrecht, § 4, N 155.
878 Also called vote clipper, voting ceilings, or voting restrictions; in German, Höchststimmlimite, Stimmkraftbegrenzung, Höchststimm(rechts)klausel, statutarische Stimmrechtsbeschränkungen. For the term, see VON SALIS, p. 53.
879 CO 627 Sec 10. See GEHRER, p. 151; HUGUENIN JACOBS, p. 155. With respect to the GmbH, CO 776a I Sec. 7. In a GmbH, the articles may also prohibit all or certain members to acquire company shares in excess of a certain threshold in order to maintain the company’s independence (CO 796 I and II). See AMSTUTZ/CHAPPUIS, Basler Kommentar, CO 796, N 10. See TRUFFER/DUBS, Basler Kommentar, CO 806, N 7.
shareholder or group of shareholders\textsuperscript{881} can cast, irrespective of a shareholder’s total amount of shares owned.\textsuperscript{882} The votes in excess of such a voting cap lie dormant and are considered unrepresented at the general meeting; that is, they do not count toward the quorum and majority vote requirements unless the articles of association provide otherwise.\textsuperscript{883}

Example. A minority investor owning 20,000 of a total of 100,000 common shares (20\%) with a nominal value of CHF 100 each (CHF 10 million total) will be outvoted under the majority rule by the controlling shareholder holding the remaining shares. However, if a voting cap is set at 35\% of the total votes, the PEMI can still vote 20,000 shares (assuming one vote per share), while the majority shareholder holding the remaining 80,000 common shares (80\%) can vote up to 35,000 shares. The percentage share of voting capital is 36\% in case of the PEMI (20,000 / (20,000 + 35,000)) and 64\% in case of the majority shareholder (35,000 / (20,000 + 35,000)). As a result, the PEMI has de facto veto power against important resolutions subject to a qualified majority.

3.3.3.2 Purpose

Numerous publicly listed Swiss corporations have voting caps,\textsuperscript{884} typically set at 5\% or 10\% of the share capital.\textsuperscript{885} Their primary purpose is to ensure a diverse group of shareholders and to safeguard the company’s independence.\textsuperscript{886} In the context analyzed in this study, voting caps are

\textsuperscript{881} The admissibility of group clauses is controversial. See GIGER, p. 191; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 63; BÖCKLI, Aktienrecht, § 12, N 473 et seqq. (finding such clauses problematic). For a discussion see also GEHRER, p. 179; HUGUENIN JACOBS, p. 164 et seq.; NOBEL, Formelle Aspekte, p. 31 et seqq. and Decision of the Commercial Court of Zurich of 26 August 2009, ZR, No. 108, 2009, p. 301 et seqq.

\textsuperscript{882} CO 692 II. See BÖCKLI, Aktienrecht, § 12, N 467; BUOB, § 5, N 164; GEHRER, p. 160; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 61; KRAZT, Möglichkeiten, § 9, N 65; BÜRGI, Zürcher Kommentar, CO 692, N 22. With respect to the GmbH, 806 I sentence 3, see TRUFFER/DUBS, Basler Kommentar, CO 806, N 7; NUSSBAUM/SANWALD/SCHIEDEGGER, CO 806, N 7; NATER, p. 98. With respect to the GmbH, both the cumulation of the votes of several company shares and the higher voting power associated with a higher nominal value of company shares may be restricted, see TRUFFER/DUBS, Basler Kommentar, CO 806, N 7.

\textsuperscript{883} See GIGER, p. 191. Whether the votes in excess of a voting cap count toward a quorum requirement depends on the wording of the respective provision in the articles of association and its interpretation, see FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 91 et seqq. (holding that, in case of doubt, the shares associated with the dormant votes should not to be included when determining the quorum and when calculating whether it is met in order to facilitate a quorum); BUOB, § 5, N 164; VON SALIS, Gestaltung, p. 469. With respect to the GmbH, see SIFFERT/FISCHER/PETRIN, CO 806, N 4; HANDSCHIN, Gesellschaftsanteile, p. 92.

\textsuperscript{884} See CONRAD, p. 29. However, voting caps are less common than voting shares, see GEHRER, p. 166.

\textsuperscript{885} See GEHRER, p. 167. Similarly for Germany, cf. GOERGEN/RENNER, p. 9.

\textsuperscript{886} See BÖCKLI, Aktienrecht, § 12, N 467; GEHRER, p. 162.
viewed as a means to curb the controlling shareholder’s absolute voice in corporate decision making at the general meeting, thereby enhancing the PEMI’s de facto voice.

3.3.3.3 Introduction

Formally, voting caps are introduced in the initial articles of association via the shareholders’ unanimous consent at the general meeting. The subsequent creation of voting caps is formally subject to an amendment of the articles of association decided by the general meeting. The respective majority threshold is debated. In the absence of particular statutory provisions on this issue, the creation of voting caps requires an absolute majority vote. VON SALIS, however, argues in favor of applying a qualified majority vote if the voting cap to be introduced applies solely to a particular class of shares because, in such a case, the introduction of a voting cap has an effect similar to the issue of voting shares.

From a material perspective, the validity of voting caps in the initial articles of association is commonly accepted. The subsequent introduction of a voting cap must comply with the principles of lawfulness, objectivity, equal treatment, and the prohibition of abusing the law. The subsequent introduction of voting caps raises concerns because it is seen an encroachment upon the shareholder’s right to vote if the introduction of a voting cap results in the reduction of voting power. The subsequent introduction of voting caps is also problematic in light of the principle of equal treatment, particularly if certain shareholders hold votes in excess of the proposed voting cap. Moreover, the legitimate expectations of share-

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887 See GEHRER, p. 151 et seq.
888 See GEHRER, p. 153; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 66; VON SALIS, p. 116; HUGUENIN JACOBS, p. 142; SCHLUEP, Rechte, p. 142 et seq. For the GmbH, see TRUFFER/DUBS, Basler Kommentar, CO 808b, N 5.
889 See VON SALIS, p. 146 et seq.
890 See BOCKLI, Aktienrecht, § 12, N 476; LÄNZLINGER, Basler Kommentar, CO 692, N 7; VON BÜREN/STOFFEL/WEBER, N 879; MEYER, Stimmrechtsvertreter p. 12; BAUMANN, Familienholding, p. 143; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 65.
891 See FN 800.
892 See FN 801.
893 See FN 802.
894 See FN 803.
895 See LÄNZLINGER, Basler Kommentar, CO 692, N 8; BAUEN/BERNET, p. 98, N 297; GEHRER, p. 169; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 66; HUGUENIN JACOBS, p. 156 et seq.; VON SALIS, p. 90; BÜRGI, Zürcher Kommentar, CO 693, N 9 et seq.
896 See MEYER, Stimmrechtsvertreter, p. 12; KRATZ, Möglichkeiten, § 9, N 71; BÜRGI, Zürcher Kommentar, CO 692, N 12.
897 See HUGUENIN JACOBS, p. 157
holders may be disappointed. In light of these arguments, some legal scholars qualify the subsequent introduction of voting caps as inadmissible or highly problematic. Others differentiate between voting caps that affect none of the shareholders directly at the time of introduction and those that immediately restrict the voting power of certain shareholders with shares beyond the voting cap. VON SALIS argues for the validity of the subsequent introduction of voting caps as long as the cap is set as high as or higher than the number of votes that the shareholder with the most shares holds, so that once the voting cap has been introduced, all shareholders may still exercise the same number of votes as before the cap. The subsequent introduction of a voting cap formally applying to all shareholders, but materially affecting only particular shareholders whose number of votes exceed the voting cap at the time of introduction is seen as a special sacrifice which is deemed unjustifiable. BÖCKLI cites exceptions permissible where objectively justified, necessary to attain legitimate corporate objectives, not excessive, and not unduly privileging or discriminating against particular shareholders. One could argue that a subsequent introduction of a voting cap affecting only the controlling shareholder is justified with the company’s interests as it would limit the controlling shareholder’s absolute voting power and thereby provide a more balanced distribution of shareholder voting power, which in turn would help attract private equity capital (assuming PEMIs would not invest without receiving voice-enhancing rights). Thereby, the firm gains access to both financial capital and value-added services. As access to these resources is a legitimate corporate interest, differential treatment, if it occurs, may be justified, provided that all the other requirements of differential treatment are also met. In the interest of legal certainty, the consent of the affected

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898 See HOFSTETTER, Corporate Governance Report, p. 25. Even if no voting power is withdrawn, i.e., the votes that each individual shareholder holds at the time of the introduction are below the voting cap, shareholder rights are effectively restricted according to HUGUENIN JACOBS because shareholders are deprived of the possibility to build up a majority position by purchasing additional shares, see HUGUENIN JACOBS, p. 157. Cf. GEHRER, p. 169 (pointing out that CO 706 II Sec 1 and 2 do not protect the possibility to increase one’s voting power by purchasing additional shares).

899 In favor of general inadmissibility is VON GREYERZ, p. 147. Although not categorically prohibited, the introduction of voting caps is deemed inadmissible in the majority of cases by MEYER, Stimmrechtsvertreter, p. 13.

900 VON SALIS, p. 97.

901 See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 68; VON SALIS, p. 97; also seen as problematic by BURKHALTER, Einheitsaktien, p. 68, FN 299.

902 For example, voting restrictions based on the nationality of shareholders are not regarded as objectively justified. See BÖCKLI, Aktienrecht, § 12, N 477; BAUMANN, p. 143; similarly, LÄNZLINGER, Basler Kommentar, CO 692, N 9; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 66; MEYER, Stimmrechtsvertreter, p. 12.

903 See Section II.A.3.2.2.
shareholders with votes beyond the voting cap should be obtained in case of a subsequent introduction of a voting cap. This will be unproblematic since the introduction of a voting cap necessarily requires the controlling shareholder’s consent, who, by definition, controls the majority of votes and thus can block any decision of the general meeting to introduce a voting cap.

3.3.3.4 Structuring Options

Voting caps are introduced in the articles of association in general or specifically, with regard to particular general meeting resolutions. They are usually expressed in relative terms – as a percentage of the total votes, or the votes represented at the general meeting. If the total votes are defined as a basis, the effect of a voting cap is less pronounced than if represented votes are defined as a basis because, in the former case, it is still possible that a single shareholder, in spite of the voting cap, controls the majority of votes at the general meeting while this is not the case if the voting cap is set at or lower than 50% of the represented votes. Alternatively, voting caps can also be expressed in absolute terms – the maximum number of votes each shareholder can cast. Moreover, a stepwise limitation of the voting power is also feasible.
be established for all shares or only for a particular class of shares.\footnote{In German, \textit{begrenzte, beschränkte, or gespaltene Höchststimmklausel.} See VON SALIS, p. 134 \textit{et seq.}, 140 \textit{et seq.} (considering voting caps which solely apply to a particular class of shares admissible because the effect of the resulting unequal treatment are less pronounced than in case of concealed voting shares. It follows that such practices does not infringe upon the basic structures of the stock corporation). Equally arguing in favor is GERSTER, p. 107. On the other hand, \textit{cf.} BÖRGI, \textit{Zürcher Kommentar}, CO 692, N 14, 21 (finding that voting caps solely applying to a specific class of shares are incompatible with the principle of equal treatment). \textit{Cf.} BÖCKLI, \textit{Aktienrecht}, § 12, N 470 ("muss eine Unterscheidung nach Aktienkategorien dann möglich sein, wenn die die Unterscheidung begründenden Sachkriterien konsequent angewendet werden"); equally, VON STEIGER, p. 93.} In such case, the differential treatment of different classes of shares must be an appropriate means to achieve a goal objectively justified by the corporate interests.\footnote{The view that the principle of equal treatment also applies between different classes of shares is debated among legal experts. In favor, FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 39 \textit{et seq.} ("Entgegen einer vereinzelt in der Literatur geäusserten Auffassung gilt der Gleichbehandlungsgrundsatz auch im Verhältnis verschiedener Aktienkategorien.").} Voting caps are often strengthened by \textit{group clauses} in the articles of association. Such provisions treat certain types of related shareholders (\textit{e.g.}, under joint leadership\footnote{\textit{See} HUGUENIN JACOBS, p. 164.}) as a group to apply the voting cap.\footnote{\textit{See} BÖCKLI, \textit{Aktienrecht}, § 12, N 473.} This is regularly the case for the owner family (controlling shareholder) and the PEMI who, even if they formally comprise several shareholders, in an economic sense, are in fact a closely knit group of shareholders. Group clauses in the articles of association are insofar admissible as they contribute to preventing evasions of voting restrictions by transferring shares for the purpose of fully exercising the associated voting rights.\footnote{CO 691 I.} However, they must not infringe upon the shareholder’s minimum voting right.\footnote{\textit{See} HUGUENIN JACOBS, p. 164 \textit{et seq.}.} 

\subsection*{3.3.3.5 Limitations}

Voting caps are subject to a number of limitations, namely those that follow from the material requirements discussed in Section IV.D.3.3.3.3. For example, clearly incompatible with the principle of equal treatment are provisions that stipulate different voting limits for different shareholders (\textit{ad personam})\footnote{\textit{See} BÖCKLI, \textit{Aktienrecht}, § 12, N 470; MEYER, \textit{Stimmrechtsvertreter}, p. 13.} and that establish voting caps based on personal characteristics (\textit{e.g.}, by name) of shareholders or groups of shareholders.\footnote{\textit{Cf.} FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 70; GEHRER, p. 173 \textit{et seq.}; HUGUENIN JACOBS, p. 157; BAUMANN, p. 144; VON SALIS, p. 65, 263 \textit{et seq.}.} Moreover, voting caps must not revoke or restrict the shareholder’s right to
at least one vote.\footnote{CO 692 II. The voting right as such must not be limited, only its scope. \textit{See} LÄNZLINGER, \textit{Basler Kommentar}, CO 692, N 2 and 7; GIGER, p. 191; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 65; KRATZ, \textit{Möglichkeiten}, § 9, N 70; BÜRGL, \textit{Zürcher Kommentar}, CO 692, N 22; \textit{VON SALIS}, p. 89; TANNER, \textit{Quoren}, §4, N 64, FN 243; BÖCKLI, \textit{Aktienrecht}, § 12, N 467. With respect to the GmbH, CO 806 I sentence 2.} Furthermore, provisions pursuant to which the board of directors can permit exceptions to a voting cap within its discretionary powers are infringing both the principle of equal treatment and the principle of parity between the general meeting and the board of directors and are hence inadmissible.\footnote{\textit{See} BÖCKLI, \textit{Aktienrecht}, § 12, N 482 (finding such provisions in the articles of association null and void because they disregard the basic structure of the corporation); GEHRER, p. 174; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 71 and § 39, N 66. Of another opinion, WATTER/ROTH PELLANDA, \textit{Basler Kommentar}, CO 717, N 29; \textit{VON SALIS}, p. 279. Differentiating, HUGUENIN JACOBS, p. 161 (stating certain exceptions).} Whether the voting cap can limit each shareholder to one vote, thereby effectively introducing the \textit{one-shareholder-one-vote} principle, is debated by legal scholars. For further references, \textit{see} Section IV.D.3.3.4.6.

### 3.3.3.6 Removal

Voting caps may be removed by the general meeting by an absolute majority vote.\footnote{Prevailing expert opinion. \textit{See}, inter alia, BÖCKLI, \textit{Aktienrecht}, § 12, N 471.} Here, BÖCKLI applies the so-called \textit{Siegwart Rule} (stating that the rule to be removed must still be observed when determining whether to remove the rule) so that the voting cap must still be observed when resolving upon its removal.\footnote{\textit{BÖCKLI, Aktienrecht}, § 12, N 471; \textit{VON SALIS}, p. 126.} To protect themselves from an unfavorable ex post removal of a voting cap by the controlling shareholder, PEMIs should ask (prior to investing) for a high majority vote requirement in the articles of association for removing a voting cap, so that the PEMI’s respective voting power at the general meeting is sufficient to effectively block the removal.\footnote{\textit{BÖCKLI, Aktienrecht}, § 12, N 471; \textit{VON SALIS}, p. 126. Almost half of the publicly listed companies with voting caps, analyzed by GEHRER, p. 182 provide for a qualified majority in the articles of association.} A voting cap applicable only to the
controlling shareholder’s class of shares (and not the PEMI’s) results in less-than-proportional votes (based on equity stakes) for him/her; voting shares held by the PEMI allow it to exercise greater voting power than proportional to its equity investment. Both instruments are therefore suitable to restrain the controlling shareholder’s predominance. In both cases, the PEMI attains proportionally more voting power vis-à-vis the controlling shareholder as if solely based on the equity investment. In contrast, while the voting privilege associated with voting shares, by law, is limited to 10 times that of common shares, voting caps have no such limits. Moreover, if the voting privilege only pertains to certain targeted issues, the voting cap is the most efficient structuring alternative. However, it must be noted that different from voting shares, voting caps do not provide a fixed privilege, but result in a voting privilege for the PEMI only if the majority shareholder holds shares subject to a voting cap in excess of the threshold stipulated in the articles of association. It follows that the PEMI’s de facto voting privilege depends on the specific ownership structure and the PEMI cannot rely on such a privilege. Finally, voting caps can be circumvented, despite group clauses, via deliberate parallel behavior of unrelated (at least on the face of it) shareholders.

3.3.4 Quorum and Majority Vote Requirements

3.3.4.1 Legal Concept

For the basics on quorum and majority vote requirements and related statutory rules, see Section IV.D.3.1.2.

3.3.4.2 Purpose

The stipulation of quorum and majority vote requirements for shareholders’ decision making at the general meeting is another method to achieve a more balanced distribution of voting power. Quorum requirements ensure a certain minimal presence of shareholders at the general meeting and thereby
support a balanced discussion during decision shaping and also prevent the attending shareholders from taking advantage of the other shareholders’ absence from a general meeting to push through controversial resolutions.\textsuperscript{929} Qualified majority vote requirements for passing resolutions at the general meeting can enhance the perceived representativeness of resolutions.\textsuperscript{930} Quorum and majority vote requirements influence the PEMI’s de facto voice in that they do not change the voting rights associated with shares as such, but influence the power of the PEMI’s votes in corporate decision making.\textsuperscript{931}

### 3.3.4.3 Introduction

All resolutions of the general meeting that shall be passed with a \textit{qualified majority vote}, but are not subject to a qualified majority vote requirement by law, must be listed in the articles of association.\textsuperscript{932} To introduce majority vote requirements beyond those stipulated by law, the general meeting must observe the proposed majority vote requirement to amend the articles of association.\textsuperscript{933} This provision is intended to prevent the introduction of excessive resolution requirements for the general meeting, which could diminish its capacity for decision making.\textsuperscript{934} Although not explicitly stated by law, the purpose of the provision suggests that such a procedure must not only be observed when introducing more stringent majority vote requirements, but also when introducing \textit{quorum requirements} or any other requirement that effectively increases the hurdle for passing resolutions.\textsuperscript{935} Conversely, insofar as deemed lawful, \textit{minority thresholds} may be

\begin{itemize}
  \item \textsuperscript{929} See DUBS/TRUFFER, Basler Kommentar, CO 704, N 17; MEIER-HAYOZ/FORSTMOSER, § 16, N 381; WEBER, Vertrags- und Statutengestaltung, p. 81; ZÄCH/SCHLEIFFER, p. 265; TANNER, Beschlussfassung, p. 771.
  \item \textsuperscript{930} See BÜRGI, Minderheitenschutz, p. 111.
  \item \textsuperscript{931} See von SALIS, p. 57.
  \item \textsuperscript{932} CO 627 Sec. 11. See BÖCKLI, Aktienrecht, § 12, N 409; DUBS/TRUFFER, Basler Kommentar, CO 704, N 13 et seq.; EHRAT, Switzerland, p. 226. With respect to the GmbH, CO 776a II Sec. 5. See TRUFFER/DUBS, Basler Kommentar, CO 808, N 3; HANDSCHIN/TRUNINGER, § 13, N 86; NATER, p. 95.
  \item \textsuperscript{933} CO 704 II. With respect to the GmbH, CO 808b II.
  \item \textsuperscript{934} The provision is particularly intended to prevent so-called \textit{petrified clauses}, majorities that are highly unlikely to be achieved in practice. See DUBS/TRUFFER, Basler Kommentar, CO 704, N 9; MEIER-HAYOZ/FORSTMOSER, § 16, N 255; GEHRER, p. 198; TANNER, Beschlussfassung, p. 771; ZÄCH/SCHLEIFFER, p. 265 et seq.
  \item \textsuperscript{935} See FRICK, § 12, N 1428; DUBS/TRUFFER, Basler Kommentar, CO 704, N 9; BÄUEN/BERNET, p. 149, N 432; GEHRER, p. 198; KUNZ, Minderheitenschutz, § 12, N 90, FN 336; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 49, FN 20; TANNER, Zürcher Kommentar, CO 704, N 91; TANNER, Beschlussfassung, p. 771; ZÄCH/SCHLEIFFER, p. 266. In contrast, BÖCKLI, Aktienrecht, § 12, N 396 (arguing that CO 704 II only applies to the introduction of majority vote requirements and not quorum requirements because the need for protection is different when introducing quorum requirements).
\end{itemize}
introduced by the shareholders by observing the majority vote requirement stipulated in the provision to be amended; that is, when making ordinary decisions, the absolute majority of the votes represented at the general meeting. In addition, certain rules relating to corporate decision taking can also be agreed upon via contract; for example ad personam veto rights. In the GmbH, ad personam veto rights can be contractually agreed upon or introduced in the articles of association, but only by unanimous consent of general meeting members.

3.3.4.4 Structuring Options

In order for the PEMI to obtain additional power to influence decision taking at the general meeting (meeting of members), a number of options exist for structuring the respective resolution requirements.

(i) Quorum Requirements

Resolution thresholds. To effectively ensure that no (or no important resolutions, depending on the PEMI’s need) can be passed at the general meeting without the PEMI’s attendance, the quorum threshold must be set sufficiently high so that if the PEMI is absent, the meeting is not quorate. For example, if the PEMI holds 30% of the share capital a quorum may be introduced requiring shareholders representing 71% of the share capital to be present at the general meeting in order to legally pass resolutions.

Measuring unit. While in the case of quorum requirements, the calculation basis cannot be changed, possible measuring units include the nominal value of the shares held, the number of shares held, and the number of shareholders.

(ii) Majority Vote Requirements

In addition or alternative to stipulating quorum requirements, the shareholders may change the statutory majority vote requirements for passing resolutions at the general meeting. Possible structuring levers are the threshold, calculation basis, and measuring unit of the respective majority vote requirement.

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936 Decisions other than those listed in CO 704 I.
937 See KUNZ, Minderheitschutz, § 12, N 95; KRATZ, Möglichkeiten, § 9, N 101; TANNER, Quoren, § 5, N 46.
938 See TREZZINI, p. 267; VON SALIS-LÜTOLF, Finanzierungsverträge, § 12, N 1406.
939 CO 807 II, 776a I Sec. 6.
940 See FN 701.
Resolution thresholds. With regard to changing the statutory resolution threshold to be observed for passing resolutions at the general meeting, legal scholars focus on two central questions. Firstly, can the statutory resolution threshold be lowered so that only a minority of votes is sufficient to pass a resolution? Secondly, to what extent can the statutory resolution threshold be increased and, in particular, can certain resolutions be made subject to unanimous consent?

Minority requirements are effectively introduced by setting the resolution threshold lower than the statutory absolute majority for ordinary decisions, that is, by stipulating that certain resolutions can be passed with less than the absolute majority of the votes (outstanding, represented, or cast). Swiss corporate law explicitly cites only the possibility of setting resolution thresholds higher than the statutory majority via the articles in association, but it does not state whether it is also possible to lower the threshold. Hence, it is a question of interpretation as to whether achieving a certain majority is mandatory for decision taking or whether a minority threshold may be stipulated as well. In the legal literature, the admissibility of minority requirements is debated. Böckli argues that corporate matters cannot be validly decided by a minority; that is, a resolution that introduces a provision in the articles of association stipulating a minority requirement is null and void because it overturns the majority rule which is a mandatory cornerstone of the basic corporate structure. Moreover, scholars argue that resolutions passed by a minority lack representativeness and result in a disproportionate relationship between power held and proportionally assumed risk. On the other hand, legal scholars argue that in the absence of an explicit legal ban, and based on the principle of private autonomy of parties (also applicable in corporate

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941 Decisions other than those listed in CO 704 I.
942 See DUBS/TRUFFER, Basler Kommentar, CO 703, N 15; BÖCKLI/BÜHLER, Grenzen, p. 56; MEIER-HAYOZ/FORSTMOSER, § 16, N 258; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 54; TANNER, Quoren, § 2, N 66.
943 CO 627 Sec. 11.
944 See BÖCKLI, Aktienrecht, § 12, N 417, 430; BÖCKLI/BÜHLER, Grenzen, p. 56. Also cf. WEBER, Vertrags- und Statutengestaltung, p. 83 (“unter allen Umständen als problematisch”); WEBER, HSG-Weiterbildungsstufe, p. 22.
945 On the discussion, see TANNER, Quoren, § 3, 6; § 5 N 41 et segg.
946 On the principle, see DUBS, p. 363 (“Es ist allgemein anerkannt, dass die Privatautonomie auch im Gesellschaftsrecht (und mitin im Aktienrecht) gilt. ... Die Privatautonomie gewährleistet, dass Rechtssubjekte dem Prinzip nach in allen privatrechtlichen Rechtsangelegenheiten frei handeln können; die Privatrechtsordnung hält den rechtlichen Rahmen bereit und innerhalb dieses Rahmens können die privaten Rechtssubjekte die Verhältnisse selbständig regeln. Die materielle Ausgestaltung der Rechtsverhältnisse und Rechtsgeschäfte ist dem Grundsatz nach Gegenstand der Autonomie und obliegt insofern der Selbstregulierung der Gesellschafter.”); KUNZ, Minderheitenschutz, § 6, N 5 and N 172; GEHRER, p. 199.
law), the statutory absolute majority vote requirement for ordinary decisions can be lowered and resolutions passed by a minority if provided in the articles of association. Moreover, scholars point out that in the absence of a quorum requirement, the attendance of a single shareholder representing a majority of votes suffices to validly pass a resolution. Hence, depending on perspective, resolutions observing the statutory absolute majority vote requirement can be passed by a minority of the total votes outstanding. In addition, corporate law itself stipulates minority vote requirements in the area of shareholder protection rights in that it allows a minority of shareholders to request a general meeting and/or to request the court to dissolve the company. Also, minority requirements are, if at all, introduced for singular decisions. In this case, the majority principle is not overturned. Legal scholars argue as well that the adequacy of a general meeting vote does not depend on whether it is decided by a majority or minority based on capital or votes represented at the general meeting. Neither are the decisions taken by the shareholder controlling the majority of the capital or votes represented at the general meeting necessarily correct and appropriate, nor are those taken by the minority shareholder necessarily wrong and unsuitable. The author of this dissertation endorses the view that minority requirements are, if applied selectively, permissible. In addition to the arguments stated above, it should be noted that minority vote requirements for decision making at the general meeting can be introduced in the articles of association only by observing the absolute majority vote requirement. Hence, by introducing a minority vote requirement, the majority explicitly demonstrates its will that certain decisions be decided by a minority. In this regard, resolutions made by a minority are (indirectly) supported by a majority. In addition, subjecting

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947 Decisions other than those listed in CO 704 I.
948 For authors arguing in favor, see DUBS/TRUFFER, Basler Kommentar, CO 703, N 15; TREZZINI, p. 265; FORSTMOSE/MIEBER-HAYOZ/NOBEL, § 24, N 54 (mentioning the stipulation of a minority requirement in connection with the resolution on the dissolution and liquidation of the company); KUNZ, Minderheitschutz, § 12, N 93 et seqq.; TANNER, Zürcher Kommentar, CO 703, N 95 et seqq. (finding the stipulation of a minority requirement admissible, but hardly suitable as a general rule for decision making of the general meeting); TANNER, Quoren, § 1, N 75, § 2, N 66, § 5, N 43.
949 See TANNER, Quoren, § 1, N 76, § 5 N 42.
950 CO 699 III. In a GmbH, CO 805 V Sec. II i.c.w. CO 699 III.
951 CO 736 I Sec. 4.
952 See TANNER, Quoren, § 3, N 36; SCHLIEER, Anfechtungsrecht, p. 214 (“Vereinzelt eröffnet das Gesetz der Minderheit die Möglichkeit, ihren positiven Willen zum Willen der gesamten Körperschaft zu erheben (positive Minderheitsrechte). So wenn der Richter auf Antrag einer Minderheit die GV einberuft oder gar die Gesellschaft auflöst.”).
953 See TANNER, Quoren, § 1, N 75.
954 Cf. also GERSTER, p. 44.
955 See FN 937.
certain resolutions to a minority requirement serves the protection of minority shareholders and can help achieve a more balanced distribution of voting power, where both minority and controlling shareholders have an active voice. It is not evident why Swiss lawmakers would want to prohibit such a minority protection arrangement, particularly if introduced with the support of the majority. No other opinion can follow from the default majority principle which, in corporate law, is not intended to ensure a balance of interests in the sense of a democratic majority opinion, but to preserve the functionality of the firm. Rather than impairing decision making at the general meeting, minority thresholds help facilitate the approval of certain resolutions. As a result, unless the law provides otherwise, PEMIs may indeed negotiate for active voice by providing for minority thresholds in the articles of association with respect to certain resolutions.

Qualified majority thresholds are introduced by the general meeting by setting the resolution threshold (to be observed by the general meeting) higher than provided by law; that is, higher than the absolute majority for ordinary resolutions and higher than the qualified majority for important resolutions. However, legal scholars continue to debate the extent to which statutory resolution thresholds can be increased. For this discussion and an assessment, see Section IV.D.3.3.4.6.

Shareholders’ unanimous consent presents the highest possible increase of the resolution threshold conceivable in the articles of association. If legal scholars have voiced reservations regarding inordinate increases in the qualified majority threshold, then the introduction of a provision in the articles of association requiring unanimous consent for passing certain decisions of the general meeting is subject to even more fierce debate. For this discussion, see Section IV.D.3.3.4.6.

Calculation basis. Aside from changing the statutory resolution threshold, shareholders may also change the statutory calculation basis. To increase the requirements for decision making, the shareholders may declare all votes outstanding as the voting rule instead of all votes represented at the general meeting. In such case, the votes held by the PEMI not attending the general meeting count as no votes for any resolution. To facilitate decision making with respect to ordinary general meeting decisions, the votes cast or

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956 See FN 746.
957 Decisions listed in CO 704 I.
958 See Section IV.D.3.1.2.3.
the yes and no votes cast can be defined as a calculation basis,\textsuperscript{959} thereby effectively replacing the absolute majority with a simple or relative majority. In such cases, true abstentions from decision making at the general meeting are possible without being counted as no votes. As counting the votes cast can be time-consuming in public companies with a large number of shareholders, the latter is more suitable for closely held and person-oriented companies with a manageable number of votes.\textsuperscript{960}

\textit{Measuring unit.} A third structuring option is to amend the measuring unit. Instead of the nominal value of shares, the number of votes that each shareholder is assigned can be based on the number of shares each holds as a measuring unit to calculate majority vote requirements. Whether the number of shareholders (one-shareholder-one-vote principle) can also be determined as the measuring unit is highly debatable. For this discussion, see Section IV.D.3.3.4.6.

(iii) Class Voting

An additional method by which to structure quorum and majority vote requirements is via share class voting.\textsuperscript{961} Various structuring options are discussed among legal scholars: the articles of association may provide that, in order for the general meeting to be quorate or to pass certain decisions, the presence or consent, is required of the majority of votes of (i) each class of shares, (ii) a particular class of shares in addition to the statutory majority vote requirement, or (iii) one or several share classes.\textsuperscript{962} Since (ii) and (iii) confer a veto right to holders of shares of a certain class, they reflect a preferential treatment of the respective share class(es) and therefore must be objectively justified by corporate interests and observe the other requirements for differential treatment.\textsuperscript{963} Class voting gives the holders of a majority of votes of a certain class whose consent is required the power to veto corporate decisions even if such majority represents only a minority of the total votes.\textsuperscript{964}

\textsuperscript{959} See DUBS/TRUFFER, Basler Kommentar, CO 703, N 6; WEBER, HSG-Weiterbildungsstufe, p. 22; ZÄCH/SCHLEIFFER, p. 266 (except in cases of CO 704 I); TANNER, Quoren, § 2, N 58.
With respect to the GmbH, see TRUFFER/DUBS, Basler Kommentar, CO 808, N 3; NUSSBAUM/SANWALD/SCHIEDEGGER, CO 808, N 18; NATER, p. 95.

\textsuperscript{960} See TANNER, Beschlussfassung, p. 770.
\textsuperscript{961} Cf. BOHRER, § 8, N 319 et seq.
\textsuperscript{962} See FRICK, § 12, N 1425, FN 1841 (mentioning (i) and (ii)); TREZZINI, p. 265 et seqq. (in favor of (ii) and (iii)); VON SALIS-LÜTOLF, Finanzierungsverträge, § 12, N 1403 et seq. (in favor of (i), (ii), and (iii), see “several”); FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 47, 52 (in favor of (i)).
\textsuperscript{963} See Section IV.E.4.1.3.3.
\textsuperscript{964} Cf. BOHRER, § 8, N 319.
(iv) Ad Personam Veto Rights

While the articles of association of a stock corporation cannot grant ad personam veto rights to particular shareholders in voting on resolutions at the general meeting, the articles of association of a GmbH may do so.665 GmbH members have considerable discretion in structuring veto rights that fit the individual needs of the members. Ad personam veto rights may be granted either to all or to particular members, or the holders of company shares of a certain category (e.g., members with managerial functions).666 Moreover, it is possible to provide for collective veto rights – veto rights jointly exercised by two or more members.667 The GmbH articles of association must clearly state (i) the entitled member(s) by name or class of company shares, (ii) the resolutions to which the veto rights shall apply,668 and (iii) the voting procedure to be followed669 when exercising veto rights.670 In terms of content, veto rights can be granted with respect to resolutions on all issues to be decided by the meeting of members.671 Yet, most scholars reject the practice of granting veto rights for all resolutions of the meeting of members in order to preserve the firm’s functionality.672 The PEMI’s influence on decision making at the meeting of members is enhanced via veto rights, even though the PEMI can only approve or reject (but not modify) proposals.673 Precisely for this reason, the qualification as a de facto organ solely resulting from exercising members’ rights in the meeting of members must be rejected.674 Qualification as a de facto organ is justified only if the entitled member exercises functions formally reserved for the company’s managing officers.675

665 See FN 742.
666 See TRUFFER/DUBS, Basler Kommentar, CO 807, N 3; SIFFERT/FISCHER/PETRIN, CO 807, N 6; NUSSBAUM/SANWALD/SCHIEDEGGER, CO 807, N 10; HANDSCHIN/TRUNINGER, § 13, N 79; HANDSCHIN, Gesellschaftsanteile, p. 93; NATER, p. 100.
667 See SIFFERT/FISCHER/PETRIN, CO 807, N 8; NATER, p. 101;
669 See, in detail, NUSSBAUM/SANWALD/SCHIEDEGGER, CO 807, N 18 et seqq.
670 See TRUFFER/DUBS, Basler Kommentar, CO 807, N 4; NUSSBAUM/SANWALD/SCHIEDEGGER, CO 807, N 3; NATER, p. 103 et seq.
671 Even in respect of the inalienable powers of the meeting of members (CO 804 II). See TRUFFER/DUBS, Basler Kommentar, CO 807, N 4; NUSSBAUM/SANWALD/SCHIEDEGGER, CO 807, N 13.
672 See TRUFFER/DUBS, Basler Kommentar, CO 807, N 4; SIFFERT/FISCHER/PETRIN, CO 804, N 10; NUSSBAUM/SANWALD/SCHIEDEGGER, CO 807, N 13; NATER, p. 102. In contrast, KÜNG/CAMP, CO 807, N 1; ISENSCHMD, p. 235.
673 See NUSSBAUM/SANWALD/SCHIEDEGGER, CO 807, N 7; NATER, p. 101.
674 See DUBS/TRUFFER, Basler Kommentar, CO 807, N 1.
675 See HANDSCHIN/TRUNINGER, § 13, N 82; SIFFERT/FISCHER/PETRIN, CO 807, N 20; HANDSCHIN, Gesellschaftsanteile, p. 93; under certain circumstances also OLIVAR PASCUAL/ROTH, p. 470. On de facto organs, see Section IV.E.4.1.4.
(iv) Time Limits and Conditions

In certain situations, the shareholders may want to introduce special resolution requirements for a limited, defined period of time only.\textsuperscript{976} For example, shareholders may want to include high majority vote requirements in the articles of association for votes on capital increases, the transferability of shares, or the dissolution of the company only during the first two years of the PEMI’s investment.\textsuperscript{977} The view held by the author is that introducing quorum and majority vote requirements in the articles of association should be permissible for a limited time provided that the requirements for an automatic termination of the provision are clearly stipulated in the articles of association.\textsuperscript{978} Thus, for example, the PEMI could be granted a de facto veto right via high quorum and majority vote requirements during a significant transitional phase in the business. At the end of this phase, resolutions can then be passed normally as set out by statutory law. It is also possible to establish quorum and majority vote requirements depending upon the shareholders’ exit options. For example, if the transferability of shares is restricted for a five-year period, then the minority investor’s voice can be increased during these five years by introducing high quorum and/or majority vote requirements effectively granting veto power in all pertinent votes and when the restrictions on the transferability of shares cease and the PEMI’s exit is facilitated, then return to the statutory rules occurs.

3.3.4.5 Content

Where lawful (see limitations in the following section), the statutory decision-making requirements can be amended with regard to all or certain matters falling within the powers of the general meeting.\textsuperscript{979} Typically, in the interest of the general meeting’s flexibility and decision-making capacity, increased quorum and majority vote requirements are introduced only with respect to resolutions that affect the PEMI’s rights and interests in a fundamental way. The question as to what resolutions the PEMI considers fundamental is, of course, highly dependent on the particular investment situation and PEMI. Yet, the following list of issues provides examples of

\textsuperscript{976} See TRUFFER/DUBS, Basler Kommentar, CO 807, N 3; NUSBAUM/SANWALD/SCHAEDEGG, CO 807, N 4; BÖCKLI, GmbH-Recht, p. 29.
\textsuperscript{977} See BRECHBÖHL/EMCH, p. 275.
\textsuperscript{978} See BRUNNER, p. 40 et seq.
\textsuperscript{979} See DUBS/TRUFFER, Basler Kommentar, CO 703, N 2; TANNER, Quoren, § 3, N 36. With respect to the GmbH, CO 776a II Sec. 5; see TRUFFER/DUBS, Basler Kommentar, CO 808, N 3; HANDSCHIN/TRUNINGER, § 13, N 86; NATER, p. 91.
what could be subject to increased resolution requirements in a stock corporation.\footnote{For similar lists, see Frick, § 12, N 1427; Trezzini, p. 266 et seq.; Von Salis-Lütolf, Finanzierungsverträge, § 12, N 1371; see for a study of legal practice, Brunner, p. 42 et seq.}

→ Amendments of articles of association in general,

→ Withdrawal or limitation of shareholder rights,

→ Amendments to the restriction of registered share transferability,

→ Any changes in the share capital (i.e., capital increases and reductions, creation of new share classes), particularly if preemptive rights are withdrawn from shareholders,

→ Issue of preferred shares, participation certificates, and profit sharing certificates,\footnote{Cf. Böckli, Aktienrecht, § 12; N 406; Buob, § 5, N 156.}

→ Amendment of the number, nominal value, and types of shares, particularly the issue or removal of shares with privileged voting rights,

→ Public offering provided that the decision-making authority rests with the general meeting,\footnote{Cf. Frick, § 11, N 1190.}

→ Elections of board members and auditors and release of the former from liability,

→ Allocation of the balance sheet profits, in particular, determination of dividends and the board of directors’ share in profits,

→ Transactions resulting in a change of the corporate purpose (e.g., a significant purchase or sale of equity holdings, of important assets – so-called crown jewels),

→ Dissolution of the company,

→ Mergers, demergers, and transformations,\footnote{See Frick, § 12, N 1427; Von Salis-Lütolf, Finanzierungsverträge, § 12, N1371.}

→ Transactions to be decided by the general meeting that result in the controlling shareholder losing control.
In addition, in a GmbH, the following issues can also be subject to increased resolution requirements:

→ Assignment of company shares or recognition of a transferee as a member entitled to voting,

→ Approval of activities of managing officers and members in breach of their duty of loyalty or the prohibition to compete if the articles of association so provide,

→ Resolution to request the court to order the expulsion of a member for valid reasons, and

→ Expulsion of a member for a reason stated in the articles of association.

3.3.4.6 Limitations

Raising and lowering the statutory resolution requirements are subject to certain statutory limitations.

General limitations. Provisions in the articles of association raising or lowering the statutory resolution requirements must not infringe upon mandatory corporate law,\(^\text{984}\) constitute an abuse of law,\(^\text{985}\) withdraw or limit shareholders’ voting rights without objective reason,\(^\text{986}\) or discriminate against or disadvantage shareholders for reasons not in the firm’s interest.\(^\text{987/988}\) Quorum and majority rules requiring the attendance or consent of a particular shareholder (ad personam veto rights) are unlawful if stipulated in the articles of association of a stock corporation (but admissible in those of a GmbH).\(^\text{989}\) However, the Pemi may negotiate for contractual ad personam veto rights. Moreover, a similar result – veto power – may be attained, by stipulating a sufficiently high quorum or majority vote requirements or by appropriate class voting rules in the articles of association.\(^\text{990}\) The latter represents preferential treatment of the respective class of shares,\(^\text{991}\) and is therefore only admissible if contained in the initial articles of association at the time of incorporation, if the

\(^\text{984}\) See FN 800.

\(^\text{985}\) See FN 803.

\(^\text{986}\) See FN 801.

\(^\text{987}\) See FN 802.

\(^\text{988}\) CO 706 II.

\(^\text{989}\) See FN 740.

\(^\text{990}\) See GRONER, p. 317; TREZZINI, p. 265 et seqq.; VON SALIS-LÜTOLF, Finanzierungsverträge, § 12, N 1403 et seq; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 47.

\(^\text{991}\) See FN 911.
subsequent introduction is approved by all shareholders,\textsuperscript{992} or if an appropriate means to achieve a goal that is objectively justified by corporate interests.\textsuperscript{993}

\textit{Limitations concerning the measuring unit.} For certain decisions of the general meeting, the par value principle, that is, the determination of voting rights in proportion to the nominal value of the shares held, is mandatory.\textsuperscript{994} In such cases, a determination based on the number of shares is invalid. An ongoing debate among legal scholars is whether the one-shareholder-one-vote principle may be introduced. Some authors argue that the determination of the shareholders’ voting rights based on the number of shareholders is unlawful because it represents an abrogation of the capital-based voting right and therefore threatens the very foundations of the stock corporation.\textsuperscript{995} Others find the introduction of the one-shareholder-one-vote principle admissible by limiting the shareholders’ voting rights to one vote.\textsuperscript{996} In light of this debate, parties wishing to distribute votes among themselves differently than what the law dictates are well-advised to supplement a respective statutory provision with a corresponding

\textsuperscript{992} See VON SALIS-LÜTOLF, Finanzierungsverträge, § 12, N 1404; in general, WATTER/ROTH PELLANDA, Basler Kommentar, CO 717, N 24 et seq. (“Eine Ausnahme vom Gleichbehandlungsgrundsatz gilt auch, wenn der Aktionär auf die Anwendung des Grundsatzes verzichtet”). \textit{Cf.} also FORSTMOSER/MEIER-HAYOZ/NOBEL, § 40, N 103 (in the context of dividend rights).

\textsuperscript{993} See TRESSINI, p. 265 et seq.; VON SALIS-LÜTOLF, Finanzierungsverträge, § 12, N 1404.

\textsuperscript{994} For such decisions, see Section IV.D.3.3.1.5.

\textsuperscript{995} The one-shareholder-one-vote principle could be put into effect by limiting the voting power of each shareholder to one vote. See TANNER, Quoren, § 2, N 29 et seq., § 5, N 23 or § 3, N 71 (finding a measuring unit based on the number of shareholders admissible with regard to quorum requirements, but not with regard to majority vote requirements applicable to resolutions of the general meeting). However, see BÖCKLI, Aktienrecht, § 12, N 476 (deeming such measure unlawful). With regard to the GmbH, see BÖCKLI, GmbH-Recht, p. 26 (equally rejecting a one-shareholder-one-vote principle at the meeting of members); HANDSCHIN/ TRUNIGER, § 13, N 66; HANDSCHIN, Gesellschaftsanteile, p. 90; KÖHLER, p. 280.

\textsuperscript{996} The one-shareholder-one-vote principle is also implemented if all shareholders have votes amounting to or beyond a voting cap. Its stipulation is seen as admissible by FORSTMOSER/ MEIER-HAYOZ/NOBEL, § 24, N 62; KRATZ, Möglichkeiten, § 9, N 31 et seq. See VON SALIS, p. 49 (finding that the subsequent introduction of a voting cap that restricts the voting right of each shareholder to one vote represents a severe encroachment on the shareholders’ legal rights and is therefore only admissible in exceptional situation where a reasonable balance between the interests of the shareholders concerned, the interests of the company, and those of the majority of shareholders is struck). Arguing for admissibility in a GmbH, see GASSER/EGGENBERGER/STÄUBER, Orell Füssli Kommentar, CO 806, N 3; TRUFFER/DUBS, Basler Kommentar, CO 806, N 1, 7; NATER, p. 98; MEIER-HAYOZ/FORSTMOSER, § 18, N 112; KÜNG/CAMP, CO 806a, N 2, 776a, N 10; VON PLANTA, l’organisation, p. 70; ISENSCHMD, p. 237.
contractual voting agreement at the level of the shareholders, and to secure the contractual arrangement with appropriate precautionary measures.\(^997\)

**Limitations concerning the calculation basis.** While the absolute majority vote requirement for ordinary resolutions of the general meeting may be increased or decreased,\(^998\) the qualified majority vote requirement for important resolutions as defined by law\(^999\) is unilateral; that is, it may only be increased and must not be relaxed.\(^1000\) It follows that while the statutory majority vote requirement for passing ordinary resolutions is dispositive, with respect to important resolutions, the articles of association may neither provide for a lower resolution threshold nor stipulate that votes cast or \textit{yes} and \textit{no} votes cast instead of votes represented be declared as the calculation basis.\(^1001\)

**Limitations from maintaining the functionality and decision-making capability of the general meeting.** Increased resolution requirements make it more difficult to pass resolutions and therefore create a risk that shareholders with a blocking minority behave obstructively for opportunistic reasons, thereby jeopardizing the flexibility, functionality, healthy development, and competitiveness of the company.\(^1002\) Therefore, the extent to which resolution requirements can be increased, and whether unanimity can be stipulated is questionable. Some legal scholars argue that the requirements must not be increased to such an extent that the passing of resolutions indispensable for the company’s proper functioning is hindered (e.g., lock-up provisions\(^1003\),\(^1004\)). Among such important resolutions are, according to BÖCKLI and BÜHLER, the election of board members and

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997 See Section IV.D.3.3.5.10.
998 See BÖCKLI, Aktienrecht, § 12, N 409 et seqq.; DUBS/TRUFFER, Basler Kommentar, CO 703, N 13, 16 and CO 704, N 13; FRICK, § 12, N 1425.
999 CO 704 I.
1000 See BÖCKLI, Aktienrecht, § 12, N 362; DUBS/TRUFFER, Basler Kommentar, CO 703, N 3a; MEIER-HAYOZ/FORSTMOSER, § 16, N 255; BAUEN/BERNET, p. 89, N 280; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 28, N 46; WEBER, Vertrags- und Statutengestaltung, p. 82; EHRA, Switzerland, p. 227; TANNER, Quoren, § 9, N 18. With respect to the GmbH, see Federal Council report, BBI (2001), p. 3210; GASSER/EGGENBERGER/STÄUBER, Orell Füssli Kommentar, CO 808b, N 13; SIFFERT/FISCHER/PETRIN, CO 808b, N 1; HANDSCHIN/TRÜNINGER, § 13, N 84.
1001 See DUBS/TRUFFER, CO 704, N 3b; BÖCKLI, Aktienrecht, § 12, N 391; BAUEN/BERNET, p. 149, N 430, FN 30.
1002 See TANNER, Quoren, § 3, N 8; PERAKIS, p. 18.
1003 Lock-up provisions increase the statutory resolution requirement for certain decisions to such an extent that it is effectively no longer possible for the general meeting to remove or relax such provisions. For the term, see GEHRER, p. 195.
1004 See BÜRGI, Minderheitenschutz, p. 110 (stating that the price to purchase increased legitimacy of resolutions is too high in this case); FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 48 (arguing against lock-up provisions as a recommendation).
auditors, the approval of annual financial statements, and resolutions on the use of balance sheet profits.\footnote{BÖCKLI/BÜHLER, Grenzen, p. 46; BÖCKLI, Aktienrecht, § 12, N 420.} In addition to these four important resolutions, they argue that the articles of association must also not increase the resolution requirements for shareholders to exercise their statutory protection rights.\footnote{BÖCKLI, Aktienrecht, § 12, N 420.} With respect to these matters, BÖCKLI and BÜHLER categorically reject any increase of the general absolute majority vote requirement. For all other resolutions, an increase is deemed lawful provided that no single shareholder obtains de facto veto power to block certain decisions, as it is deemed incompatible with the fundamental concept of corporate self-management.\footnote{BÖCKLI/BÜHLER, Grenzen, p. 47 et seq.} The stipulation of unanimous consent is qualified as illegal.\footnote{BÖCKLI/BÜHLER, Grenzen, p. 52. Equally, BAUEN/BERNET, p. 149, N 430, FN 29 (considering provisions in the articles of association which provide a shareholder with veto power inadmissible); NENNINGER, p. 37 (pointing out that blocking minorities create the possibility of questionable use of minority power whereby the life and the evolution of a company could be severely disabled); BÜRGI, Zürcher Kommentar, CO 703, N 26 (stating that quorum or majority vote requirements must not be increased beyond a three-quarters majority).} BÖCKLI holds that if the shareholders intend to implement veto rights, they must instead use the business form of the GmbH or implement such rights via a shareholders’ agreement, but not via the articles of association by increasing the statutory resolution requirements.\footnote{With respect to both listed and non-listed corporations, see BÖCKLI, Aktienrecht, § 12, N 418, 427a; BÖCKLI/BÜHLER, Grenzen, p. 57 et seq. At least with respect to public companies, see GEHRER, p. 199 et seq.} Like BÖCKLI and BÜHLER, DUBS and TRUFFER find the increase of the statutory majority vote requirement unlawful with respect to the four important decisions mentioned above as well as resolutions that enable the general meeting to exercise its supervisory functions.\footnote{BÖCKLI, Aktienrecht, § 12, N 427a.} For such resolutions, the absolute majority vote requirement must not be increased or at least not increased to such an extent that decision making could become de facto impossible. For other resolutions, DUBS and TRUFFER consider the stipulation of the principle of unanimity admissible.\footnote{For example, the right to initiate a special audit, the right to appoint experts to examine the management, and the right to remove members of the board of directors and auditors, see DUBS/TRUFFER, Basler Kommentar, CO 704, N 14a.} FRICK generally allows for increasing the absolute majority vote requirement as long as such increases do not jeopardize the company’s decision-making capacity by creating hurdles that cause a one-time or a

\footnote{DUBS/TRUFFER, CO 704, N 13. Similarly, with respect to the GmbH, see NATER, p. 95.}
lasting lack of quorum/majority.  

1012 TANNER sees the requirement not to make passing resolutions that are necessary for the company’s continued existence excessively difficult as merely a postulate. If a company deviates from this requirement, then that company’s respective rules are nevertheless valid and can only be redressed with an amendment to the articles of association.  

1013 VON STEIGER acknowledges the need for unanimity in small companies strongly tailored to personal relationships and therefore allows for selective provisions of unanimity.  

1014 KUNZ argues in favor of increasing statutory resolution thresholds, even up to unanimous consent, in light of the shareholders’ autonomy and the lack of any explicit statutory provisions to the contrary.  

1015 Of equal opinion are ZÄCH and SCHLEIFFER who refer to the shareholders’ autonomy in structuring the articles of association.  

1016 The Swiss Federal Supreme Court held that stock corporations’ articles of association may stipulate a majority other than the absolute majority for ordinary decisions.  

1017 Particularly, resolutions of the general meeting regarding the removal of board members may be made subject to a qualified majority, provided that this does not render a dismissal impossible.  

1018 In such cases, the court finds the stipulation of unanimous consent is impermissible.  

Clearly, increased resolution requirements carry the risk that shareholders with a blocking minority, for egoistic or other reasons, hinder the approval process of urgently needed resolutions that serve the interest of all shareholders, thereby paralyzing the company. Shareholders must keep this risk in mind when setting the requirements for passing resolutions. Possibly, however, the shareholders, aware of such risk, may conclude that the advantages of sharing control via setting high resolution requirements for certain resolutions outweigh the risks of stalled decision making, for example, if the PEMI may be prepared to invest only if granted veto power for certain types of resolutions. Hence, setting high resolution requirements can be in the company’s best interests. Moreover, for companies with a small shareholder base, granting veto power by introducing a high majority vote requirement for subsequent amendments of the articles of association can be an effective means of protecting minority shareholders’ expectations because the agreements and arrangements made prior to the investment will

1012 FRICK, § 12, N 1430; equally BUOB, § 5, N 162.  
1013 TANNER, Zürcher Kommentar, CO 703, N 107; TANNER, Quoren, § 5, N 32.  
1014 VON STEIGER, Recht der AG, p. 73.  
1015 KUNZ, Minderheitenschutz, § 12, N 91. Also in favor of the admissibility of unanimous consent are RUFFNER, Grundlagen, p. 569; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 47.  
1016 ZÄCH/SCHLEIFFER, p. 265.  
1017 Decisions other than those listed in CO 704 I.  
1018 BGE in 117 II 290 (E. 7 aa).
be adhered to and are protected against opportunistic amendments submitted by the controlling shareholder. In the author’s view, in the absence of clear statutory provisions, the company’s functionality should not automatically be valued more than the private autonomy and protection of minority shareholders.\footnote{1019} If Swiss lawmakers have not stipulated any mandatory provisions to the contrary (which is not the case with respect to the increase of resolution thresholds), the parties’ private autonomy, also applicable in corporate law, is to be assumed when structuring the articles of association.\footnote{1020} Despite the principle of corporate self-management, the stock corporation is a business vehicle open to person-centered companies and enables shareholders, within the limits of mandatory law, to devise a solution tailored to the individual resolutions to be passed.\footnote{1021} Shareholders should be able to introduce the principle of unanimity regarding decisions that the shareholders consider especially significant.\footnote{1022} While high majority thresholds, and particularly unanimity, can indeed make it virtually impossible for shareholders to pass a resolution in corporations with a broad shareholder base, the situation is different in closely held companies with a limited number of shareholders. Here, an unanimity requirement does not necessarily make passing a resolution impossible and hence is compatible with the approach of the Swiss Federal Supreme Court when it ruled that passing a resolution shall not be made virtually impossible by increasing the majority vote requirement for votes of the general meeting. In addition, corporate law itself requires the shareholders’ unanimous consent for certain decisions.\footnote{1023} Furthermore, as pointed out by VON DER CRONE, the need for consensus does not necessarily have a destabilizing effect.\footnote{1024} He argues that deadlock appears to be a potential dysfunction of an appropriate decision-making process more so than a necessary side effect of a non-functional decision-making process.\footnote{1025} The principle of unanimity is not only associated with the risk of a deadlock, but is linked with advantages that are clearly in the company’s best interest. It can facilitate a healthier

\footnote{1019} Similarly, see WEBER, HSG-Weiterbildungsstufe, p. 19.  
\footnote{1020} See FN 946.  
\footnote{1021} In agreement with KUNZ, Minderheitenschutz, § 12, N 91.  
\footnote{1022} In agreement with DUBS/TRUFER, Basler Kommentar, CO 704, N 13, 14a (for important and unimportant resolutions, but not for necessary resolutions); KUNZ, § 12, N 91; TANNER, Quoren, § 5, N 28; TANNER Zürcher Kommentar, CO 703, N 107; ZÄCH/SCHLEFFER, p. 265; WEBER, Vertrags- und Statutengestaltung, p. 81; WEBER, HSG-Weiterbildungsstufe, p. 19.  
\footnote{1023} For such resolutions, see Section IV.D.3.1.2.3. See DUBS/TRUFER, Basler Kommentar, CO 704, N 13; WEBER, Vertrags- und Statutengestaltung, p. 81; ZÄCH/SCHLEFFER, p. 265; TANNER, Quoren, § 5 N 28. In contrast, Gehringer, p. 200 (seeing in this an individual case that is laid down expressly by the law: “Keinesfalls darf daraus jedoch gefolgert werden, dass die Statuten von Publikumsgesellschaften grundsätzlich Einstimmigkeit vorsehen dürfen.”).  
\footnote{1024} See VON DER CRONE, Pattsituationen, p. 38.  
\footnote{1025} Ibid, p. 37.
interplay between risk and power and improve the quality of decisions based on a joint consensus-building process. With reference to the economically oriented branch of political science, VON DER CRONE points out that the principle of unanimity is basically superior to the majority principle because, in addition to the protection of shareholders’ collective interests, the individual interests of all shareholders are also protected. Ultimately, deadlocks also have positive aspects. A temporary deadlock, as VON DER CRONE astutely notes, is oftentimes a necessary intermediate stage on the path to consensus based on compromise. Finally, the risk of a lack of decision-making ability can be effectively mitigated by implementing suitable deadlock-breaking devices in the event of a permanent disagreement among the shareholders (see Section IV.D.3.3.4.8). A deadlock is only disastrous if of absolute nature. Whereas if the parties agree to viable deadlock-breaking devices the principle of unanimity cannot result in the firm’s permanent blockage. As a result of these arguments, granting veto power by raising the requirements for passing resolutions (e.g., via high majority thresholds, unanimous consent, class voting) is regarded as permissible by this author. However, such measures should be used cautiously. The same is true when granting ad personam veto rights in a GmbH. Moreover, to mitigate the risk of a permanent deadlock, shareholders should introduce such provisions in combination with effective deadlock-breaking devices. In case of doubt about the acceptance of unanimity requirements, the parties may consider amending the articles of association to include a high majority vote requirement that effectively results in the PEMI’s veto power. Yet, compared to a high majority vote requirement, a requirement of unanimous consent is more advantageous for PEMIs as they do not need to establish special safeguards to protect themselves if the controlling shareholder decides to issue new shares to decrease the PEMI’s proportionate voting power and thereby quash the PEMI’s veto power.

1026 With further references, VON DER CRONE, Pattsituationen, p. 39 (“Projekte, die sich zwar positiv auf die Stellung einzelner Beteiligter auswirken, deren kollektiver Saldo aber negativ ist, haben hier – anders als unter dem Mehrheitsprinzip – in keinem Fall Erfolgschancen.”).
1027 VON DER CRONE, Pattsituationen, p. 41.
1028 Ibid.
1029 Many legal scholars recommend a modest use of veto rights. See SIFFERT/FISCHER/PETRIN, CO 807, N 2; NUSSBAUM/SANWALD/SCHEIDEGGER, CO 807, N 2; HANDSCHIN/TRUNINGER, § 11, N 25 (“nur ausnahmsweise vorzusehen”; KRATZ, Handkommentar, CO 807, N 4; NATER, p. 104.
1030 See O’NEAL/THOMPSON, § 4.30.
3.3.4.7 Removal

Removal of increased resolution requirements. According to prevailing expert opinion, resolutions that revoke or amend previously increased resolution requirements are passed by observing the increased requirement to be eased. Provisions in the articles of association that call for unanimity to pass certain resolutions by the general meeting can be removed or facilitated only with a unanimous vote. The purpose of this rule is to protect minority shareholders’ participation in corporate decision making. Without such a requirement, quorums and majority vote requirements inconvenient to the controlling shareholder could easily be revoked with the (lower) statutory majority vote requirement.

Removal of facilitated resolution requirements. Majority vote requirements that are facilitated via the articles of association may be revoked or increased by the general meeting under the absolute majority vote rule unless the articles of association provide otherwise. Here, PEMIs should consider a statutory provision that increases the absolute majority vote requirement so that, to protect the minority shareholder’s active voice, the controlling shareholder cannot suspend the statutory facilitation.

3.3.4.8 Assessment of Legal Tool

The requirements for passing resolutions should be formulated so that, on the one hand, PEMIs are guaranteed voice in critical matters, but that, on the other hand, the risk of a permanent deadlock is also minimized, for example, by incorporating appropriate deadlock-breaking devices. In other words, a proper mixture of rigidity and flexibility should be structured on a case-by-case basis. Even if no universal solution is presented, the structuring considerations discussed here can illuminate the issues and point to solutions for the parties when devising decision-making rules.

1031 Known as the Siegwart rule, see Section IV.D.3.3.3.6. See BÖCKLI, Aktienrecht, § 12, N 401; DUBS/TRUFFER, Basler Kommentar, CO 704, N 11; VON BÜREN/STOFFEL/WEBER, p. 119 N 560; BAUEN/BERNET, p. 149, N 432; HANDSCHIN, Swiss company law, p. 62; GEHRER, p. 203; KUNZ, Minderheitenschutz, § 12, N 90; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 51; KRATZ, Möglichkeiten, § 9, N 91; ZÄCH/SCHLEIFFER, p. 266; TANNER, Beschlussfassung, p. 771; TANNER, Quoren, § 5, N 47 et seqq. D-CO 704 I expressly provides that articles of association provisions that require higher majorities than the law requires for passing certain resolutions must be observed both at their introduction and removal. With respect to GmbHs, see TRUFFER/DUBS, Basler Kommentar, CO 808b, N 11; HANDSCHIN, Swiss company law, p. 73; SIFFERT/FISCHER/PETRIN, CO 808b, N 6; KÜNG/CAMP, CO 808b, N 9.

1032 See VON STEIGER, Recht der AG, p. 74.

1033 See DUBS/TRUFFER, Basler Kommentar, CO 704, N 11; GEHRER, p. 203; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 51; ZÄCH/SCHLEIFFER, p. 266.

1034 CO 703. See KUNZ, Minderheitenschutz, § 12, N 95; TANNER, Quoren, § 5, N 35.
Introducing quorum requirements. Quorum requirements can be a useful tool to prevent the controlling shareholder from taking advantage of the PEMI’s absence to push through changes in the articles of association or pass other resolutions that are against the PEMI’s interests. Quorum requirements also broaden the discussion and promote the free exchange of ideas, guarantee the representativeness and stability of resolutions, help strengthen personal contacts between shareholders, and help protect the company against lightheaded decisions. There is, however, a risk that the PEMI will block resolutions by deliberately missing general meetings. To mitigate this risk, a quorum requirement can apply only for a specified time (e.g., to two consecutive general meetings); if the quorum is still not reached, a third general meeting can be called with no quorum requirement or a lower quorum requirement. This solution is useful only when a certain time interval passes between the successive general meetings so as to avert a third meeting to be held directly after the first two, but with no quorum requirement applying and thus effectively preventing the PEMI from attending.

Reducing majority vote requirements. By reducing the requirements for passing resolutions at the general meeting, the PEMI can be granted control of certain decisions, that is, obtain an active voice. Lower majority vote requirements are introduced via lowering the statutory resolution threshold, or by requiring the consent of holders of a particular class or classes of shares, or by requiring relative majorities based on votes cast or based on yes and no votes cast instead of votes represented. To gain an active voice, the requirements must be such that the minority investor can independently pass certain resolutions; for example, if the PEMI holds 30% of the total votes it can control a certain vote if the majority vote requirement for such a vote is lowered to 30%. The downside of such a provision is that, depending on the shareholder structure, minority thresholds may counteract the stability and representativeness of resolutions. Hence, lowering statutory majority vote requirements, even though deemed admissible, should be implemented with utmost caution, if at all. They may be suited to decide on certain exit paths.

Raising majority vote requirements. By raising the requirements for passing certain important resolutions to the extent that a vote effectively requires

1035 See FN 929.
1036 See TANNER, Quoren, § 3, N 50, 79.
1037 See ZACH/SCHLEIFER, p. 265; similarly also TANNER, Quoren, § 5, N 27, FN 135. With respect to the GmbH, see HANDSCHIN, Gesellschaftsanteile, p. 95.
1038 See BRUNNER, p. 38.
1039 See TANNER, Quoren, § 3, N 36 et seq.
the PEMI’s cooperation, the PEMI can thus exercise veto power and thereby prevent being overruled by the majority (i.e. obtain passive voice). Resolution requirements are increased by raising the statutory resolution threshold, by requiring the consent of holders of a particular class or every class of shares, or by declaring the total votes outstanding as the decisive calculation basis. The active PEMI will generally want to secure veto power for certain critical decisions. On the other hand, too stringent requirements can jeopardize the company’s functionality.\footnote{1040} Hence, high resolution requirements should be applied restrictively so as to minimize the risk of a deadlock. Even if the resolution threshold is increased in the articles of association to the granting of de facto veto power, some uncertainty exists as to whether the respective provision can withstand legal challenges given legal scholars’ differing views on this. It is therefore advisable for the PEMI to arrange for incorporating corresponding regulations in a shareholders’ agreement to secure the PEMI’s veto power. Moreover, it must be noted that increased resolution requirements may protect the PEMI from certain proposed resolutions from being adopted. However, such tools do not confer active voice and the passing of an alternative proposal by the PEMI requires the controlling shareholder’s consent.\footnote{1041} In addition, of note is that the veto power of shareholders with a blocking minority is not ad personam. To effectively sustain a blocking minority, the PEMI may be forced to participate in capital increases to prevent losing its blocking minority.\footnote{1042}

Class voting. The creation of more than one class of shares is a suitable instrument to mold a control structure that gives the PEMI the power to veto corporate decisions. However, in addition to the concerns about a shareholder’s veto power discussed above, multiple classes of shares can make the capital structure more opaque, which could be viewed negatively by potential IPO investors and therefore create a barrier to the PEMI’s exit.\footnote{1043}

Protection against unfavorable ex post amendments. If PEMIs negotiate for enhanced voice and other protection rights, they must take special care to safeguard these tools and arrangements against repeal, amendment or circumvention undertaken single-handedly by the majority shareholder ex post, who, for instance, may decide to issue new voting shares, convert participation certificates into shares, eliminate voting caps, or remove the PEMI’s enhanced information rights. A central tool for PEMIs to protect their position ex post is providing for unanimity or a high majority vote

\footnote{1040}{See FN 1002.} \footnote{1041}{See ACHLEITNER/SCHRAML/TAPPEINER, Familienunternehmen, p. 45.} \footnote{1042}{See TREZZINI, p. 265.} \footnote{1043}{See FN 828.}
requirement that effectively necessitates the Pemi’s consent for amendments of the articles of association in general, or at least for those concerning the aforementioned decisions. Moreover, high majority vote requirements that give the Pemi veto power must be protected from dilution via issuing additional shares. Otherwise, the Pemi’s veto power may be eliminated if the controlling shareholder decided to increase the number of outstanding shares – in situations in which the Pemi is unlikely to use its statutory preemptive rights – until the minority holdings are less than the fraction of outstanding shares required for the Pemi to exercise veto power.\footnote{1044}{See O’Neal/Thompson, § 4.31.}

**Deadlock-breaking devices.** According to Thomas and Ryan, a deadlock is “purely a procedural inability to make a decision because a mandated majority (or unanimity) is unobtainable.”\footnote{1045}{Thomas/Ryan, p. 289} Deadlock arises if an equal number of yes and no votes are cast and thus a positive resolution cannot be passed.\footnote{1046}{See Bösig, p. 13; Forstmoser/Meyer-Hayoz/Nobel, § 24, N 57.} Deadlocked situations can result if qualified majority vote requirements and unanimity are provided for in specific resolutions and the status quo can be broken only with both the majority shareholder’s and the Pemi’s consent, one of which is refused. According to Bürgi, a deadlocked situation only exists if dissent is the rule and if the respective organ is rendered virtually inoperative.\footnote{1047}{See Bürgi, Zürcher Kommentar, CO 716, N 19.} These are the type of deadlocked situations that pose a risk to the firm’s growth and functionality and need to be addressed. Even though potential conflicts are difficult to discuss in the run-up to a Pemi deal when each party is excited about the partnership, discussions of potential problems along with a list of viable measures to address such conflicts are imperative to mitigate the risk of a permanent deadlock. To this end, various mechanisms are available as outlined below.

**Successive general meetings.** Principally, the parties should first attempt to negotiate out of a deadlocked situation. Usually, deadlock-breaking devices are triggered only after a deadlock persists for an extended period of time such as two successive general meetings, and these devices should not allow majority shareholders to easily overrule the Pemi’s dissent. In first attempting to solve their conflict via a series of conflict resolution meetings, shareholders have an opportunity to reach a compromise.
The casting vote. This deadlock-breaking device requires an amendment of the articles of association\textsuperscript{1048} that gives the chairperson of the general meeting the decisive vote on certain sensitive issues.\textsuperscript{1049} The casting vote is an instrument to ensure the shareholders’ de facto ability to make decisions at the general meeting. However, a proposal that the general meeting’s chairperson casts a tie-breaking vote that could bring about a positive resolution on a contentious issue will not be undisputed if used to bring about a decision between two opposing shareholder groups rather than to solve accidental disunity.\textsuperscript{1050} In deciding upon whether to implement a casting vote, the following aspects can prove helpful from the PEMI’s perspective. Firstly, the casting vote is only significant if resolutions are voted upon with an absolute or simple majority. If, in contrast, a qualified majority is required, then the casting vote must not be utilized to achieve a qualified majority since in such a case the casting vote holder would receive two votes from the outset, which is at odds with the prohibition of shares with plural voting rights.\textsuperscript{1051} Secondly, from the PEMI’s perspective, the casting vote as a deadlock-breaking device is of little use if the chairperson is routinely determined by the controlling shareholder. Hence, if such conflict resolution method is implemented, the office of the chairperson should regularly rotate between the controlling shareholder and the PEMI.\textsuperscript{1052} Thirdly, introducing the casting vote is a stopgap measure, not a normal instrument of decision taking.\textsuperscript{1053} If the company’s decision-taking

\textsuperscript{1048} Without such a specific provision in the articles of association it is unlawful to grant the chairperson of the general meeting the casting vote. See DUBS/ROLAND, Basler Kommentar, CO 703, N 12.

\textsuperscript{1049} In a GmbH, the law provides the chairman of both the meeting of members and the managing officers with a casting vote unless otherwise provided in the articles of association (CO 808a and 809 IV sentence 2).

\textsuperscript{1050} On the general meeting chairperson’s casting vote, see Swiss Federal Supreme Court in BGE 95 II 555 (E. 2) and with reference to this decision, see BÖCKLI, Aktienrecht, § 12, N 358 et seq.; BAUEN/BERNET, p. 148, N 421; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 57.

\textsuperscript{1051} See FN 758. See HOMBURGER, Zürcher Kommentar, CO 713, N 320; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 31, N 32.

\textsuperscript{1052} Shareholders may stipulate in the shareholders’ agreement that each group of shareholders alternately nominates the chairperson of the general meeting and/or the chairman of the board of directors for one fiscal year. See KRNETA, CO 713, N 802; also cf. proposal by HOMBURGER, Zürcher Kommentar, CO 713, N 323 et seq. with respect to board chairmanship (“Denkbar ist eine Statutenbestimmung, wonach ein Wechsel im VR-Vorsitz erfolgen muss, wenn eine bestimmte Zahl von VR-Beschlüssen nur durch Einsatz des Stichentscheides zustande gekommen ist.”). Cf. NATER, p. 206 (pointing out that the parties will aim to have certain critical decisions made in their term in office, which is why he finds this solution unconvincing).

\textsuperscript{1053} See NOBEL, Formelle Aspekte p. 37 (correctly pointing out that the casting vote must not be used for permanently exercising power in a deadlocked situation; it is, however, harmless for letting the dice fall to one side or the other in the event of accidental disunity in larger companies). Of another opinion, see KUNZ, Minderheitsschutz, § 12, N 83 (finding such procedure unlawful). Cf. also for further references, TANNER, Quoren, § 4 N 98 et seqq. (who
mechanism constantly fails and the casting vote results in a permanent majority situation that is incompatible with the principle of good faith, then according to NOBEL, the action for rescission and even the action for dissolution are not excessive demands.\textsuperscript{1054} Finally, apart from the simplicity of this deadlock-breaking device, the problem is that the casting vote does not solve the conflict between the partners at its core. The losing party is forced into the other’s position without any room for compromise.\textsuperscript{1055} Hence, this practice can reduce trust between the parties if used consistently in either of the parties’ favor and without solving the parties’ central dispute.

\textit{Decision by lottery}. Instead of assigning a casting vote to the general meeting chairperson, deciding to make a decision by lottery could mitigate some of the concerns mentioned.\textsuperscript{1056} Again, however, this device does not solve the conflict among the opposing parties at its core.

\textit{Referee}. Another method to deal with deadlocked situations is a voting agreement in which the shareholders agree that in case of a deadlock they will vote in accordance with the instructions of a specified individual such as a lawyer, an accountant, a conflict mediator, or other specified professional chosen to rule on the dispute.\textsuperscript{1057} To set up this conflict resolution method, alternatively to respective voting agreements, \textit{golden share}\textsuperscript{1058} conferring the decisive vote can also be transferred ex ante to this neutral person, who rules in cases of severe falling outs among the parties.\textsuperscript{1059} A potential drawback is that the neutral third person may be seen as being biased or lacking expertise by the parties in conflict.\textsuperscript{1060}

\textit{Exit rights}. If the conflict between the parties is so profound that common will to maintain the business relationship no longer exists among the shareholders, then all that remains is the revision of the shareholder base based on suitable exit rights and duties. It may be stipulated, for example, that the Pemi dissenting from a defined positive resolution may demand finds the casting vote critical from a legal standpoint, but justifiably from an economic perspective).

\textsuperscript{1054} See NOBEL, \textit{Aktienrechtliche Entscheide}, p. 250; HOMBURGER, \textit{Zürcher Kommentar}, CO 713, N 325.

\textsuperscript{1055} See \textit{VON DER CRONE}, \textit{Pattsituationen}, p. 43; HUBER, p. 30.

\textsuperscript{1056} See DRUEY, \textit{Stimmbindung}, p. 31.

\textsuperscript{1057} See KRNETA, CO 713, N 803 (qualifying such solution as not very effective but frequently applied); HUBER, p. 60. At the board level, the election of an independent board member is also a possible solution.

\textsuperscript{1058} A \textit{Golden Share} is a share which enables to outvote all other shares in certain specified circumstances.

\textsuperscript{1059} See BRENCHBÜHL/EMCH, p. 276; GRONER, p. 373. Critically, NATER, p. 207 \textit{et seqq.}

\textsuperscript{1060} See GRONER, p. 373.
that, to the extent possible, the controlling shareholder or the firm purchases its shares at a price, defined ex ante, set by an independent third party, or determined by an auction to be held among the parties.1061 There is a great variety of mechanisms to achieve this goal such as a Texas shoot-out1062 or a Dutch auction1063. Contractually, these mechanisms involve a combination of put and call options. In a GmbH, such rights may also be stipulated at the corporate level by inserting appropriate provisions in the articles of association.1064 Exit optionality enables the minority shareholder to exit if the company turns out to be fundamentally different from the one originally assessed, or if the PEMI is asked to accept investment terms very different from those originally agreed upon.1065 These exit rights not only benefit the PEMI by providing a way out in case of extreme differences, or a severe falling out, but they also protect the company and the controlling shareholder because they enable necessary business decisions to be taken and can help avert deadlocked situations.1066

Dissolution. The most drastic alternative in cases where the company’s decision-making process is stymied by shareholder disputes or deadlocks is company dissolution.1067 This, however, is clearly a solution of last resort.

Expulsion of a GmbH member. In a GmbH, the company can file an action with the court to expel a member for a valid reason or the meeting of members can directly expel a member for a reason stated in the articles of association.1068 The decision to file an action is the sole authority of the meeting of members1069 and the vote must meet the qualified majority vote requirement.1070 If, however, the opposing member holds more than one-third of the total votes, the expulsion cannot be carried out against his/her will. Therefore, NATER argues that the articles of association can exclude the members to be expelled from voting in such decisions.1071

1061 For further references on the different mechanisms, see VON DER CRONE, Pfatsituationen, p. 42 et seq.; CLOPATH, p. 157, GRONER, p. 374. Cf. also HUBER, p. 32.
1062 See Section VI.A.3 and FN 2382.
1063 See Section VI.A.3 and FN 2383.
1064 Possible rights include the right of first offer, of first refusal, or purchase rights of company shares of the members or the company (CO 776a I Sec. 2) and indirectly the rights of expulsion and withdrawal (CO 776a I Sec. 17, 18). See BRECHTBUHL/EMCH, p. 276.
1065 See GARZA, p. 654; WEBER, Rechtsprobleme, p. 54 et seq.
1066 See GARZA, p. 659.
1067 See Section VI.A.2.4.
1068 CO 823 I and II.
1069 CO 804 II Sec. 14.
1070 CO 808b I Sec. 8.
1071 NATER, p. 211 et seq.
3.3.5 Voting Agreements

3.3.5.1 Legal Concept

Voting agreements are contracts among two or more natural or legal parties in which at least one party is a (current or future) shareholder and agrees either to refrain from voting at the general meeting or to vote in a specified manner on issues regulated by the terms of the agreement. Voting agreements are a core element of shareholders’ agreements and may be concluded among stock corporation shareholders and GmbH members. Voting agreements do not entail a transfer of voting rights, which remain with the obliged shareholders.

3.3.5.2 Purpose

The general purpose of shareholders’ agreements is outlined in Section III.B.3.2. Voting agreements can offset some of the inadequacies stemming from the largely absent person-oriented elements of corporate law and are a key instrument for enhancing the PEMI’s voice in corporate decision making. They may confer veto power (passive voice) or even allow the PEMI to decide certain matters (active voice).

3.3.5.3 Validity

In principle, voting agreements among shareholders in stock corporations and GmbHs are admissible based on jurisprudence and prevailing
opinion due to the freedom of contract principle. Shareholders in a corporation (but not in a GmbH) are under no obligation to safeguard or promote the company’s interests. As long as exercising voting rights is not considered an infringement of the good faith principle, shareholders may exercise their voting rights to serve their interests best and are free to make commitments on how to vote. Moreover, voting agreements do not constitute a violation of the principle of the inalienable and irrevocable right to vote. According to this principle, the shareholder can neither surrender the right to vote nor be denied the right to a minimum of one vote. A shareholder’s commitment to exercise his/her votes in an agreed-upon manner does not constitute a waiver of such right. Although not allowed under the agreement, the shareholder can still cast his/her votes at the general meeting differently than he/she previously agreed.

3.3.5.4 Legal Nature

In light of the diverse shapes of shareholders’ agreements, the determination of their legal nature is equally diverse. Legal scholars qualify shareholders’ agreements, and voting agreements in particular, either as contracts pursuant to the general law of obligations, as simple


See Section IV.D.4.1.

See FN 1205.

See the decision of the Swiss Federal Supreme Court of 14 October 2003, 4C.143/2003 (E. 6: “Im Gegensatz dazu sind aber die Aktionäre bei ihrer Stimmabgabe nicht gehalten, ein übergeordnetes Gesellschaftsinteresse zu wahren.”). See also BAUEN/BERNET, p. 98 et seq., N 298; APPENZELLER, p. 40, 43; BÜRGI, Zürcher Kommentar, CO 692, N 31; GLATTFELDER, p. 260a.

Yet, this could make him/her liable for damages to the parties entitled by the agreement (CO 97 I) and, if the shareholders’ agreement so provides, to pay a contractual penalty.

See PFISTER, p. 11.
partnerships, or as hybrid instruments with contractual and corporate law elements.

Qualification as a contract. A voting agreement can be a unilateral or bilateral contract. In case of a unilateral voting agreement, only one party assumes the obligation to cast his/her votes at the general meeting in an agreed-upon way. A bilateral legal contract exists if the shareholders consent to a mutual agreement as regards the exercise of shareholder rights. The subsumption under a particular type of contract, e.g., employment contract or mandate, or the qualification as a contracts sui generis and the question as to what legal norms should be applied, must be carried out individually, based on the particular voting agreement to be assessed. It is not possible to do so in general since voting agreements lack subordination as required for employment contracts and since voting agreements may contain, for instance, negative covenants that cannot be the principal subject matter of a mandate. Moreover, the mandatory

1087 CO 530 et seqq.
1089 See Böckli, Aktienstimmrecht, p. 52 (qualifies unilateral voting agreements as mandates); Pfister, p. 11. With respect to the GmbH, see Nater, p. 37.
1090 See von Salis, p. 183; Glattfelder, p. 174a.
1091 According to a number of legal scholars, a two-sided shareholders’ agreement exists only if both parties or all parties, respectively, make commitments related to their shareholder status. If one party owes the other a different obligation, they deem such contract a unilateral shareholders’ agreement. See Lang, p. 21, von Salis, Gestaltung, p. 188. Other authors do not require the commitments of both parties or all parties to the agreement relate to their shareholder status. Part of the commitments may be of a different nature. See with further references and practical examples, Hintz-Bühler, p. 25, 29 et seqq.; Appenzeller, p. 51.
1092 A general qualification of shareholders’ agreements as mandates is rejected by legal experts. Only unilateral voting agreements may be qualified as mandates. See Forstmoser, Schnittstelle, p. 385; Böckli, Aktienstimmrecht, p. 54. Cf. Hintz-Bühler, p. 32 (qualifying only one-off, simple voting agreements as mandates in exceptional cases).
1093 See BGE 109 II 43 (E.2). See also, for further references, Hintz-Bühler, p. 31 et seq.; Lang, p. 22; Pfister, p. 11; Appenzeller, p. 51 et seq.; von Salis, p. 188; Böckli, Aktienstimmrecht, p. 52 (qualifying unilateral voting agreements, however, as mandates); Glattfelder, p. 234a.
1095 Such as the duty to abstain from voting. Negative covenants, in case of mandates, may only be agreed as a collateral duty. See Weber, Basler Kommentar, CO 394, N 6; Hintz-Bühler, p. 32; Lang, p. 23; Appenzeller, p. 52; Glattfelder, 234a.
1096 The Swiss Federal Supreme Court has made clear that the right to revoke the mandate at any time is mandatory and applies both to pure-play mandates and mixed contracts where, in view of the parties’ temporal binding, the laws on mandates appear appropriate. See BGE 115 II 464 (E. 2a); BGE 110 II 383 (E.2).
revocation right applicable to mandates and exercisable at any time does not normally conform to the long-term nature of shareholders’ agreements.\(^\text{1097}\) Its direct or analogous application may only be conceivable in case of one-time or gratuitous unilateral voting agreements.\(^\text{1098}\)

**Qualification as a simple partnership.** When two parties have a common purpose and share the powers and means to realize this purpose they have the basic elements required for qualifying as a simple partnership.\(^\text{1099}\) Shareholders form a community of interests with a common purpose if they wish to mutually influence corporate decisions to achieve a common goal and therefore agree to coordinate their voting behavior at the general meeting.\(^\text{1100}\) Two further indicators for a simple partnership are (i) all shareholders of the company agree to be parties to the agreement and commit to vote all their shares as agreed (*Doppelgesellschaft*),\(^\text{1101}\) and (ii) all parties agree to actively participate in the firm’s governance to help achieve the common goal – to enhance corporate value, for example, by being represented on the board of directors, by holding executive management functions, or by rendering consultancy services.

\(^{1097}\) See GLATTFELDER, p. 234a; FORSTMOser, Aktionärbindungsverträge, p. 367.

\(^{1098}\) Cf. WEBER, Basler Kommentar, CO 404, N 10 (applying the revocation right to *typical* mandates that are gratuitous or person-oriented. For *atypical* mandates, the parties can at any time waive the right to revoke the contract); HINTZ-BÜHLER, p. 149 *et seq.* (only applying the revocation right, exercisable at any time, to unilateral shareholders’ agreements or in cases of special relationships based on mutual trust); APPENZELLER, p. 53 (applying CO 404 I only to voting agreements based on mutual trust between the parties or which do not require any obligations in return, but not if the parties assume obligations where they depend on the other party to attain their goals, e.g., in case of an agreement to exercise the voting rights in accordance with the instructions of another shareholder); BÖCKLI, Aktienstimmrech, p. 52 *et seq.* (approving the laws on mandates, including CO 404, in case of unilateral voting agreements).

\(^{1099}\) CO 530 *et seq.* See PIFSTER, p. 11; VON SALIS, p. 183; GLATTFELDER 174a. CO 530 stipulates “mit gemeinsamen Kräften oder Mitteln”. On these terms in detail, see HINTZ-BÜHLER, p. 26 *et seq*.

\(^{1100}\) See FELLMANN/MÜLLER, Berner Kommentar, CO 530, N 283; BAUMANN, p. 160; FORSTMOser/MEIER-HAYoz/Nobel, § 39, N 163; LANG, p. 24; APPENZELLER, p. 55; BÜRGI, Zürcher Kommentar, CO 692, N 35; GLATTGELDER, p. 231 *et seq.* (pointing out that exercising shareholder rights for the purpose of achieving a common goal is key for the qualification as a simple partnership where – other than in case of bilateral contracts – the duties serve as a means to a common purpose). For the term *common purpose*, see MEIER-HAYoz/FRISTMOser, § 1 N 66.

\(^{1101}\) The term goes back to NAEGELI, particularly p. 1, *et seq.*, 187 *et seq.* (“Es schließen sich die Inhaber von Aktien einer bestimmten AG, die dauernd an dieser Gesellschaft interessiert sind, insbes. also die Großaktionäre, zusammen, um auf die AG einen einheitlichen beherrschenden Einfluß auszuüben.”), with further references, FORSTMOser, Schnittstelle, p. 386; LANG, p. 25; PIFSTER, p. 20; FORSTMOser/MEIER-HAYoz/Nobel, § 39, N 164; DRUEY Stimmbindung, p. 22 *et seq.*
Assessing a shareholders’ agreement between a PEMI and a controlling shareholder that laid out the principal financial and non-financial terms of the PEMI’s investment (comprising, inter alia, voting agreements, information, and exit rights), the Swiss Federal Supreme Court in 2003 qualified such a contract as a *synallagmatic relationship of exchange*, and not a simple partnership because the private equity investment was considered confined to the remunerated financing of the business activity. The court held that the parties had not intended to jointly manage the company and that the private equity investor had not rendered consultancy services, even though the parties agreed to concertedly exercise their shareholder rights to achieve their common goals, and despite the PEMI having information and participation rights, and rights to partake in corporate governance (e.g., via a seat on the board of directors).\textsuperscript{1102} The Federal Supreme Court assumed a divergence of interests between the PEMI and the controlling shareholder with the latter being interested in the long-term development of the firm, while it assumed the PEMI to focus on maximizing financial returns. Although such assessment may have been justified in the particular case, it is the author’s view that the court’s statements do not hold for private equity minority investments in general. Shareholders’ agreements that are concluded in private equity minority investments often meet the indicators for a qualification as a simple partnership as outlined above, particularly in case of active PEMIs who, in addition to monetary investments, routinely provide non-financial, value-added services to increase the firm’s value for the benefit of all shareholders. Moreover, it is certainly true that the PEMI’s ultimate goal is to maximize returns. However, this is also typically the goal of other shareholders and an investment horizon over a shorter period of time – still multiple years in case of private equity investors – compared to those of other shareholders is not a suitable indicator for assuming a general divergence of interests. Reducing PEMIs to being providers of financial capital falls short of the nature of private equity and neglects the significant non-financial added value by which private equity professionals support their portfolio firms. In light of the court’s ruling, to avoid legal uncertainty with regard to the qualification of shareholders’ agreements, and voting agreements in particular, which can result in negative effects (e.g., contract termination), the parties should precisely address the intended qualification, its intended effects and possible ruptures, and the legal consequences thereof.\textsuperscript{1103}

\textsuperscript{1102} Decision of the Swiss Federal Supreme Court of 21 November 2003, 4C.214/2003 (E. 3.3).
\textsuperscript{1103} See LANG, p. 27.
Pursuant to the principle of contractual freedom, the parties are free to enter any contractual agreements within the limits of the law. Typically, voting agreements among shareholders are structured in one of the following ways: (i) the obliged shareholder(s) agree to vote, or abstain from voting, their shares pursuant to agreed-upon guidelines or in such a way as to reach certain defined objectives. For example, the parties mutually agree to vote their shares in favor of the candidate proposed by each other as representatives on the board of directors and to exercise their shareholder rights in such a way as is necessary to ensure that the provisions of the shareholders’ agreement are satisfied. Moreover, voting agreements may contain guidelines on how to vote regarding particular issues such as the payment of dividends or the increase of share capital. (ii) The parties can agree to vote their shares based on the instructions of the obligee. In this case, the agreement typically stipulates when and how the obligor receives the obligee’s voting instructions. (iii) The shareholders commit to vote as agreed in a consensus-building process prior to the general meeting without a priori specifying how to vote with regard to certain matters. Generally, voting agreements apply to all or particular resolutions to be taken at the general meeting. For an overview of transactions that may be deemed important, see Section IV.D.3.3.4.5.

1105 See BÜRGI, Zürcher Kommentar, CO 692, N 29, 36; HINTZ-BÜHLER, p. 75; LANG, p. 31.
1106 See ibid; FRICK, §12, N 1434.
1107 See HINTZ-BÜHLER, p. 20.
1108 See BÜHLER, Regulierung, § 10, N 1359 (stating that the shareholders’ agreement may stipulate a minimum payout rule pursuant to which a certain percentage of the balance sheet profit shall be paid out after the allocations to the legal reserves and to the reserves provided for in the articles of association have been made). See also GRONER, p. 283; FRICK, §12, N 1416; BÖSIGER, p. 11.
1109 See FRICK, §12, N 1416.
1110 See ibid, N 1434; VON SALIS-LÜTOLF, Finanzierungsverträge, § 12, N 1425; HINTZ-BÜHLER, p. 20, 76.
1111 See FRICK, § 12, N 1435; VON SALIS-LÜTOLF, Finanzierungsverträge, § 12, N 1385.
1112 See FRICK, § 12, N 1434 et seq.; HINTZ-BÜHLER, p. 85. See also the decision of the Swiss Federal Supreme Court of 28 June 2006, 4P.26/2006 (E. 2) concerning a voting agreement between shareholders who committed to vote their combined shares in the general meeting as agreed in the run-up to the meeting by a majority of two thirds.
1113 See VON SALIS-LÜTOLF, Finanzierungsverträge, § 12, N 1384; HINTZ-BÜHLER, p. 19; LANG, p. 31.
1114 See FRICK, § 12, N 1437; HINTZ-BÜHLER, p. 19; PFISTER, p. 5.
3.3.5.6 Limitations

Despite the general validity of voting agreements, they are subject to certain limitations, including the general limitations on the freedom of contract in that they must not run counter to mandatory law, public policy, bonos mores, or basic personal rights (i.e., no excessive commitments\(^\text{1115}\)), and they must not be impossible to carry out, or otherwise the contract is null and void.\(^\text{1116}\) Although shareholders are not subject to a duty of loyalty to the company,\(^\text{1117}\) the principle of good faith, the prohibition of abusing the law, and the principle of exercising rights with consideration must still be observed.\(^\text{1118}\) The general prohibition of abusing the law is violated, for instance, by agreements intended to deliberately damage or ruin the company.\(^\text{1119}\) Voting agreements must not undermine the statutory decision-shaping process at the general meeting.\(^\text{1120}\) DRUEY deems voting agreements problematic if they do not allow shareholders to react to a change in information.\(^\text{1121}\) Moreover, voting agreements intended to circumvent voting restrictions set by law or the articles of association are inadmissible.\(^\text{1122}\)

Voting restrictions exist in connection with the acquisition

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\(^{1115}\) According to the Swiss Federal Supreme Court, voting agreements do not constitute an excessive commitment. See BGE 88 II 172 (E. 2: “Selon la jurisprudence, les engagements de nature pécuniaire ne sont contraires aux moeurs que s’ils mettent en péril l’existence économique du débiteur. En s’obligeant à voter selon les décisions du groupe et à déposer ses actions en main tierce, pendant une durée de six ans, le recourant ne s’est pas exposé à un tel risque.”). Long-term voting agreements are, however, problematic and could be viewed as excessive commitments infringing upon basic personal rights. See FN 1146.

\(^{1116}\) CO 19 II, 20 I, CC 27. See BGE 109 II 43 (E. 3). See also LÄNZLINGER, Basler Kommentar, CO 692, N 11; FRICK, § 12, N 1439; HINTZ-BÜHLER, p. 49, 59; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 208; APPENZELLER, p. 38; BÜRGI, Zürcher Kommentar, CO 692, N 28.

\(^{1117}\) See Section IV.D.4.1.

\(^{1118}\) See BÖCKLI, Aktienrecht, § 1, N 19; NUSBAUM/VON DER CRONE, p. 144; HINTZ-BÜHLER, p. 51 (mentioning the prohibition of abusing the law). On the principle of good faith, see FN 1204. On the prohibition of abusing the law see FN 803.


\(^{1120}\) See DRUEY, Stimmbindung, p. 12.

\(^{1121}\) See ibid, p. 13.

\(^{1122}\) CO 691 I. By interpreting CO 691 I expansively, prevailing expert opinion derives a general prohibition of preventing the objectives intended with limiting voting rights materializing by way of evasion. See LÄNZLINGER, Basler Kommentar, CO 692, N 11 et seq.; FRICK, § 12, N 1439; BAUEN/BERNET, p. 98, N 297; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 24, N 94, § 39, N 204; FORSTMOSER, Aktionärbindungs-verträge, p. 377 et seq.; BÜRGI, Zürcher
of own shares,\textsuperscript{1123} the discharge of board members,\textsuperscript{1124} in the context of restrictions on the transferability of shares,\textsuperscript{1125} and voting caps\textsuperscript{1126} imposed by the articles of association.\textsuperscript{1127} Third parties not involved in corporate decision making, or shareholders excluded from voting with all or part of their shares, shall not gain such power via voting agreements.\textsuperscript{1128} If the respective resolution of the general meeting has been materially influenced by such unauthorized persons or the votes cast in breach of voting restrictions, the resolution is challengeable.\textsuperscript{1129} Furthermore, the company must not be a party to voting agreements because a company cannot enter

\textit{Kommentar}, CO 692, N 32. Furthermore, for an assessment of vote buying, see APPENZELLER, p. 46 et seq. With respect to the circumvention of transfer restrictions, see BGE 109 II 43 (E. 3b). See also LANG, p. 42 et seq. (stating that the circumvention of voting restrictions represents a participation of unauthorized persons against which any shareholder is entitled to raise an objection to the board of directors or in the minutes of the general meeting, CO 691 II).

\textsuperscript{1123} CO 659a I, 659b I.

\textsuperscript{1124} CO 695.

\textsuperscript{1125} The acquisition of shares subject to transfer restrictions by succession, division of estate, marital property law, or by debt enforcement may result in the voting right lying dormant until the company gives its consent to the transfer (685c II). See BÖCKLI, Aktienrecht, § 12, N 431a; GEHRER, p. 150.

\textsuperscript{1126} CO 692 II.

\textsuperscript{1127} See APPENZELLER, p. 45; HINTZ-BÜHLER, p. 80.

\textsuperscript{1128} See BGE 81 II 539 (E. 3: “Fände das Vorgehen … Rechtsschutz, so könnte jedermann sich durch den Kauf von Aktien mit Stimmverpflichtung der Verkäufer in der Generalversammlung entscheidenden Einfluss verschaffen, sich selber oder ihm unterworfenen Personen in den Verwaltungsrat wählen lassen und hierauf mit Erfolg um Genehmigung der Übertragung der Aktien nachsuchen. Dieses Vorgehen ist offenbarer Missbrauch eines Rechts und daher nicht zu schützen”). Legal experts, however, point out that voting agreements with respect to registered shares not freely transferable are not unlawful in general, but only if they circumvent transfer restrictions stipulated in the articles of association. See FORSTMOSER, Aktionärbindungsverträge, p. 378 et seq. (“Ein Bindungsvertrag ist bei vinkulierten Namenaktien dann, und nur dann, verpönt, wenn ein eingetragener Aktionär seine Stimmen nach den Weisungen eines Dritten und in dessen Interessen ausübt, immer vorausgesetzt, dieser Dritte könnte mit den gebundenen Aktien nicht selber Aktionär werden. Zulässig ist es dagegen, dass sich Namenaktionär zusammenschliessen, um gemeinsam ihre jeweils eigenen Interessen zu verfolgen.”); HINTZ-BÜHLER, p. 81 (pointing out that if certain shareholders enter into a voting agreement that obliges them to vote their shares as agreed upon upfront according to the majority of the parties of the agreement, and if the total votes of these shareholders bound by the voting agreement exceed the voting cap, there is no circumvention thereof, if none of the parties exercises substantial influence on the others’ internal voting behavior). Also cf. DRUEY, Stimmbindung, p. 10; HOMBURGER, Urteil, p. 125; BÄR, Rechtsprechung, p. 235 et seq.

\textsuperscript{1129} CO 691 III. See BGE 122 III 279 (E. 3cc: “kann die Gesellschaft den Erfolg der Anfechtungsklage trotz tatsächlicher Mitwirkung Unbefugter dadurch abwenden, dass sie nachweist, das Abstimmungsergebnis sei dadurch nicht beeinflusst worden. … ist im Rahmen der Kausalitätswiderlegung einzig zu prüfen, ob die unzulässig abgegebenen Stimmen das Abstimmungsergebnis zahlenmäßig beeinflusst haben.”); Also see HINTZ-BÜHLER, p. 61 (stating that resolutions are only challengeable if the unlawful votes were decisive for the result of the vote); BAUEN/BERNET, p. 112, N 329; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 208; APPENZELLER, p. 45 et seq.
into contractual agreements on the exercise of its stockholders’ participation rights and thereby influence decision making at the general meeting.\footnote{1130} To prevent the voiding of a voting agreement in its entirety, a severance clause should be included in case any provisions or covenants turn out to be invalid. With regard to GmbH members, voting agreement limitations are more stringent due to the members’ duty of loyalty to the firm. For such stricter limitations, see Section IV.E.3.3.6.

\section*{3.3.5.7 Form}

Due to the principle of \textit{freedom of form},\footnote{1131} shareholders’ agreements, and voting agreements in particular, do not generally require any particular form, and can be concluded in writing, orally, and even in form of tacit agreements.\footnote{1132} Certain formal requirements, however, may result from its content. For example, jurisdiction and/or arbitration clauses must be in writing.\footnote{1133} In practice, contractual agreements among shareholders are routinely arranged in writing, which is recommended for purposes of proof.\footnote{1134}

\footnote{1130}{For an overview of legal scholars’ arguments against the company as a party to a shareholders’ agreement, with respect to voting agreements, see \textit{VON BÜREN/HINTZ}, p. 806, FN 25. For further references, see also \textit{BÖCKLI, Aktienrecht}, § 12, N 578 (“Die Gesellschaft als juristische Person kann nicht rechtsverbindlich an der Gestaltung ihres eigenen Willens teilnehmen.”); \textit{KÜRER, Basler Kommentar}, CO 680, N 12; \textit{VON BÜREN/STOFFEL/WEBER}, N 983; \textit{BÖCKLI/BÜHLER, Grenzen}, p. 56; \textit{HINTZ-BÜHLER}, p. 9; \textit{MEYER, Aktionärbindungsvertrag}, p. 421 (deeming voting agreements with the company illegal, but finding company participation lawful with respect to other aspects of shareholders’ agreements); \textit{STIRNIMANN}, p. 585 (deeming the participation of the company unlawful with respect to voting agreements, but lawful if a shareholder agrees to perform certain activities at below-market prices); \textit{FORSTMOSER/MEIER-HAYOZ/NOBEL}, § 2, N 46, \textit{APPENZELLER}, p. 49 (finding that voting agreements for the benefit of the company or its board of directors are invalid because they violate the capital-based structure of the company and the division of powers in corporate law. Indirectly, they would have the same effect as the voting right associated with own shares).}

\footnote{1131}{\textit{CO} 11 I.}

\footnote{1132}{\textit{See JÖRG/ARTER}, p. 474; \textit{HINTZ-BÜHLER}, p. 7; \textit{LANG}, p. 18; \textit{PFEISTER}, p. 12; \textit{FORSTMOSER/MEIER-HAYOZ/NOBEL}, § 39, N 170; \textit{APPENZELLER}, p. 50; \textit{FORSTMOSER, Aktionärbindungsverträge}, p. 367.}

\footnote{1133}{\textit{CCP} 17 II and 358.}

3.3.5.8 Legal Effects

Voting agreements are effective *inter partes*, between the parties to the agreement. Shareholders who cast their votes in breach of the agreement are liable for damages to the entitled partie(s) and, if the shareholders’ agreement so provides, they must pay a contractual penalty. If the respective votes have not yet been cast the potentially infringed shareholder is entitled to specific performance, which can be enforced by seeking a court injunction that compels the obliged party to vote in a specific way. Being effective *inter partes*, voting agreements neither affect third parties nor the company directly. They restrict the obliged shareholders only with respect to what they are allowed to do under the agreement, not what they can do in practice. According to prevailing expert opinion, votes cast in breach of a voting agreement are valid vis-à-vis the company and must be counted as cast. The company is neither

1135 See Decision of the Commercial Court of Zurich of 26 March 1970, ZR, No. 69, 1970, p. 261 et seq. See also BAUDENBACHER, Basler Kommentar, CO 620, N 37; with further references also HINTZ-BÖHLER, p. 6, FN 12 and p. 61; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 158. In context of the GmbH, see NUSSBAUM/SANWALD/SCHIEDEGGER, CO 776a, N 32; KÜNG/HAUSER, § 12, N 5; NATER, p. 38.

1136 See LÄNZLINGER, Basler Kommentar, CO 693, N 13. In context of the GmbH, see TRUFFER/DUBS, Basler Kommentar, CO 806, N 4; KÜNG/HAUSER, § 12, N 5.

1137 Expressly on specific performance in case of a voting agreement, see Decision of the Commercial Court of Zurich of 7 November 1983, ZR, No. 83, 1984, p. 141. For prevailing expert opinion, see LÄNZLINGER, Basler Kommentar, CO 693, N 13; BAUEN/BERNET, p. 113, N 333; VON BÜREN/STOFFEL/WEBER, N 989; FORSTMOSER, Schnittstellte, p. 387; with further references on specific performance, LANG, p. 72 et seq. and injunction, p. 98 et seq.; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39 N, 191 et seq.; with further references, APPENZELLER, p. 60; KRATZ, Möglichkeiten, § 9, N 28; FORSTMOSER, Aktionärbindungsverträge, p. 373; LÖRTSCHER, p. 192 et seq.

1138 See LÄNZLINGER, Basler Kommentar, CO 693, N 10; DUBS/TRUFFER, Basler Kommentar, CO 706a, N 11; FRICK, § 12, N 1437; BAUEN/BERNET, p. 111, N 326; TREZZINI, p. 88; FORSTMOSER, Schnittstellte, p. 387; HINTZ-BÖHLER, p. 6, 61; LANG, p. 8; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 158; APPENZELLER, p. 35; BÜRGI, Zürcher Kommentar, CO 692, N 35, 40; GLATTFELDER, p. 299a.


1140 See, inter alia, BÖCKLI, Aktienrecht, § 12, N 578a; LÄNZLINGER, Basler Kommentar, CO 693, N 10; MEIER-HAYOZ/FORSTMOSER, § 3, N 38; BAUEN/BERNET, p. 113, N 333; VON BÜREN/STOFFEL/WEBER, N 984. In contrast, APPENZELLER, p. 62 et seq. (not considering the actual votes cast to be decisive in determining the result of the vote, but the votes to be exercised as stipulated in the voting agreement. He also argues for the contestability of resolutions of the general meeting because of votes cast contrary to the agreement). With respect to the GmbH, see TRUFFER/DUBS, Basler Kommentar, CO 806, N 4; NUSSBAUM/SANWALD/SCHIEDEGGER, CO 806, N 23.
obliged nor entitled to count the votes as they should have been cast pursuant to the voting agreement.

3.3.5.9 Duration

Voting agreements between PEMIs and controlling shareholders are generally concluded prior to the proposed minority investment to ensure that the parties are bound by the respective agreements from the commencement of the investment. Such a practice is possible because shareholders’ agreements can be validly signed before the shareholder status exists.\(^{1142}\) In terms of duration, the following structuring options are found in practice.

Absence of an explicit duration stipulation. Without an explicit duration stipulation, voting agreements that qualify as simple partnerships may be terminated by a partner giving notice subject to a six-month notice period.\(^{1143}\) Voting agreements that qualify as mandates may be terminated at any time, with no notice period.\(^{1144}\) Voting agreements that qualify as contracts sui generis may be terminated by any party based on good grounds or – subject to debate – after the expiration of a reasonable period without any reason.\(^{1145}\)

Voting agreements concluded for an indefinite period. Voting agreements concluded for an undefined period can have an unintended or opposite effect because such agreements run the risk of being qualified by Swiss courts as excessive commitments infringing on a shareholder’s personal rights\(^{1146}\) and, as a result, may terminate unexpectedly. Some authors apply the rules on agreements without explicit determination of the duration,

\(^{1142}\) See HINTZ-BÜHLER, p. 8; BAUMANN, p. 99 et seq.
\(^{1143}\) CO 546 I. See JÖRG/ARTER, p. 474; HAAB, p. 386; HINTZ-BÜHLER, p. 146.
\(^{1144}\) See FN 1097.
\(^{1145}\) See JÖRG/ARTER, p. 475; FORSTMOSER, Schnittstelle, p. 390. On the extraordinary termination, see FORSTMOSER, Schnittstelle, p. 391; HINTZ-BÜHLER, p. 160 et seqq.; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 181. In favor of the possibility to terminate the agreement without stating reasons, see GLATTFELDER, p. 347a.
\(^{1146}\) CC 27 II. Prevailing expert opinion and case law. See BGE 114 II 159 (E. 2); BGE 113 II 210 (E. 4). For legal expert opinion, see, inter alia, with further references, BUCHER, Berner Kommentar, CO 27, N 348; BAUEN/BERNET, p. 113, N 332, FN 83; FORSTMOSER, Schnittstelle, p. 388; PFISTER, p. 8 et seq.; HINTZ-BÜHLER, p. 57, 158; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 174.

See JÖRG/ARTER, p. 475; FORSTMOSER, Schnittstelle, p. 388; WEBER, Vertrags- und Statutengestaltung, p. 86.
while others argue in favor of a reduction to a reasonable duration, applying an ordinary right to give notice only after the expiry of this duration.\textsuperscript{1147}

\textit{Voting agreements extending for the company’s duration.} For the aforementioned reason, a regulation whereby the contract shall be valid for the company’s existence is problematic since the duration of a company’s existence is theoretically indefinite.\textsuperscript{1148} According to HINTZ-BÜHLER, such a regulation could be deemed admissible by exception if those involved are able to readily withdraw from the contract, for example, based on suitable exit rights because in this case the agreement is not excessive and infringing upon shareholders’ personal rights.\textsuperscript{1149}

\textit{Termination upon expiry.} A voting agreement concluded for an express period ends automatically with its expiry.\textsuperscript{1150} These contracts either name a precise closing date (e.g., duration until 31 December 2020) or a specific time period (e.g., eight years).\textsuperscript{1151} Regarding the maximum possible duration of the voting agreement, the courts have a tendency to protect relatively long durations for voting agreements (e.g., 20 years). Ultimately, the longest possible duration can be determined only with regard to the legal qualification of the contract, its intensity, and subject matter of the commitment in each individual case.\textsuperscript{1152} An agreement with a term of 10 years, which is more than the typical investment horizon of private equity investors,\textsuperscript{1153} appears unproblematic.

\textit{Termination via a specific event.} The voting agreement can also be terminated via an anticipated specific event, provided that the event will in all likelihood occur in the future, though when it will occur can be

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{1147} Cf. JÖRG/ARTER, p. 475; FORSTMOSER, Schnittstelle, p. 388; LANG, p. 48, FN 192; FORSTMOSER, Aktionärbindungsverträge, p. 370.
\item \textsuperscript{1148} Rejecting such clauses, see BÖCKLI, Aktienrecht, § 12, N 576; FORSTMOSER, Schnittstelle, p. 391; FORSTMOSER, Aktionärbindungsverträge, p. 372 et seq.; LANG, p. 51; APPENZELLER, p. 54 et seq. Critical also FELLMANN/MÜLLER, Berner Kommentar, CO 530, N 285; HINTZ-BÜHLER, p. 158; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 188. In contrast, GLATTFELDER, 338a et seq., FN 15.
\item \textsuperscript{1149} HINTZ-BÜHLER, p. 158.
\item \textsuperscript{1150} However, if the voting agreement is of mandate-like character, it may be terminable at any time due to the mandatory nature of CO 404 I. Moreover, there are grounds for extraordinary termination. See FORSTMOSER, Aktionärbindungsverträge, p. 371, FN 77a.
\item \textsuperscript{1151} See HINTZ-BÜHLER, p. 143; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 182; APPENZELLER, p. 54, 56.
\item \textsuperscript{1152} See BGE 114 II 159 (E. 2c. aa: “Trotzdem überschreiten zwanzig Jahre die nach Art. 27 ZGB zulässige Höchstdauer im vorliegenden Fall nicht.”). See, for further references, HINTZ-BÜHLER, p. 57, 159; KNECHT/KOCH, p. 242, FN 235 (mentioning a maximum of 15 to 20 years); SCHENKER, Familiengeellschaften, p. 29 (mentioning 15 to 25 years as a maximum duration depending on the intensity of the commitment).
\item \textsuperscript{1153} See FN 53.
\end{enumerate}
\end{footnotesize}
ambiguous (e.g., the death of a party).\footnote{1154} In this case, the exact duration of the contract remains unspecified.\footnote{1155} Though principally lawful, such a provision must not constitute an excessive commitment that infringes on a shareholder’s personal rights, in which case, the contract is subject to early termination. If both the date, and the occurrence of the event is uncertain (e.g., sale of shares), then a qualification is in fact given, which has prompted some legal scholars to assume that the shareholders’ agreement is terminable after the expiry of a certain minimum duration.\footnote{1157} A provision for which the voting agreements shall exist for the duration of the parties’ shareholder status is therefore not advisable.

_Termination via giving notice._ The parties can expressly stipulate a right to terminate a voting agreement by giving notice subject to a defined notice period without stating a reason.\footnote{1158} The option for termination can also be combined with a minimum contract term.

_Cancellation via mutual agreement._ Parties can terminate voting agreements qualified as contracts at any time via mutual agreement. The resolution to terminate a simple partnership requires the consent of all shareholders unless the partnership agreement expressly states otherwise.\footnote{1159}

Parties to voting agreements routinely seek continuity and stability, particularly with regard to maintaining a balance of power.\footnote{1160} If voting agreements apply over an extended period of time (e.g., 10 years) it is advisable, in the interest of legal certainty, to limit the duration expressly to a specific period of time and to stipulate possible exit rights to avoid the agreements being qualified as excessive commitments infringing the shareholders’ personal rights.\footnote{1161}

\footnotetext{1154}{See FELLMANN/MÜLLER, Berner Kommentar, CO 530, N 286; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 183; WEBER, Vertrags- und Statutengestaltung, p. 86; FORSTMOSER, Aktionärbindungsverträge, p. 371.}
\footnotetext{1155}{See HINTZ-BÖHLER, p. 144.}
\footnotetext{1156}{Voting agreements concluded for the duration of the shareholder status are qualified as admissible by FORSTMOSER, Schnittstelle, p. 390 with reference to the practice of the Swiss Federal Supreme Court. If, however, the parties are subject to severe transfer restrictions, the shareholders’ agreement can be deemed excessive in view of its duration. See also HINTZ-BÖHLER, p. 159; FORSTMOSER, Aktionärbindungsverträge, p. 372. Cf. BÖCKLI, Aktienrecht, § 12, N 577 (stating that a contract agreed for the duration of the shareholder status must provide the option for the shareholder to break the contract under acceptable conditions within an appropriate time frame. With respect to the GmbH, see KÜNG/HAUSER, § 12, N 3.}
\footnotetext{1157}{See HINTZ-BÖHLER, p. 144.}
\footnotetext{1158}{Cf. ibid, p. 145.}
\footnotetext{1159}{CO 545 I Sec 4. See, for further references, HINTZ-BÖHLER, p. 166.}
\footnotetext{1160}{See HINTZ-BÖHLER, p. 150.}
\footnotetext{1161}{See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 180; WEBER, Vertrags- und Statutengestaltung, p. 86.}
3.3.5.10 Enforcement

Oftentimes, votes subject to a voting agreement have already been cast in breach thereof, specific performance is no longer possible,1162 and damages are difficult to prove.1163 The practical difficulties of legally enforcing voting agreements have led legal practitioners to develop various preventive measures to ensure the fulfilment of contractual agreements1164 including (i) stipulating a contractual penalty to be paid if contractual duties are not fulfilled, regardless of the exact damage, and if necessary, the shares of the infringing party are used to guarantee the obligations (repressive precautionary measures);1165 (ii) stipulating contingent exit rights, purchase rights, and other preferential rights or sanctions (e.g., loss of management rights) affecting the infringing party in case of a breach of contract;1167 (iii) placing the party’s shares in the joint property of all parties to the agreement. Here, the votes are cast by a representative1168 who receives instructions by the shareholders, decided by simple majority if so agreed;1169 (iv) pooling of the shares in a holding company owned by the parties1170 (the votes are exercised by the board of directors);1171 (v) effecting a fiduciary transfer of all committed shares to a third-person trustee who votes the shares in accordance with the shareholders’ agreement;1172 and (vi) establishing an usufruct with the shareholders’

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1162 Cf. APPENZELLER, p. 58 et seqq. (arguing in favor of specific performance even after votes have been cast. However, he is critical insofar as the legal processing of claims on specific performance of the voting agreements sometimes take years).


1165 The problem with contractual penalties is that, albeit their deterrent effect, they cannot prevent a breach of the voting contract as such. See, for further references, LANG, p. 125 et seqq.; HINTZ-BÜHLER, p. 227. See also DRUEY/GLANZMANN, § 11, N 87 (stating that contractual penalties stand on shaky ground since the court can reduce them due to excesses).

1166 See SCHEnKER, Familiengesellschaften, p. 29.

1167 See, for further references, HINTZ-BÜHLER, p. 230; HAYMANN, p. 25.

1168 CO 690 I, 534 I.

1169 See BGE 4A.197/2008; DOMENICoN/von der crONE, p. 226. A prerequisite for the pooling of shares in the joint property is that the shareholders’ agreement is qualified as a simple partnership (CO 544 I). Moreover, parties may dislike the idea that they practically lose direct control over their shares, see STUBER, p. 36.

1170 See WEBER, Vertrags- und Statutengestaltung, p. 87.

1171 See DRUEY/GLANZMANN, § 11, N 87; with further references, LANG, p. 162 et seqq.; KRATZ, Möglichkeiten, § 9, N 7; BÜRGI, Zürcher Kommentar, CO 692, N 40; FORSTMOser, Aktionärbindungsverträge, p. 376. A drawback of this protection measure is that it may be time-intensive and costly. Moreover, it represents merely a transfer of structuring person-oriented elements to a different level, see LANG, p. 96.

1172 See WEBER, Vertrags- und Statutengestaltung, p. 87. A perceived drawback is that ownership of shares is transferred with the parties losing their shareholder status, see HINTZ-BÜHLER, p. 136 et seqq.; LANG, p. 160. Moreover there is a risk that the fiduciary transfer could be
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combined shares, thereby transferring participation rights to the usufructuary and leaving the shareholders with the bare ownership.\textsuperscript{1173} Other measures discussed in the literature in the context of securing shareholders’ agreements generally can hardly prevent the infringing party from exercising voting rights in breach of contractual agreements, such as granting a \textit{proxy} to a third party who will vote as contractually agreed upon\textsuperscript{1174} or \textit{placing} the committed shares in an \textit{escrow account}.\textsuperscript{1175}

In a GmbH, corporate level arrangements can duplicate contractual agreements among members by introducing respective obligations to provide ancillary performances in the articles of association, provided they serve the corporate purpose, or aim to help maintain the company’s independence or the composition of its member base.\textsuperscript{1176} Thereby, the GmbH itself could enforce voting agreements if structured as ancillary performances, and contest their infringement.\textsuperscript{1177} However, whether ancillary performances can be voting agreements is highly contested by legal scholars and hence the parties should not rely on a stipulation of voting agreements at the corporate level on its own, but also resort to contractual arrangements.\textsuperscript{1178}

\textsuperscript{1173}See, for further references, HINTZ-BÜHLER, p. 229. Not useful as a measure to safeguard exit rights, see LANG, p. 199; HINTZ-BÜHLER, p. 236.

\textsuperscript{1174}See, in detail, APPENZELLER, p. 14 et seq.; with further references, LANG, p. 129 et seqq. and p. 144 et seqq. On its own, such measure is not a suitable instrument to ensure enforcement of voting agreements since the proxy may be revoked at any time (CO 34 I), see FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 196, FN 79.

\textsuperscript{1175}See FORSTMOSER, \textit{Aktionärbindungsverträge}, p. 375. Only suitable measure in case of bearer shares, but not in case of registered shares since, in the latter case, exercising voting rights is based on the entry in the share register (CO 689a), and not on the presentation of shares, see LANG, p. 142 et seq. In respect of exit rights, placing committed shares in escrow is only suitable in case of registered shares where the transfer of shares by means of cession is excluded in the articles of association, see HINTZ-BÜHLER, p. 134 et seq.

\textsuperscript{1176}CO 796. See FN 1237.

\textsuperscript{1177}See SIFFERT/FISCHER/PETRIN, CO 796, N 11; NATER, p. 39; KÜNG/CAMP, CO 796, N 4.

\textsuperscript{1178}Arguing that voting agreements among GmbH members can be implemented at a corporate level as ancillary performances in the articles of association, are HANDSCHIN/TRÜNINGER, § 13, N 73; HANDSCHIN, \textit{Gesellschaftsanteile}, p. 91. Rejecting, TRUFFER/DUBS, \textit{Basler Kommentar}, CO 806, N 4 (seen as a circumvention of the \textit{numerus clausus} of possible deviations from the statutory right to vote; also seen as incompatible with the purposes of ancillary performances pursuant to CO 796 II); also BRECHBÜHL/EMCH, p. 272.
3.3.5.11 Assessment of Legal Tool

The primacy of shareholders’ agreements. A Pemi investing in a closely held stock corporation will most likely insist on a shareholders’ agreement as a primary tool to strengthen the Pemi’s voice in corporate decision making and to create exit options. Firstly, shareholders’ agreements, and voting agreements in particular, are a means to establish shareholder rights and duties, which cannot be stipulated at a corporate level (i.e., in the articles of association). Secondly, the primacy of shareholders’ agreements is rooted in their flexibility. Shareholders’ agreements are only effective inter partes, while the articles of association pertain to all shareholders and the company. Hence, shareholders’ agreements may be tailored so that certain provisions apply only to particular shareholders. Conversely, differentiations in favour of, or at the expense of, certain shareholders are generally not permitted in the articles of association.

For example, shareholders’ agreements can grant ad personam veto rights specifically to the Pemi. Thirdly, shareholders’ agreements can easily be amended via all parties’ consent while amending the articles of association is subject to formal requirements including a resolution passed by absolute majority vote at the general meeting, notarization, and registration in the Swiss Commercial Register.

Fourthly, from the Pemi’s perspective, stipulations in the articles of association can be shaky since, by default and apart from specific provisions, they may be altered at any time by the absolute majority of the votes represented at the general meeting without requiring the Pemi’s consent. Conversely, contractual agreements ordinarily require unanimous consent to be amended by the parties. Moreover, from the controlling shareholder’s perspective, voting agreements do not change the ratio between a shareholder’s capital investment and his/her voting rights. In contrast to contractual agreements, privileges arising from voting shares, voting caps, and participation certificates are not associated with the shareholder, but shares, and thus shares with (directly or indirectly) privileged voting power may fall into undesirable hands unless adequate legal rules concerning the sale of such shares are agreed upon. Finally, different from arrangements in the articles of association which are public records, control sharing arrangements made via shareholders’ agreements can be kept confidential.

For these reasons, the articles of association regularly do not extend beyond the degree of

1179 See Section IV.D.4.1.
1180 See FORSTMOSER, Schnittstelle, p. 396.
1181 CO 698 II Sec. 1
1182 CO 647.
1183 See BAUEN/BERNET, p.19, N 52; FORSTMOSER, Schnittstelle, p. 396; EHRAT, Switzerland, p. 234; BURGI, Minderheitenschutz, p. 36.
individualization and specification of standard articles. Instead, shareholders often prefer to address person-oriented issues via contractual arrangements.

**Drawbacks of shareholders’ agreements.** Despite the key role of shareholders’ agreements, and voting agreements therein, their drawbacks must be considered when structuring minority investments. One major drawback relates to their enforceability. As shareholders’ agreements are effective inter partes and neither affect third parties nor the company directly, they restrict the obliged parties only with respect to what they are allowed to do under the agreement, not what they can do in practice. As a result, actions in breach of the agreement are valid vis-à-vis the company. Shareholders’ agreements sometimes exist in the grey area between validity and unenforceability, resulting in considerable legal uncertainty as to the enforceability of the contractual agreements while the effects of (primarily standard) articles of association are more easily foreseeable. To mitigate these drawbacks the measures as outlined (see Section IV.D.3.3.5.10) to ensure enforceability in practice can be implemented. Moreover, while the articles of association and the organizational regulations exist for the duration of the company’s existence, the duration of shareholders’ agreements is limited (see Section IV.D.3.3.5.9). Another drawback results from the requirement of the consent of all parties to amend the shareholders’ agreement, which, at times, may be difficult to achieve, as well as time-consuming and costly.

**GmbH contractual agreements.** Contractual voting agreements for GmbH members are less important than for stock corporation shareholders primarily due to the flexibility of the Swiss GmbH laws, which allow members the establish personal rights and duties at the corporate level via the articles of association (e.g., veto rights, obligations to provide ancillary performances), even if such provisions favor certain members at the expense of others. The principle of equal treatment of members does

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1184 See FORSTMOSER, Gestaltungsfreiheit, p. 256, FN 10 (“Ein Querschnitt der Statuten (Satzungen) schweizerischer Aktiengesellschaften zeigt freilich, dass der Phantasie der Juristen offenbar Grenzen gesetzt sind … Statuten zumeist sehr ähnlich.”).

1185 See FN 1141 for shareholders’ agreements and FN 1629 for board of directors’ agreements.

1186 See GARZA, p. 667.

1187 See FORSTMOSER, Schnittstelle, p. 396.

1188 See NUSSBAUM/SANWALD/SCHIEDEGGER, CO 776a, N 33; VON STEIGER, Zürcher Kommentar, CO 808, N 8.

1189 It is possible to associate the ownership of all or only particular company shares with the duty to perform the same or different ancillary performances. See NUSSBAUM/SANWALD/SCHIEDEGGER, CO 779, N 7. The differential treatment of members takes place indirectly since the stipulation of supplementary financial contributions and/or ancillary performances
not constitute a limitation for such clauses in cases where the obliged members personally consent to certain rights and obligations.\textsuperscript{1191} Stipulating such rights and duties in the articles of association offers the advantages of better enforceability and longer duration. Nevertheless, the remaining arguments in favor of shareholders’ agreements, and voting agreements in particular, outlined in the context of stock corporations apply equally in the GmbH context. Therefore, the conclusion of contractual agreements among GmbH members is conceivable, for instance, where arrangements are intended to remain confidential,\textsuperscript{1192} and where they shall remain in force beyond the duration of membership, such as in case of non-compete clauses.\textsuperscript{1193} Moreover, voting agreements are concluded with respect to matters that cannot be stipulated as ancillary performances of the members at the corporate level.\textsuperscript{1194}

Shareholders’ agreements combined with the articles of association. Although shareholders’ agreements are an effective and powerful instrument, particularly in stock corporations, the related uncertainty regarding their enforceability and duration warrants supplemental corporate law instruments. Hence, corporate documents, in particular the articles of association, should reflect the shareholders’ contractual agreements, where appropriate and lawful. In this way, the contractual arrangement has a safety net of provisions that may be a loose weave, but is enforceable under corporate law, and thereby secures and buttresses the fulfillment of the contractual provisions.\textsuperscript{1195} For example, contractual voting agreements can be reinforced at the corporate level by suitable majority vote requirements.\textsuperscript{1196} A balanced composition of the board of directors as agreed upon in a shareholders’ agreement can be reflected at the corporate level by providing for cumulative voting\textsuperscript{1197} in the articles of association or by creating different classes of shares where the shareholders of each class are entitled to nominate a candidate for election to the board of directors.\textsuperscript{1198} Vice versa, a statutory arrangement, the legal force of which does not preclude the possibility of doubt (e.g., a right of first offer or of first refusal), can be secured by a parallel provision in the shareholders’

\textsuperscript{1190} CO 813.
\textsuperscript{1191} See NUSSBAUM/SANWALD/SCHIEDEGGER, CO 795, N 6.
\textsuperscript{1192} See APPENZELLER, p. 10.
\textsuperscript{1193} See NUSSBAUM/SANWALD/SCHIEDEGGER, CO 776a, N 33.
\textsuperscript{1194} See FN 1178.
\textsuperscript{1195} See HUBER, p. 44.
\textsuperscript{1196} See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 169.
\textsuperscript{1197} See Section IV.E.1.3.4.1.
\textsuperscript{1198} See BÜHLER, Leitlinien, p. 324.
agreement.\textsuperscript{1199} However, for legal or factual reasons, the often precise and person-oriented provisions in shareholders’ agreements cannot be reflected, or can only partly be reflected in the articles of association of a stock corporation. Moreover, the mandatory allocation of powers under corporate law limits the parties’ freedom in assigning corporate powers between the shareholders and the board of directors. In practice, many governance aspects are actually agreed upon on a contractual basis only and not reflected in corporate level documents.\textsuperscript{1200} Therefore, ensuring enforceability of contractual agreements via the mechanisms discussed (see Section IV.D.3.3.5.10) is important. Secondly, it must be acknowledged that if contractual agreements are incorporated in corporate documents, changes to the contractual rules do not have an automatic effect on the corporate documents, but warrant a respective amendment by the authorized corporate organ. The result is a risk of inconsistencies between contractual and corporate-level arrangements and questions of hierarchy of rules if the provisions in the shareholders’ agreements deviate from those of the articles of association.\textsuperscript{1201} It follows that the careful negotiation and drafting of respective provisions is of utmost importance. Shareholders’ agreements, together with the articles of association, should form a coherent, integrated whole and be devised in close coordination.\textsuperscript{1202} In view of a potential conflict between the shareholders’ agreement and the articles of association, the shareholders’ agreement should make clear that the agreement shall prevail for all the parties to the agreement. Moreover, shareholders should be obliged, if so requested by the other shareholders and insofar as lawful, to exercise their shareholder rights to approve any necessary amendments to the articles to avoid such conflict.

\begin{quote}
\textit{Shareholders’ agreements combined with the organizational regulations.}
The organizational regulations may be used if reflecting certain contractual provisions in the articles of association is unlawful, if the provisions to be implemented at the corporate level are very detailed, and/or if the matter should remain confidential. The organizational regulations are easy to amend compared to the articles of association. Hence, it can make sense to set forth a matter in the articles of association in general and leave details for the organizational regulations. As a caveat, however, the PEMI must recognize that the organizational regulations, by default, may be altered at any time by the majority of the board of directors’ votes,\textsuperscript{1203} effectively
\end{quote}

\textsuperscript{1199} See FORSTMOSER, Schnittstelle, p. 396.
\textsuperscript{1200} See WEBER, Rechtsprobleme, p. 60 et seq.
\textsuperscript{1201} See FORSTMOSER, Schnittstelle, p. 396.
\textsuperscript{1202} See BAUEN/BERNET, p. 113, N 332; FORSTMOSER, Schnittstelle, p. 396; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 7, N 31 or § 39, N 168.
\textsuperscript{1203} CO 713 I.
without the PEMI’s cooperation provided the PEMI does not have a majority at the board level. The PEMI therefore runs the risk that these rules will be amended ex post to its detriment, which is why the implementation of suitable enforcement mechanisms of the contractual provisions remains important even if respective provisions are duplicated in the organizational regulations. Moreover, PEMIs should require amendments of the organizational regulations to be subject to a quorum and/or qualified majority vote for its board representatives to obtain veto power against any unfavorable ex post changes by the controlling shareholder’s board representatives.

4 Minority Investor Duties at Shareholder Level

4.1 Statutory Framework

Under Swiss corporate law, shareholders are not generally liable for company losses. By law, the shareholders’ only obligation is to pay the subscription price of their shares. In addition, the stock corporation’s articles of association cannot impose any further duties upon the shareholders. According to prevailing expert opinion, shareholders owe no duty of loyalty to the company and may pursue their own interests when voting on company matters. They are entitled to vote even in conflict of interest cases. In exceptional cases, a shareholder can nevertheless be

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1204 CO 680 I. See, inter alia, FORSTMOSE/MEIER-HAYOZ/NOBEL, § 41, N 16 et seqq.
1205 For example, they may vote even if competing with the company or controlling a rival business. With respect to the resolution on the use of the balance sheet profit, the shareholders may pursue their own income strategy even if inconsistent with the company’s long-term interest. The same applies to members of the board of directors voting in the shareholder capacity. The Swiss Federal Supreme Court also rejects the shareholders’ duty of loyalty, see the decision of the Swiss Federal Supreme Court of 14 October 2003, 4C.143/2003 (E. 6: “Im Gegensatz dazu sind aber die Aktionäre bei ihrer Stimmabgabe nicht gehalten, ein übergeordnetes Gesellschaftsinteresse zu wahren.”); decision of 5 March 2003, 4C.242/2001 (E. 3.3: “Dass der einzelne Aktionär bei der Stimmabgabe in der Generalversammlung seine eigenen Interessen verfolgt, ist legitim.”); BGE 105 II 114 (E. 7b); BGE 99 II 55 (E. 4b “Mit dem Eintritt in die Gesellschaft unterwirft der Aktionär sich bewusst dem Willen der Mehrheit und anerkennt, dass diese auch dann bindend entscheidet, wenn sie nicht die bestmögliche Lösung trifft und ihre eigenen Interessen unter Umständen denjenigen der Gesellschaft und einer Minderheit vorgehen lässt”); confirmed in BGE 117 II 290 (E. 4e.bb); BGE 91 II 298 (E. 6a: “Der Aktionär ist zu nichts weiterem verpflichtet als zur Leistung seiner Einlage. Verpflichtungen persönlicher Art auferlegt ihm das Gesetz nicht. Insbesondere … braucht [er] auf die Interessen der Gesellschaft und der übrigen Aktionäre keine Rücksicht zu nehmen”); BGE 100 II 384 (E. 2a). For scholars rejecting a duty of loyalty, see BÖCKLI, Aktienrecht, § 1, N 659 et seqq.; KURER, Basler Kommentar, CO 680, N 7 et seqq.; SCHAAD, Basler Kommentar, CO 689, N 1; DUBS/TRUFFER, Basler Kommentar, CO 702a, N 32; BÜHLER, Regulierung, § 5, N 421; MEIER-HAYOZ/FORSTMOSE, § 3, N 22 et seqq.; § 16, N 156; VON BÜREN/STOFFEL/WEBER, N 975; BAUEN/BERNET, p. 93, N 287;
held liable, for example, if a formal organ (e.g., director, executive manager), a de facto organ, or for serious reasons of good faith (particularly via *piercing the corporate veil*).

Moreover, shareholders must return any benefits they received unjustifiably and in bad faith from the company.

As is the case in a stock corporation, GmbH members are not liable for loss suffered by the company beyond the amount of issue of the company shares, and aside from potential obligations to make supplementary

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1206 In German, *Durchgriffshaftung. Piercing the corporate veil* refers to the shareholder’s liability in cases in which referring to the separate personality of the legal entity and its owners appears to be an abuse of law. In these cases, liability is extended to the shareholders in that their private fortunes are included in the liability substrate. In general, see MEIER-HAYOZ/FORESTMOSER, § 2, N 43; FORESTMOSER/MEIER-HAYOZ/NOBEL, § 62, N 47 et seqq.; O’NEAL/THOMPSON, § 1.11. With respect to the GmbH, see BAUDENBACHER/SPETTLER, Basler Kommentar, CO 772, N 29a.; SIFFERT/FISCHER/PETRIN, CO 794, N 4; MEYER-HAYOZ/FORESTMOSER, § 18, N 59; NUSSBAUM/SANWALD/SCHEIDEGGER, CO 794, N 6; HANDSCHIN/TRUNIGER, § 5, N 10 et seqq.; FORESTMOSER/PEYER, p. 434; NATER, p. 16.

1207 See Section IV.E.4.1.2 for the duty of loyalty as a director; see Section IV.E.4.1.4 for the duty of loyalty as a *de facto* organ. With respect to a duty to act in line with the principle of good faith, see FN 1205.

1208 CO 678.
financial contributions as stated in the articles of association. In contrast, however, GmbH members, by law, owe a duty of loyalty to the company in return for their broader information rights and their extended decision-making powers and as a result of the GmbH’s corporate structure and purpose, and the personal relations among the members. Such duty of loyalty comprises the duty (i) to desist from any action that might jeopardize the interests of the company, (ii) to abstain from business dealings that could give them a particular advantage and by which the corporate purpose would be adversely affected (e.g., by capitalizing on corporate opportunities from their connection with the GmbH), (iii) to abstain from competing with the company if dictated in the articles of association, (iv) to abstain from voting in cases of conflicts of interest defined by law, and (v) to safeguard business secrets. In view of these elements, the members’ duty of loyalty largely corresponds to the duty of loyalty of the board members in a stock corporation. The rules

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1209 CO 777c I, CO 793. See FORSTMOSER/PEYER, p. 398.
1210 The duty of loyalty applies vertically, i.e., the duty is owed to the company, not to the other members. See GASSER/EGGEBNIGHTER/STÄUBER, Orell Füssli Kommentar, CO 803, N 6; AMSTUTZ/CHAPPIUS, Basler Kommentar, CO 803, N 5; NUSSBAUM/SANWALD/SCHEIDEGGER, CO 803, N 11 („immer nur der Gesellschaft gegenüber“); NATER, p. 30. Nevertheless, the duty of loyalty between the members may arise from a relationship of confidence among the members, e.g., in a two-person GmbH. See HANDSCHIN/TRUNIGER, § 18, N 14; NATER, p. 30; KöHLER, p. 269 et seq.; KÜNG/HAUSER, § 1, N 15.
1212 CO 803 II sentence 1.
1213 CO 803 II sentence 2.
1214 See BÖCKLI, GmbH-Recht, p. 40.
1215 CO 803 II sentence 3, CO 776a II Sec. 8. The introduction of a non-compete obligation in the articles of association may be effected by observing the absolute majority vote requirement except where the articles of association stipulate a different majority vote requirement (CO 808). See, in detail on the prohibition to compete, see AMSTUTZ/CHAPPIUS, Basler Kommentar, CO 803, N 13 et seqq.; NUSSBAUM/SANWALD/SCHEIDEGGER, CO 802, N 12 et seqq.
1216 Those situations include: (i) if participating in any manner whatsoever in the management with respect to resolutions to release managing officers from liability; (ii) if transferring company shares to the company with respect to resolutions on the transfer of such company shares; and (iii) if seeking approval to engage in activities which are in breach of the duty of loyalty or the prohibition of competition with respect to resolutions on the admissibility of such activities (CO 806a). The member is, however, only excluded from decision taking, i.e., exercising his/her voting right, but not from decision shaping, i.e., from using his/her remaining membership rights at the meeting of members. See TRUFFER/DUBS, Basler Kommentar, CO 805a, N 1; SIFFERT/FISCHER/PETRIN, CO 806a, N 8; HANDSCHIN/TRUNIGER, § 13, N 56; KÜNG/CAMP, CO 806a, N 2. Of another opinion, apparently are NUSSBAUM/SANWALD/SCHEIDEGGER, CO 806a, N 6. On the controversial question whether the members must also abstain from voting in other cases of conflicts of interest, see also FN 697.
1217 CO 803 I. In detail on the duty of confidentiality, see AMSTUTZ/CHAPPIUS, Basler Kommentar, CO 803, N 23 et seqq.; NUSSBAUM/SANWALD/SCHEIDEGGER, CO 803, N 2 et seqq.
1218 See Section IV.E.4.1.2.
governing the GmbH, however, expressly allow for exceptions to the general duty of loyalty and the prohibition to compete, on a case-by-case basis provided that all the other members agree in writing or, alternatively, if the articles of association require the meeting of members to agree. In addition, GmbH members, like shareholders, can be held liable as formal or de facto organs of the firm. Moreover, the doctrine of piercing the corporate veil equally applies to GmbH members and is even more relevant in a GmbH due to the at times insufficient capitalization and the members’ proximity to the firm’s business activities.

4.2 Assessment of Legal Status and Further Need for Protection

As shown in the first chapter of this dissertation, private equity investments are beneficial not only for the financial capital provided, but also for the human capital and resources made available to the portfolio company. Hence, the PEMI’s identity is of immense importance. Through the professional expertise, experience, ideas, and business contacts, PEMIs can make important contributions to the company’s economic success. In return for obtaining additional information rights or enhanced voice in corporate decision making, controlling shareholders may want PEMIs to commit to providing their expertise and/or contacts, to actively engaging in discussions, to complying with confidentiality rules and/or non-compete obligations, etc. Yet, statutory rules governing the Swiss stock corporation prevent the firm from obligating shareholders to any duty other than to pay the subscription price of their shares. As discussed, shareholders in a stock corporation are not obligated to demonstrate loyalty toward the other

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1219 A general exclusion, whether in terms of duration or content, from the duty of loyalty is not permissible; with further details, see AMSTUTZ/CHAPPUIS, Basler Kommentar, CO 803, N 11; NATER, p. 34.
1220 While the introduction of a non-compete obligation in the articles of association may be effected by observing the absolute majority vote requirement except where the articles of association stipulate a different majority vote requirement, the decision on the exclusion from the duty of loyalty is subject to the qualified majority vote requirement (CO 808b I Sec. 7), see AMSTUTZ/CHAPPUIS, Basler Kommentar, CO 803, N 12; WATTER/ROTH PELLANDA, Basler Kommentar, CO 813, N 9; NUSSBAUM/SANWALD/SCHIEDEGG, CO 812, N 8; KÜNG/CAMP, CO 803, N 4.
1221 CO 803 III. The law only refers to exceptions to the duty of loyalty or to the prohibition to compete, but not to the duty of confidentiality, see AMSTUTZ/CHAPPUIS, Basler Kommentar, CO 803, N 1, 29.
1222 See WIDMER/GERICKE/WALLER, Basler Kommentar, CO 827, N 5.
1223 See FN 1206.
1224 See MEIER-HAYOZ/FORSTMOSER, § 18, N 59.
1225 See Section II.A.3.2.2.
1226 See FN 1204.
shareholders or toward the corporation.\footnote{1227} The limits of permissible behavior are based in the principles of good faith and the prohibition of abusing the law.\footnote{1228} Hence, the question arises what other legal tools are available to establish certain person-oriented duties.

### 4.3 Legal Structuring Options

In a stock corporation, shareholders’ duties (other than to pay the subscription price of their shares) can be established only at the contractual level, not at the corporate level. GmbHs offer more leeway in this arena, because, according to Swiss GmbH laws, members are subject to a duty of loyalty.\footnote{1229} In addition, the articles of association may oblige members to make supplementary financial contributions\footnote{1230} and/or to provide ancillary performances.\footnote{1231} Obligations to provide ancillary performances can relate to actions, tolerations, or non-actions.\footnote{1232} Concerning the Pemi, for instance, the articles of association can stipulate a duty to provide advisory services, to conclude satellite contracts with the target company, to arrange for contracts or to gather data, to abstain from speaking with the news media, to abstain from competitive actions,\footnote{1233} and to provide liquidated damages to secure the fulfillment of obligations stated by law or in the articles of association\footnote{1234}. Moreover, tag-along rights, drag-along rights, the range of purchase rights (e.g., rights of first offer, rights of first refusal, call options), and put options may be included.\footnote{1235} Members’ ancillary performances must be stipulated in the articles of association\footnote{1236} and serve the corporate purpose, aim to ensure maintain the company’s independence,

\footnote{1227}{See Section IV.D.4.1.}
\footnote{1228}{See FN 1204 on the principle of good faith and FN 803 on the prohibition of abusing the law.}
\footnote{1229}{See FN 1210.}
\footnote{1230}{The obligation to provide supplementary contributions is not necessarily limited to emergencies, but can equally be implemented for the purpose of financing growth or investing in new technologies or business fields. However, they must not exceed twice the amount of the nominal value of the company shares (CO 795 II). See HANDSCHIN, personalistische GmbH, p. 60.}
\footnote{1231}{CO 772 II, 776a I Sec. 1, 795 et seq., 796 et seq.}
\footnote{1232}{See BAUDENBACHER/SPITLER, Basler Kommentar, CO 772, N 36a; in detail, AMSTUTZ/CHAPPUIS, Basler Kommentar, CO 796, N 12; NUSBAUM/SANWALD/SCHIEDEGGER, CO 796, N 1, 12; HANDSCHIN, Gesellschaftsanteile, p. 91.}
\footnote{1233}{CO 776a I Sec. 3.}
\footnote{1234}{CO 776a I Sec. 4.}
\footnote{1235}{See BAUDENBACHER/SPITLER, Basler Kommentar, CO 772, N 36a; SCHENKER, Basler Kommentar, CO 776a, N 5; AMSTUTZ/CHAPPUIS, Basler Kommentar, CO 796, N 12; NUSBAUM/SANWALD/SCHIEDEGGER, CO 776a, N 5, CO 796, N 12; BRECHBÜHL/EMCH, p. 271; FREY/FISCHER, p. 537.}
\footnote{1236}{CO 776a I Sec. 1. See NUSBAUM/SANWALD/SCHIEDEGGER, CO 796, N 4 et seq.}
or maintain the composition of its member base.\textsuperscript{1237} The respective provision must clearly state the object and extent, and other essential elements of each respective obligation (e.g., time limits, termination, conditions).\textsuperscript{1238} Details can be stipulated in the regulations of the meeting of members.\textsuperscript{1239} Moreover, the subsequent introduction and the extension of obligations such as to make supplementary financial contributions or provide ancillary performances requires, by law, the approval of all members affected\textsuperscript{1240} as well as a positive resolution of the meeting of members since the introduction of such duties necessitates an amendment of the articles of association.\textsuperscript{1241} In addition to these requirements, the obligation to provide ancillary performances must not run counter to mandatory law, public policy, bonos mores, or basic personal rights (i.e., no excessive commitments\textsuperscript{1242}), and they must not be impossible to carry out. In addition, these obligations must not result in preferential treatment of particular members for no valid reason.\textsuperscript{1243} Principally, the members are obliged to the company. Yet, it is also possible to grant the claim to a third party or a member, provided the valid purposes of ancillary performances as outlined above are observed.\textsuperscript{1244} GmbH members are obliged to provide ancillary performances only while holding company shares. Obligations that shall remain valid beyond must be agreed via a contract.\textsuperscript{1245} In any event, obligations to provide ancillary performances can be agreed upon entirely in contractual terms. However, corporate enforcement mechanisms are not available in this case.\textsuperscript{1246}

\textsuperscript{1237} CO 796 II. In detail, see AMSTUTZ/CHAPPUIS, Basler Kommentar, CO 796, N 9 et seqq.; MEIER-HAYOZ/FORSTMOSER, § 18, N 72.
\textsuperscript{1239} CO 796 III sentence 2. See AMSTUTZ/CHAPPUIS, Basler Kommentar, CO 796, N 5. A delegation of such task to the managing officers is not allowed since the matter concerns an inalienable duty of the meeting of members. See NUSSBAUM/SANWALD/SCHEIDEGER, CO 797, N 14.
\textsuperscript{1240} See AMSTUTZ/CHAPPUIS, Basler Kommentar, CO 796, N 2.
\textsuperscript{1241} CO 797. “Affected” to be read as “obliged” according to AMSTUTZ/CHAPPUIS, Basler Kommentar, CO 797, N 3; KÜNG/CAMP, CO 797, N 3 (“der Adressat”).
\textsuperscript{1242} See FN 1115.
\textsuperscript{1243} See AMSTUTZ/CHAPPUIS, Basler Kommentar, CO 796, N 12.
\textsuperscript{1244} Ibid, CO 796, N 13.
\textsuperscript{1245} Ibid.
Part Two: Legal Framework and Tools

5 Organizational Aspects of the General Meeting Influencing Voice

5.1 Statutory Framework

PEMIs’ influence on corporate decision making is not only a function of their rights to participate in and vote at general meetings, but also determined by organizational structures and procedural rules, which impact PEMIs’ exercise of voice-related rights at the general meeting. Apart from statutory provisions, the procedural rules concerning the general meeting are specified in the articles of association and internal guidelines adopted by the general meeting, the latter, however, hold little practical importance. In practice, procedural rules concerning the general meeting are defined by the board of directors. The rudimentary statutory rules offer room for flexible and situation-based structures aligned with the parties’ needs.

5.1.1 Convening General Meetings

Ordinary general meetings are a yearly occasion. They take place within six months following the end of the fiscal year. The exact date and time is determined by the board of directors. The general meeting convocation must be announced at least 20 calendar days prior to the day of

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1247 Particularly the rules on the calling of the general meeting and its agenda (CO 699-701), the information to be made available to shareholders (CO 696), the shareholder rights to participation, representation, and voting rights (CO 689-695).

1248 In German, Geschäftsordnung or GV-Reglement. See, in detail, HORBER, Parlamentsregeln, p. 931 et seqq. (“Reglemente, die verfahrens- und organisationsrechtliche, formelle und materielle Aspekte für ein bestimmtes Gremium normieren”). Among other things, such regulations address the preparation and holding of the general meeting as well as other organizational aspects with an effect on content, scope, and effect of the shareholders’ personal membership rights.

1249 For a discussion on what corporate body is competent to adopt organizational regulations on the general meeting, see HORBER, Parlamentsregeln, p. 933 et seqq. (arguing in favor of the general meeting).

1250 See DUBS/TRUFFER, Basler Kommentar, CO 702, N 1 et seq.; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 23, N 82; VON DER CRONE/KESSLER, p. 11.

1251 See DUBS/TRUFFER, Basler Kommentar, CO 702, N 2.

1252 See HORBER, Parlamentsregeln, p. 931.

1253 With respect to the GmbH, the laws on stock corporations apply analogously (CO 805 V Sec. 1, 2, and 5).

1254 CO 699 II. Such provision is mandatory, see VON BÜREN/STOFFEL/WEBER, p. 106, N 484. With respect to the GmbH, CO 805 II. See HANDSCHIN, Gesellschaftsanteile, p. 84.

1255 See BOHRER, § 8, N 339 et seq.; WATTER/RAMPINI, p. 9.
the meeting.\textsuperscript{1256} \textit{Extraordinary meetings} are called by the board of directors\textsuperscript{1257} as required,\textsuperscript{1258} particularly in situations stipulated by law\textsuperscript{1259} or upon request of a group of shareholders representing at least 10\% of the share capital.\textsuperscript{1260} Apart from timing, there are no legal differences between ordinary and extraordinary general meetings; both are subject to the same formal requirements.\textsuperscript{1261}

General meetings are called as prescribed in the articles of association.\textsuperscript{1262} If PEMIs hold registered shares, they are invited to general meetings in writing, generally in form of a simple letter sent to the address listed in the share register.\textsuperscript{1263} Draft Legislation\textsuperscript{1264} allows the use of electronic transmittal of the invitation and supporting documents if shareholders agree to this.\textsuperscript{1265} The formalities may be waived if all shareholders are present at the general meeting or represented by proxy and no objection is raised (called a \textit{plenary meeting}).\textsuperscript{1266} In plenary meetings, all subject matters within the scope of the general meeting’s powers may be discussed and resolved via voting.\textsuperscript{1267} The possibility of waiving the formal requirements outlined above concerning calling a general meeting is particularly convenient for closely held companies.\textsuperscript{1268} Yet, the formalities related to

\textsuperscript{1256} CO 700 I. Pursuant to prevailing expert opinion, the 20-day period can only be prolonged, but not be shortened via the articles of association, see DUBS/TRUFFER, Basler Kommentar, CO 700, N 7; VON BÜREN/STOFFEL/WEBER, p. 109, N 500; BOHRER, § 8, N 340; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 23, N 40. In contrast, BÖCKLI, Aktienrecht, § 12, N 83 (maintaining that the period may neither be prolonged nor shortened). With respect to the GmbH, CO 805 III. The law expressly provides for the possibility to extend or shorten this period in the articles of association. It must, however, be no less than 10 days.

\textsuperscript{1257} CO 699 I. With respect to the GmbH, CO 805 I.

\textsuperscript{1258} CO 699 II. With respect to the GmbH, CO 805 II sentence 2.

\textsuperscript{1259} E.g., CO 725 I and 726 II. See DUBS/TRUFFER, Basler Kommentar, CO 699, N 20. With respect to the GmbH, e.g., CO 820 I i.c.w. CO 725 I, CO 787 I; CO 815 IV.

\textsuperscript{1260} See FN 533.

\textsuperscript{1261} See DUBS/TRUFFER, Basler Kommentar, CO 698, N 10 and CO 699, N 21; BAUEN/BERNET, p. 140, N 405; VON BÜREN/STOFFEL/WEBER, p. 107, N 485. With respect to the GmbH, see KRATZ, Handkommentar, CO 805, N 8; NATER, p. 42.

\textsuperscript{1262} CO 700 I. With respect to the GmbH, CO 805 V Sec. 1 i.c.w. CO 700 I. If the articles of association do not contain respective provisions, the invitation must be published in the same form in which the company publishes its notices (CO 776 Sec. 4). See NUSSBAUM/SANWALD/SCHIEDEGGER, CO 805, N 14; NATER, p. 46 et seq.

\textsuperscript{1263} In the case of bearer shares, invitations are published, in the Swiss Official Gazette of Commerce. See, NOBEL, Switzerland, p. 312.

\textsuperscript{1264} See FN 463.

\textsuperscript{1265} D-CO 700 I.

\textsuperscript{1266} CO 701 I. With respect to the GmbH, CO 805 III sentence 3 and V Sec. 5 i.c.w. CO 701 I.

\textsuperscript{1267} CO 701 II. With respect to the GmbH, see NUSSBAUM/SANWALD/SCHIEDEGGER, CO 805, N 39; KÜNG/CAMP, CO 805, N 41; NATER, p. 49; VON STEIGER, Zürcher Kommentar, CO 809, N 13.

\textsuperscript{1268} See MEIER-HAYOZ/FORSTMOSER, § 16, N 359. With respect to the GmbH, see NATER, p. 48.
conducting the general meeting and its decision-making process must still be observed.\textsuperscript{1269}

The board of directors determines the location of the general meeting unless defined in the articles of association or a previous decision by the shareholders.\textsuperscript{1270} The general meeting generally takes place at the company’s registered office. Other locations are possible if justified on objective grounds and provided the location does not prevent some shareholders from attending.\textsuperscript{1271} The Draft Legislation\textsuperscript{1272} allows for the general meeting to be convened abroad if so provided in the articles of association or if all shareholders agree.\textsuperscript{1273} Moreover, the general meeting may be held simultaneously at various locations (called a \textit{multi-location general meeting} connecting members in real time via electronic communication devices\textsuperscript{1274}) in which case the votes of the participants are immediately transmitted (in image and sound) to all locations.\textsuperscript{1275} Subject to certain conditions,\textsuperscript{1276} the Draft Law even allows the general meeting to be held entirely live by electronic means if all shareholders agree and provided that the general meeting resolutions do not require notarization.\textsuperscript{1277}

\textsuperscript{1269} E.g., the requirement to take minutes (CO 702 II) or the majority vote requirements (CO 703 \textit{et seq}). See DUBS/TRUFFER, Basler Kommentar, CO 701, N 2 and N 5; MEIER-HAYOZ/FORSTMOSER, § 16, N 360; VON BÜRER/STOFFEL/WEBER, p. 107, N 488. With respect to the GmbH, see TRUFFER/DUBS, Basler Kommentar, CO 805, N 36; SIFFERT/FISCHER/PETRIN, CO 805, N 34.

\textsuperscript{1270} See BOHRER, § 8, N 340 \textit{et seq}. For details on the general meeting held at two locations, see LAMBERT, p. 36 \textit{et seq}. With details on online and virtual general meetings, see BEUTHEL. With respect to the GmbH, see NATER, p. 50.

\textsuperscript{1271} See BÖCKLI, Aktienrecht, § 12, N 90 (“unter Einhaltung des Prinzips der relativ leichten Erreichbarkeit”); MEIER-HAYOZ/FORSTMOSER, § 16, N 366; BOHRER, § 8, N 341; LAMBERT, p. 42. With respect to the GmbH, see NATER, p. 47.

\textsuperscript{1272} See FN 463.

\textsuperscript{1273} D-CO 627 Sec. 16, 701b. Under current law, this practice is controversial. In favor unless shareholders are factually prevented from participation, MEIER-HAYOZ/FORSTMOSER, § 16, N 366. Due to the dynamic nature of the references to the stock corporation laws in its most recent version, the new law also applies to the GmbH, see BÜRGI/MOSKR, Orell Füssli Kommentar, CO 827, N 1; HANDSCHIN/TRUNINGER, § 1, N 6; NATER, p. 47. Against a dynamic reference is BAUDENBACHER/BANKE, p. 57 \textit{et seq}.; reluctant is also WOHLMANN, Positionierung, p. 128.

\textsuperscript{1274} D-CO 701a II. See, BAUEN/BERNET, p. 275, N 770.

\textsuperscript{1275} D-CO 701a III.

\textsuperscript{1276} According to D-CO 701e, the board of directors must ensure that in holding a general meeting by electronic means (i) the identities of the participants and the voters are unambiguously established, (ii) each participant is in a position to make motions and participate in the discussion, and (iii) the result of the vote cannot be distorted.

\textsuperscript{1277} D-CO 701d.
5.1.2 Holding General Meetings

The board of directors is responsible for the proper conduct of the general meeting. Voting can take place only in physical meetings (not via letter (post) or email voting). Letter or internet votes and circular resolutions are unlawful in stock corporations. In contrast, the GmbH allows for resolutions to be passed in writing unless a member requests an oral discussion. Such form of decision making is suitable with respect to routine matters and when urgent matters or timely decisions must be made, but not for corporate decisions necessitating careful consideration of the resolutions proposed. Subject to certain conditions, the Draft Legislation expressly allows for shareholder rights to be exercised by electronic means if so provided in the articles of association and if the meeting as well as the shareholders’ votes are transmitted in real time electronically.

1278 With respect to the GmbH, the laws applicable to stock corporations shall apply analogously (CO 805 V Sec. 3 et seqq.).

1279 Such arrangements to ascertain the voting rights and to record the minutes (CO 702). See, DUBS/TRUFFER, Basler Kommentar, CO 702, N 1; MEIER-HAYOZ/FORSTMOSER, § 16, N 365. With respect to the GmbH, it is upon the managing officers (preparation and implementation, CO 810 II Sec. 6) and, particularly, the chair of the management (CO 810 III Sec. 1) to do so, see. KRAUTZ, Handkommentar, CO 805, N 20; NATER, p. 50. If, however, the meeting of members is exceptionally called by an authority other than the managing officers, such authority is also responsible for the necessary preparation, see TRUFFER/DUBS, Basler Kommentar, CO 805, N 26.

1280 See BAUEN/BERNET, p. 143, N 409. With respect to the GmbH, see SIFFERT/FISCHER/PETRIN, CO 805, N 16; HANDSCHIN/TRUNINGER, § 13, N 94; NATER, p. 52.

1281 See SCHAAD, Basler Kommentar, CO 689, N 33; VON BÜREN/STOFFEL/WEBER, p. 189, N 912; TANNER, Quoren, § 3, N 86. By exception, written resolutions are lawful where expressly permitted by law, see LÄNZLINGER, Basler Kommentar, CO 692, N 1; DUBS/TRUFFER, Basler Kommentar, CO 698, N 7; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 16, N 382. Cf. also BGE 128 III 142 (E. 3b). Cf. GLANZMANN, Aktienrechtsrevision, p. 676 (providing arguments in favor of the recognition of circular resolutions of the general meeting). Particularly in corporations with few shareholders the minutes of a (fictive) general meeting are sometimes signed without convening a general meeting. Such a practice is, however, against the law, see DUBS/TRUFFER, Basler Kommentar, CO 698, N 6.

1282 CO 805 IV. The procedure to do so must be set out in the articles of association. On circular resolutions in detail, see TRUFFER/DUBS, Basler Kommentar, CO 805, N37 et seqq.; NATER, p. 54 et seqq.; HANDSCHIN, Gesellschaftsanteile, p. 96 et seq.

1283 D-CO 701c.

1284 See FN 463.

1285 D-CO 701c. Cf., in detail on multimedia meetings of members in a GmbH, see NATER, p. 58 et seqq. Even in view of prevailing law, certain authors find the use of videoconferencing technology lawful, see HANDSCHIN/TRUNINGER, § 13, N 96 et seqq.
5.1.3 General Meeting Chairperson

5.1.3.1 Appointment

The Swiss Code of Obligations does not expressly state that the general meeting should have a chairperson nor does it provide specific rules on either the chairperson’s appointment process or powers.\textsuperscript{1286} In common practice, the general meeting is presided over by the chairman of the board of directors, or by his/her deputy or another board member.\textsuperscript{1287} Further rules on the position of the chairperson of the general meeting may be stipulated in the articles of association\textsuperscript{1288} which can either designate the general meeting chairperson directly or stipulate rules governing the chairperson’s election. The latter, however, rarely occurs in practice.\textsuperscript{1289} With respect to GmbHs, Swiss corporate law expressly stipulates that the chair of the management oversees the meeting of members.\textsuperscript{1290}

5.1.3.2 Powers

It is the chairperson’s responsibility\textsuperscript{1291} to open and close the general meeting as well as to ensure its efficient running. The chairperson initiates and concludes the debate on individual agenda items, determines the order in which speakers take the floor, cuts off speakers upon prior warning if they are long-winded, unnecessarily derogatory, speaking off topic, or jeopardizing the meeting’s order and objectives, and determines the voting procedure.\textsuperscript{1292} In extreme cases, after prior warning, the chairperson may

\textsuperscript{1286} The chairperson is, however, referred to in CO 689e II. See DUBS/TRUFFER, Basler Kommentar, CO 702, N 24; HOFSTETTER, Corporate Governance Report, p. 18; BÖCKLI, Leitungsbefugnisse p. 48; VON DER CRONE/KESSLER, p. 3.

\textsuperscript{1287} See VON BÜREN/STOFFEL/WEBER, p. 117, N 548; with further references KERNATA, CO 712, N 537; BÖCKLI, Leitungsbefugnisse, p. 55; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 23, N 98. Different from the preparation of the general meeting, its chairing does not represent a non-delegable duty of the board of directors and may therefore be assumed by a shareholder or a third party determined by the general meeting, see VON DER CRONE/KESSLER, p. 2.

\textsuperscript{1288} Even if all shareholders agree otherwise, such rules must be followed unless the articles of association are formally amended, see DUBS/TRUFFER, Basler Kommentar, CO 702, N 24.

\textsuperscript{1289} See KERNATA, CO 716a, N 1459; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 23, N 98, FN 74; VON DER CRONE/KESSLER, p. 4.

\textsuperscript{1290} CO 810 III Sec. 1. However, the meeting of members may also appoint a different chairperson, see TRUFFER/DUBS, Basler Kommentar, CO 805, N 30; NUSSBAUM/SANWALD/SCHIEDEGGER, CO 810, N 15; NATER, p. 50.

\textsuperscript{1291} In detail on the duties, see KERNATA, CO 712, N 554 et seqq.; VON DER CRONE/KESSLER, p. 10. With respect to the GmbH, see HANDSCHIN/TRUNINGER, § 13, N 55, 57; NATER, p. 50 et seq.

\textsuperscript{1292} See BOHRER, § 8, N 348 et seq.; WATTER/RAMPINI, p. 19 et seq.; HOFSTETTER, Corporate Governance Report, p. 18.
even expel an unruly or non-compliant participant from the meeting. In imposing such restrictions in the interest of an orderly and efficient meeting, the chairperson must ensure that the measures employed are proportionate to the behavior and that the obligations of equal treatment and neutrality are adhered to.

By law, the chairperson of the stock corporation’s general meeting does not have a casting vote. However, the articles of association may provide that the chairperson shall have the casting vote on certain sensitive issues. In contrast, in a GmbH, the chairperson is by law assigned the casting vote in case of a deadlock unless the articles of association provide otherwise. The articles of association may withdraw the casting vote with respect to all or certain resolutions, or assign it to a different member.

5.2 Assessment of Legal Status and Further Need for Protection

As PEMIs’ influence on corporate decision making at the general meeting (and at the meeting of members in a GmbH) also depends on an efficient structuring of organizational processes, minority investors may want to set rules and procedures that allow them to efficiently exercise their voice-related rights so as to allow them to effectively participate in the meeting discussions, express their views, and vote.

5.3 Legal Structuring Options

5.3.1 Convening General Meetings

To enable PEMIs who represent less than 10% of the share capital to request the convening of a general meeting the articles of association may stipulate a lower threshold reflecting the PEMI’s equity stake, or grant individual shareholders a right to do so irrespective of the size of their shareholding. To prevent any surprises in convening a general meeting,
the dates and time limits applying to the convening of general meetings should be clearly stated. The articles of association may provide for a period shorter than six months following the end of the fiscal year within which the ordinary general meeting shall be convened. Moreover, if considered useful for a proper preparation of the general meeting, the articles of association may stipulate a longer than the 20-day invitation period. A period of more than 30 days is, however, not advisable because it prevents the timely convening of the general meeting in extraordinary situations that require critical decisions to be made within a reasonable period of time. The shareholders can also determine the form of the invitation as well as the location for the general meeting. Particularly, in closely held companies and family firms, it is common to invite family members, or in the case of PEMIs certain employees or advisors, who are not shareholders as guests.

5.3.2 Agenda

The right to put items on the general meeting agenda is one of the most fundamental formal shareholder rights to raise shareholder concerns. The legal threshold to request a particular item to be placed on the agenda of the upcoming general meeting – the nominal value of shares of CHF 1 million, or 10% of the share capital – may be lowered via a respective provision in the articles of association. This right may also be granted to each shareholder as an individual right irrespective of the size of his/her shareholding. If the threshold of these rights is expressed in terms of the nominal value of shares, the respective thresholds must be revisited each time the nominal value of shares is changed to ensure that the PEMI’s rights are not curtailed. Moreover, shareholders’ deadline to request that items be placed on the agenda and/or associated motions should be determined. In

1299 See DUBS/TRUFFER, Basler Kommentar, CO 699, N 22 e contrario. With respect to the GmbH, see TRUFFER/DUBS, Basler Kommentar, CO 805, N 5.
1300 See TANNER, Beschlussfassung, p. 765; WEBER, Vertrags- und Statutengestaltung, p. 83 (“z.B. 30 Tage”). In a GmbH, the period of 20 days may be extended or shortened to no less than 10 days by means of the articles of association (CO 805 III).
1301 See DUBS/TRUFFER, Basler Kommentar, CO 700, N 7; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 23, N 41; cf. also HOFSTETTER, Corporate Governance Report, p. 14.
1302 The decision is in the hands of the chairperson. See MEIER-HAYOZ/FORSTMOSER, § 16, N 371 et seq.
1303 See HOFSTETTER, Schlüsselrolle, p. 519.
1304 Numerous publicly listed corporations have lowered the threshold in the articles of association. See MEIER-HAYOZ/FORSTMOSER, § 16, N 362. Also the Swiss Code of Best Practice (SCBP) 2.
1306 See SCBP 2.
the interest of efficiency, it is advisable for shareholders to specify in the articles of association a reasonable time period preceding the general meeting for shareholder requests for agenda items (e.g., 30 to 40 days before the general meeting).\textsuperscript{1307}

5.3.3 Holding General Meetings

Minority investors may want to regulate the general meeting conduct, the voting procedures, and they could soon – if the Draft Legislation\textsuperscript{1308} passes – regulate voting by electronic means. While votes in the form of a letter, are unlawful in a stock corporation, the GmbH allows for resolutions to be submitted in writing, which is suitable for routine matters or in urgent cases which can be specified in the articles of association.\textsuperscript{1309}

5.3.4 General Meeting Chairperson

The chairperson has an important role in leading the general meeting. This is of particular relevance if the chairperson is granted the casting vote.\textsuperscript{1310} Hence, PEMIs may want to have a say with respect to the appointment and responsibilities of the general meeting’s chairperson.

E Minority Investor Voice at Board of Directors Level

While the general meeting adopts the company’s constitution (i.e., the articles of association) and determines its leadership and capital resources,\textsuperscript{1311} the board of directors, as the stock corporation’s executive body,\textsuperscript{1312} is in charge of running the business (\textit{principle of third-party management}).\textsuperscript{1313} MONKS and MINOW characterize the board of directors as a “fulcrum,” “the link between the people who provide capital (the shareholders) and the people who use that capital to create value (the managers).”\textsuperscript{1314}

\textsuperscript{1307} See NOBEL, \textit{Switzerland}, p. 320 (recommending a time period of 30 to 40 days before the general meeting). Also \textit{cf.} DUBS/TRUFFER, \textit{Basler Kommentar}, CO 699, N 30; BOHRER, § 9, N 143; WATTER/RAMPINI, p. 11; TANNER, \textit{Beschlussfassung}, p. 767 (finding a times period of 2 to 3 weeks prior to determining the agenda is adequate for publicly listed companies).

\textsuperscript{1308} See FN 463.

\textsuperscript{1309} See FN 1282.

\textsuperscript{1310} See FN 1048.

\textsuperscript{1311} See Section IV.D.2.1.

\textsuperscript{1312} BAUEN/BERNET, p. 153, N 448.

\textsuperscript{1313} See DRIEU/GLANZMANN, § 13, N 1.

\textsuperscript{1314} MONKS/MINOW, p. 164.
In a GmbH, there is no such link between the members and management. By default, all members jointly manage the business (principle of self-management). A firm’s articles of association may, however, provide that the business is run by singular members (effectively separating members into executive and non-executive members), or by third parties (effectively introducing the principle of third-party management), both of which are called managing officers.

In the following, focus is on the PEMI’s voice at the board level in a stock corporation. The rules applicable to the managing officers in a GmbH are also briefly referred to for reasons of comparison. The PEMI’s de jure voice in a corporation at the board level is determined by (i) the statutory and privately negotiated rights of participation in the board of directors, (ii) the board of directors’ powers and responsibilities, (iii) the decision-making processes at the board level and the factors that determine the PEMI’s voting power in these processes and (iv) further organizational aspects that do not necessarily confer voice at the board level, but influence it. This section analyzes each of these factors, first by outlining the related statutory framework and illustrating the PEMI’s rights in the absence of any privately negotiated arrangements. Next, the privately negotiable legal tools and arrangements available to enhance the PEMI’s voice at the board level are discussed.

1 Representation on the Board of Directors

1.1 Statutory Framework

1.1.1 Election and Removal of Board Members

1.1.1.1 Election

The right to elect the board of directors is among the inalienable powers of the general meeting, which does so by an absolute majority of votes represented unless the law or the articles of association state a different
majority.\textsuperscript{1317} Hence, a Pemi holding less than 50\% of the votes cannot determine board members unless supported by other shareholders.\textsuperscript{1318} Swiss corporate law does not provide PEMIs with any particular board representation rights.\textsuperscript{1319} In a GmbH, the managing officers are appointed by the meeting of members if the articles of association provide that the company shall not be managed by all members together and provided that the articles of association have not already explicitly named the managers.\textsuperscript{1320} For reasons of flexibility, election by the meeting of members is advisable.

### 1.1.1.2 Eligibility

Only natural persons are eligible to become members of the board of directors (or managing officers in a GmbH).\textsuperscript{1321} Legal entities or commercial enterprises must not serve on the board, but may be represented by natural persons elected in their place (in the following Pemi (board) representatives).\textsuperscript{1322} The Pemi’s board representative(s) neither have to be shareholders nor have a specific citizenship or domicile as long as at least one member of the board of directors or manager empowered to represent the company is domiciled in Switzerland.\textsuperscript{1323} Apart from the eligibility criteria flowing from the general principles of law and specific statutory provisions,\textsuperscript{1324} there are no statutory minimum requirements for board membership, particularly relating to industry experience or other expert

\textsuperscript{1317} CO 698 II Sec. 2, CO 703.

\textsuperscript{1318} See Von Salis-LüTolf, Finanzierungsverträge, § 12, N 1438.

\textsuperscript{1319} See Meier-Hayoz/Forstmoser, § 16, N 398.

\textsuperscript{1320} CO 804 II Sec. 2, See Truffer/Dubs, Basler Kommentar, CO 804, N 17. The nomination of the managing officers in the articles of association is not advisable since their removal or withdrawal is cumbersome. It would require an amendment of the articles of association, a request to the court to withdraw the managing officer’s power, or a withdrawal or an expulsion of the respective managing officer as a member of the GmbH. See Watter/Roth Pellant, Basler Kommentar, CO 809, N 8.

\textsuperscript{1321} CO 707 III. With respect to the GmbH, CO 809 II.

\textsuperscript{1322} See Wernli, Basler Kommentar, CO 707, N 15 (“Aktives und passives Wahlrecht fallen bei der juristischen Person auseinander.”). Therefore, regarding the Pemi in its capacity as member of the board of directors it is intended to denote either the Pemi, if a natural person, or, if a legal person – the typical case – its representative(s) on the board of directors. In a GmbH, the articles of association may require the approval by the meeting of members for such appointment (CO 809 II, 776a I Sec. 12). This prevents the other members from being presented managing officers whom they deem unsuitable for managing the business. See Nussbaum/Sanwald/Scheidegger, CO 809, N 10.

\textsuperscript{1323} CO 718 III. Equally, in the GmbH, at least one person empowered to represent the company must be domiciled in Switzerland (CO 814 III).

\textsuperscript{1324} Including public and civil law provisions on incompatibility, particularly the incompatibility of an audit mandate with membership on the board of directors (CO 728 II Sec. 1). See Wernli, Basler Kommentar, CO 707, N 2 and N 16 et seqq.; Homburger, Zürcher Kommentar, CO 707, N 108 et seqq.
knowledge. KRNETA, however, asserts that board members should have at least general experience in operating a business, plus a basic understanding of business and legal procedures, and the ability to understand and assess complex information to make informed motions. Pursuant to BÖCKLI, certain board member eligibility criteria indirectly follow from the statutory duties and liability of board members, including a basic understanding of financial issues and business matters that enable the individual to assess proposals, strategies, and threats; the willingness to personally contribute to the discussions and the firm; the ability to recognize one’s own limits of expertise and, if need be, seek professional advice.

1.1.1.3 Term of Office

As a general rule, board members in Switzerland are elected for a term of three years, at the end of which re-election is permitted. The general meeting can elect the company’s board members for a different term of office, up to six years. The Draft Legislation newly stipulates that board members are elected on an individual basis for a term of one year. This proposal is vehemently criticized for jeopardizing the continuity of corporate leadership. The Swiss Council of States dismissed the

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1325 See BÖCKLI, Aktienrecht, § 13, N 38; KRNETA, CO 707, N 51. The same applies to GmbH managing officers. See BUOB, § 6, N 256; ROTH PELLANDA, p. 130, N 245; BERTSCHINGER, Arbeitsteilung, § 4, N 239; FORSTMOSER, Verantwortlichkeit, N 304.
1326 KRNETA, CO 707, N 53; also see BERTSCHINGER, Arbeitsteilung, § 4, N 239 (“dass niemand ohne grundlegende betriebswirtschaftliche Kenntnisse ein Verwaltungsratsmandat übernehmen soll”).
1327 BÖCKLI, Aktienrecht, § 13, N 39 et seq.
1328 The term of office pursuant to CO 710 must be distinguished from the maximum period of time a person can serve on the board, see BÖCKLI, Aktienrecht, § 13, N 53c.
1329 See FN 463.
1330 D-CO 710 I.
1331 A plethora of arguments are made in the legal literature that a one-year term of office is not enough for board members to familiarize themselves with the firm’s particular circumstances (see BAUEN/BERNET, p. 266, N 750, FN 17; BÖCKLI/HUGUENIN/DESSEMONTET, p. 90). Not only is it impossible to stagger the terms of office (see BÜHLER, Regulierung, § 14, N 1701; BAUEN/BERNET, p. 266, N 750, FN 16), but it also weakens the board of directors institutionally vis-à-vis the management, which is not subject to a vote of confidence (see BÜHLER, Regulierung, § 14, N 1701; BAUEN/BERNET, p. 266, N 750, FN 16). The mandatory term of office of one year emphasizes the institutional dependence of the board of directors on the executive management and does not reinforce its role as independent supervisor (see BÖCKLI/HUGUENIN/DESSEMONTET, p. 90). The proposed rule also promotes a short-term management orientation (see BÖCKLI, Aktienrecht, § 13, N 53f; BÜHLER, Regulierung, § 14, N 1701; MEIER-HAYOZ/FORSTMOSER, § 16, N 545; WATTER/MÂZAR, p. 421 et seq.). It also endangers the continuity, stability, and know-how of the corporate leadership. For instance, in a takeover situation the board of directors in its entirety can be replaced (see BÜHLER, Regulierung, § 14, N 1701). Furthermore, as BÖCKLI states, there is no proven public interest
proposal with respect to non-listed companies stating a term of three years to a maximum of six years, but providing for an election of each board member on an individual basis. In a closely held firm context with a stable majority at the general meeting, the proposed revision could lead to an increased administrative burden as the re-election of the representatives of the respective shareholder groups can be expected every year.\textsuperscript{1332} In a GmbH, the managing officer’s term of office ends with his/her status as member in the case of self-management unless stated otherwise in the articles of association.\textsuperscript{1333} Third-party managers can resign from their offices in accordance with a required notice period.\textsuperscript{1334}

1.1.1.4 Removal

The general meeting is entitled to remove board members at any time, that is, before the term of office expires.\textsuperscript{1335} To do so, an absolute majority of the votes represented at the general meeting is required.\textsuperscript{1336} However, board members representing a certain class of shares or a group of shareholders with a statutory board representation right can be removed only when requested by the respective shareholders represented, or based on good cause.\textsuperscript{1337} Moreover, the Swiss Federal Supreme Court has made clear that making it more difficult to remove a board member by requiring a quorum or qualified majority vote requirement via the articles of association is lawful as long as the removal remains practically possible.\textsuperscript{1338} Conversely,
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directors may resign at any time unless inopportune, in which case they are liable for damages.\textsuperscript{1339}

In a GmbH, the meeting of members may remove managing officers (members or third-parties) whom it has appointed at any time.\textsuperscript{1340} Unless otherwise provided, the removal decision requires an absolute majority vote.\textsuperscript{1341} If a managing officer obtains his/her position as a member of the GmbH, or directly based on the articles of association,\textsuperscript{1342} or if the managing officer is a natural person acting on behalf of a member that is a legal entity or commercial undertaking,\textsuperscript{1343} the court may be requested to withdraw or limit the managing officer’s power to manage and represent the company for valid reasons, based on gross neglect of duty or the incapacity to act as managing officer.\textsuperscript{1344} Managing officers may also be removed by changing the provisions on the company’s organization as stated in the articles of association,\textsuperscript{1345} or via expulsion if a GmbH member. Conversely, managing officers elected by the meeting of members may resign at any time unless inopportune for the firm.\textsuperscript{1346} In case of self-management, resignation is not possible unless stated in the articles of association.\textsuperscript{1347} In the most extreme cases, no other options may remain for the member other than to sell the company shares.

If the meeting of members appoints the managing officers based on an absolute majority vote, the PEMI has no precautionary corporate means to dismiss the unwanted managing officer(s) and must request the court to dismiss a managing officer based on valid reasons, for instance, if the person concerned seriously violated his/her duties or has become incapable, due to an illness or other reasons, of managing the company well.\textsuperscript{1348} If no valid reasons exist, the only course of action left to the PEMI is selling its shares.

\textsuperscript{1339} See WERNLI, Basler Kommentar, CO 710, N 11a.
\textsuperscript{1340} CO 815 I.
\textsuperscript{1341} CO 808.
\textsuperscript{1342} CO 809 I sentence 2.
\textsuperscript{1343} CO 809 II sentence 1.
\textsuperscript{1344} CO 815 II. On possible valid reasons, see WATTER, Basler Kommentar, CO 815, N 11.
\textsuperscript{1345} See WATTER/ROTH PELLANDA, Basler Kommentar, CO 809, N 11; WATTER, Basler Kommentar, CO 815, N 5; NUSSBAUM/SANWALD/SCHEIDEGGER, CO 815, N 4; HANDSCHIN, Gesellschaftsanteile, p. 102.
\textsuperscript{1346} See NUSSBAUM/SANWALD/SCHEIDEGGER, CO 815, N 9; HANDSCHIN, Gesellschaftsanteile, p. 114.
\textsuperscript{1347} See WATTER, Basler Kommentar, CO 815, N 8; HANDSCHIN, Gesellschaftsanteile, p. 113. Arguing in favor of a requirement of a resolution of the meeting of members are NUSSBAUM/SANWALD/SCHEIDEGGER, CO 815, N 8.
\textsuperscript{1348} CO 815 II.
1.1.2 The Right to Attend and to Invitation

As outlined, board representation should not be taken for granted. Yet, if PEMIs are represented on the board their representatives are entitled to attend board meetings and to receive an invitation. Resolutions taken at board meetings to which not all board members have been invited are null and void.\(^\text{1349}\) On the flip side of the right to attend board meetings, board members have a duty to take part.\(^\text{1350}\) The absence of a board member is permissible only in cases of \textit{vis major} or other reasons generally accepted in business (e.g., illness).\(^\text{1351}\)

1.1.3 The Right to Call

In principle, board meetings are called by the chairman on his/her own initiative. However, each board member has an irrevocable right to request the chairman to immediately call a meeting upon his/her substantiated request\(^\text{1352}\) and to place items on the agenda.\(^\text{1353}\) Moreover, instead of a resolution being adopted via written consent, each member may request an oral discussion instead.\(^\text{1354}\)

1.1.4 The Right to Participate in Decision Shaping

The PEMI’s board representatives are entitled to participate in all activities that the board of directors undertakes.\(^\text{1355}\) At board meetings, PEMI board representatives are entitled to express their views, make proposals,\(^\text{1356}\) and thereby influence (or attempt to influence) the opinion shaping of fellow

\(^{1349}\) See BOCKLI, Aktienrecht, § 13, N 113b; WERNLI, Basler Kommentar, CO 713, N 5 (provided the omitted invitation causes the absence of the respective board member); KRNETA, CO 713, N 869; BAUEN/BERNET, p. 162, N 473; TANNER, Quoren, § 8, N 18.

\(^{1350}\) For further references, see WERNLI, Basler Kommentar, CO 713, N 6; MÜLLER/LIPP/PLÜSS, p. 218 \textit{et seq}.; KRNETA, CO 713, N 719 \textit{et seq}.

\(^{1351}\) For further references, see WERNLI, Basler Kommentar, CO 713, N 6; FORSTMOSER, \textit{Verantwortlichkeit}, N 308 \textit{et seq}. (citing health reasons as acceptable, but not lack of time); TANNER, Quoren, § 8, N 9.

\(^{1352}\) CO 715. GmbH laws do not contain provisions on the calling of management meetings. Absent any specific provisions in the organizational regulations, each managing officer has a right to call management meetings. Non-managing members do not have such right, see NATER, p. 112.

\(^{1353}\) See BAUEN/VENTURI, § 3, N 293.

\(^{1354}\) CO 713 II.

\(^{1355}\) See BAUEN/VENTURI, § 3, N 293.

\(^{1356}\) See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 28, N 111 \textit{et seq}. 

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board members. In fact, it is the PEMI board representatives’ duty to participate in the discussions.\textsuperscript{1357}

\section*{1.2 Assessment of Legal Status and Further Need for Protection}

From a voice-related perspective, representation on the board of directors is key for PEMIs for the following reasons.\textsuperscript{1358}

\textit{Share in flow of information.} Holding the ultimate management responsibility for the corporation, the board of directors is equipped with comprehensive information rights, thus board representation comes with immense information advantages. Board representation allows the PEMI board representatives to gain first-hand insight into the business situation.\textsuperscript{1359}

\textit{Effective monitoring.} With better access to information, PEMI board representatives are in a better position to monitor the company’s progress, to gain a more detailed and deeper understanding of the company’s activities at the board of directors and executive management level, and to assess whether the right managers are in the right positions and are effectively doing their jobs.\textsuperscript{1360} By having a seat on the board of directors, the PEMI can address potential adverse developments, imprudent management decisions, and opportunistic behavior that could damage the PEMI’s interests.\textsuperscript{1361}

\textit{Voice in management decisions.} By taking part in the general meeting as a shareholder, the PEMI may exert influence only on a very limited number of important corporate decisions. The shareholders’ influence on corporate management is largely confined to the election of the board of directors.\textsuperscript{1362} The firm’s most significant actions of relevance in terms of corporate value enhancement are determined by the board of directors and the managers appointed by the board; and the largely mandatory legal division of powers leaves little room for variation. For instance, the board of directors

\begin{footnotesize}
\begin{enumerate}
\item[1357] See \textit{WERNLI, Basler Kommentar}, CO 713, N 6; with further references, \textit{KRNETA}, CO 713, N 719.
\item[1358] On the functions of board representation, see \textit{SAHLMANN}, p. 508 (“All of these activities [i.e., taking a role in the operation of the company] are designed to increase the likelihood of success and improve return on investment; they also protect the interests of the venture capitalist and ameliorate the informational asymmetry.”). Also see \textit{FRICK}, § 12, N 1440 et seq.; \textit{VON SALIS-LÜTOLF, Finanzierungsverträge}, § 12, N 1439 (“Interessenwahrung”).
\item[1359] See \textit{GRONER}, p. 294; \textit{PERAKIS}, p. 77.
\item[1360] See \textit{ACHARYA/KEHOE/REYNER}, p. 3 (“This performance-management focus is the board’s real raison d’être”).
\item[1361] See \textit{MÜNCH}, p. 67.
\item[1362] See Section IV.D.2.3.1.
\end{enumerate}
\end{footnotesize}
commences new business activities, decides whether to build new factories and where/when to close others down, raise debt, without the shareholders’ approval. Hence, within the corporate purpose and the equity financing made available by the shareholders, the board of directors defines the guidelines for the firm’s future development and decides largely autonomously on how to spend corporate assets and resources.\textsuperscript{1363} The board is, in effect, the firm’s most powerful organ.\textsuperscript{1364} Presence on the board of directors allows the PEMI to engage in corporate management decisions. Even if the PEMI’s board representative(s) are not able to control or even considerably influence decision making, board representation enables the PEMI to engage in corporate management, voice its views, influence opinion shaping,\textsuperscript{1365} and to address and discuss conflicts and help avert some as well.\textsuperscript{1366} Apart from a facilitated balancing of interests, the PEMI’s participation on the board allows it to exchange views at the company’s top level, to be a sparring partner for executive management, contribute knowledge and expertise, challenge the views and actions of the majority shareholder’s representatives and management, put matters into different perspectives, and provide new insights, stimulation and impetus. Thus, private equity investors generally view the board of directors as the primary platform for representing their interests while the general meeting is seen rather as a formality.\textsuperscript{1367}

By law, the general meeting elects board members by an absolute majority of the votes represented.\textsuperscript{1368} Under such a \textit{straight voting system},\textsuperscript{1369} the controlling shareholder, by holding 51\% (or more) of the votes represented, can elect the firm’s entire board of directors by casting all of his/her votes for the preferred candidate for each position (so-called \textit{winner-take-all elections}).\textsuperscript{1370} In such a situation, the par value principle rarely results in a distribution of powers among major shareholders, which would be a reflection of their respective equity stakes. Because such a situation is

\begin{footnotesize}
\textsuperscript{1363} See KRNeta, CO 716, N 1073; Koller, Grundgerüst, p. 805.
\textsuperscript{1364} See RUFFNER, Grundlagen, p. 137; Bazzani, p. 4 (calling the board of directors “Schlüsselorgan”).
\textsuperscript{1365} Soft steering refers to various avenues of influencing the company’s strategic moves which
the PEMI may use without being able to legally enforce its position. It is based on personal
factors such as competence, experience, persuasiveness, and the indirect effect of the PEMI’s
\textsuperscript{1366} Cf. Glattfelder, p. 296a.
\textsuperscript{1367} Cf. study among venture capitalists conducted by Ruppen, p. 143 \textit{et seq.}
\textsuperscript{1368} CO 703.
\textsuperscript{1369} See Cox/Hazen, § 13.16 (defining straight voting as “casting votes according to the number
of shares held for each vacancy”); Garza, p. 646 (defining straight voting as “a system of
voting that entitles a shareholder to cast one vote per share for each position on the board of
directors”); O’Neal/Thompson, § 3.17.
\textsuperscript{1370} See Garza, p. 646
\end{footnotesize}
unsatisfactory for many PEMIs, they regularly turn to legal tools and arrangements to ensure representation on the board of directors. In a GmbH, a management model is likely to be chosen where only certain members or third parties or a combination thereof run the business. If the articles of association require that the meeting of members appoints and removes the managing officers by an absolute majority of the votes represented the PEMI is again not in a position to determine any managing officers.

1.3 Legal Structuring Options

As PEMIs’ representation on boards of directors is not secured by law, they must use privately negotiated tools and arrangements to secure board representation. The principle tools and arrangements available to do so at the corporate level include explicit representation rights via holdings of shares of a separate class or via a respective clause in the articles of association, and board representation via alternative voting procedures such as cumulative voting and proportional representation voting. PEMIs can also conclude contractual voting agreements with other shareholders to ensure the election of their nominees. Moreover, the controlling shareholder’s ability to remove members of the board of directors and to change the size of the board can be restricted via high quorum and majority vote requirements. In addition, the tools that enhance the PEMI’s voting power in the general meeting in general, that is, voting shares, voting caps, and participation certificates, are also effective in respect to board elections.
1.3.1 Board Representation Rights via a Separate Class of Shares

1.3.1.1 Legal Concept

One method for PEMIs to gain a seat on the board of directors is by establishing two or more classes of stock and holding the absolute majority of the votes of at least one of those classes. Swiss law provides that in a company with several classes of shares, the articles of association shall ensure to the shareholders of each class the election of at least one representative to the board of directors.\textsuperscript{1371} In the absence of a provision in the articles of association, the representation right follows directly from the mandatory nature\textsuperscript{1372} of the statutory provision.\textsuperscript{1373}

1.3.1.2 Qualifying Conditions

The representation right exists only in cases when several classes of shares differ in terms of voting rights or financial claims.\textsuperscript{1374} The Swiss Federal Supreme Court has ruled that these differences must be set out in the articles of association and that the difference in legal status must be real and permanent.\textsuperscript{1375} Such requirements are effectively fulfilled by preferred shares and voting shares.\textsuperscript{1376} Of no relevance is the number of shares or shareholders in each class.\textsuperscript{1377} One single share or shareholder with a

\textsuperscript{1371} CO 709 I. See WERNLI, Basler Kommentar, CO 709, N 10; FRICK, § 12, N 1375.

\textsuperscript{1372} See WERNLI, Basler Kommentar, CO 709, N 5; HOMBURGER, Zürcher Kommentar, CO 709, N 186; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 27, N 82.

\textsuperscript{1373} BGE 66 II 43 (E.6c). For legal expert opinion, see Böckli, Aktienrecht, § 13, N 68a (“Fehlt eine Statutenvorschrift, so ist Art. 709 direkt anwendbar, der Verwaltungsrat muss eine funktional befriedigende Lösung anordnen und so rasch wie tunlich der Generalversammlung eine zweckmässige statutarische Regelung vorschlagen”); WERNLI, Basler Kommentar, CO 709, N 5; BAUEN/VENTURI, p. 19, N 51; MÜLLER/LIPP/PLÜSS, p. 27; TREZZINI, p. 270; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 27, N 82. Of different opinion, KÄCH, p. 52; HOMBURGER, Zürcher Kommentar, CO 907, N 202.

\textsuperscript{1374} BGE 120 II 47 (E. 2c). See WERNLI, Basler Kommentar, CO 709, N 9.

\textsuperscript{1375} BGE 120 II 47 (E. 2c). For legal expert opinion, see WERNLI, Basler Kommentar, CO 709, N 9; BERNET/VENTURI, p. 20, N 52; KRNETA, CO 708, N 362; with further references, HOMBURGER, Zürcher Kommentar, CO 709, N 187; MÜNCH, p. 53.


\textsuperscript{1377} See BGE 95 II 555 (E. 5); BGE 66 II 43 (E. 6b). See WERNLI, Basler Kommentar, CO 709, N 10; FRICK, § 12, N 1375; HOMBURGER, Zürcher Kommentar, CO 709, N 190; MÜNCH, p. 54.
different permanent legal status qualifies for the representation right. Groups based on their interests or other characteristics such as active/passive or majority/minority shareholder status or as holders of bearer/registered shares, rather than their legal status do not meet such requirements.\textsuperscript{1378}

1.3.1.3 \textit{Election and Removal}

While the law stipulates that the representation right in the articles of association is mandatory if several classes of shares are issued, the concrete implementation format may be freely decided upon by the shareholders as long as it achieves the stated objective and observes the general principles of corporate law.\textsuperscript{1379} Hence, the election procedure is determined in the articles of association.\textsuperscript{1380}

The representation right is not a true right of nomination; that is, it is not a right to directly elect a board member, but rather a \textit{right to propose} a board member for election because the respective board member must still be elected by the general meeting as part of its inalienable powers.\textsuperscript{1381} However, according to the practice of the Swiss Federal Supreme Court, which is supported by prevailing expert opinion, the general meeting must not elect a different candidate than nominated by the entitled shareholders of a certain class of shares except for good cause.\textsuperscript{1382} The general meeting

\begin{itemize}
\item \textsuperscript{1378} See HOMBURGER, \textit{Zürcher Kommentar}, CO 709, N 191; BERNET/VENTURI, p. 20, N 53; VON BÜREN/STOFFEN/WEBER, p. 124, N 586; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 27, N 80.
\item \textsuperscript{1379} See BGE 107 II 179 (E. 3); WERNLI, \textit{Basler Kommentar}, CO 709, N 5.
\item \textsuperscript{1380} See WERNLI, \textit{Basler Kommentar}, CO 709, N 11; HOMBURGER, \textit{Zürcher Kommentar}, CO 709, N 203; GERSTER, p. 172. For further references on the election procedure, see GERSTER, p. 173 et seq. and HOMBURGER, \textit{Zürcher Kommentar}, CO 709, N 206) (stating that the stipulation of election procedures is not required if the class of shares is small and its shareholders known).
\item \textsuperscript{1381} CO 698 II Sec. 2. See BGE 66 II 43 (E. 6c); BÖCKLI, \textit{Aktienrecht}, § 13, N 66 et seq. (“kein direktes Entsendungsrecht, sondern ein Vorschlagsrecht”); WERNLI, \textit{Basler Kommentar}, CO 709, N 11; MÜLLER/LIPP/PLÜSS, p. 27; KRNETA, CO 709, N 369; KÄCH, p. 52; HOMBURGER, \textit{Zürcher Kommentar}, CO 709, N 204; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 27, N 81; GERSTER, p. 172.
\item \textsuperscript{1382} See BGE 66 II 43 (E. 6c); BGE 107 II 179 (E. 3). According to the Swiss Federal Supreme Court, a good cause exists in case the business relationships of the proposed candidate or his/her personal character and qualifications are contrary to the company’s interests. Also see WERNLI, \textit{Basler Kommentar}, CO 709, N 11; BAUEN/VENTURI, p. 20, N 53; BAUEN/BERNET, p. 101, N 304; VON BÜREN/STOFFEN/WEBER, p. 191, N 925; KRNETA, CO 709, N 369; HOMBURGER, \textit{Zürcher Kommentar}, CO 709, N 204; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 27, N 41, N 81, 86. For the term \textit{good cause}, see RÖTHLISBERGER, p. 64 et seq. (equating good cause with objective grounds); equally, FORSTMOSER/MEIER-HAYOZ/NOBEL, § 40, N 249; with further references, WERNLI, \textit{Basler Kommentar}, CO 709, N 14; HOMBURGER, \textit{Zürcher Kommentar}, CO 709, N 205 (mentioning board membership of a competitor, serious
also has the right to remove the board members representing a certain class of shares, either upon request of the shareholders of the respective class or, without their consent, based on good cause.\footnote{1383}

### 1.3.1.4 Limitations

Due to the inalienable nature of the general meeting’s right to elect and remove members of the board of directors,\footnote{1384} a provision in the articles of association that effectively withdraws the right of removal, even if based on good cause, is null and void.\footnote{1385}

### 1.3.1.5 Assessment of Legal Tool

Provisions in the articles of association granting the shareholders of separate classes of shares a right to propose a candidate for election to the board of directors are rare in practice,\footnote{1386} at least in publicly listed companies. This may be explained by the fact that, unless stated otherwise in the articles of association, such a right entails only one representative, and the absence of such provision in the articles of association does not mean the loss of the entitlement to a board representative.\footnote{1387} Holding the majority of the shares of a separate class is a valid measure of protection for the PEMI to secure at least one board seat, particularly in family firms in which different groups of shareholders hold shares of separate classes and in which the board of directors consists of few members only.\footnote{1388} In order for the PEMI to secure additional board seats, however, other measures, threat to the company’s reputation as examples for good cause). In the interest of legal certainty, the express stipulation of eligibility criteria for board members is advisable.

\footnote{1383}{See BOCKLI, Aktienrecht, § 13, N 84; WERNLI, Basler Kommentar, CO 709, N 17; KRNETA, CO 709, N 371; HOMBURGER, Zürcher Kommentar, CO 709, N 199 (“Massgebend sind in erster Linie die Interessen der Gesellschaft. Geht der Abberufungsantrag von der betreffenden Aktien-Kategorie aus, sind auch deren Interessen abwägend in Betracht zu ziehen.”); FORSTMOser/MEIER-HAYoz/NOBEl, § 27, N 41 (“an die wichtigen Gründe dürfen keine allzu hohen Anforderungen gestellt werden”). On the indirect right of the shareholders of the respective class of shares to remove its representative, see GERSTER, p. 177.}

\footnote{1384}{CO 698 II Sec. 2 and 705 I.}

\footnote{1385}{CO 706b Sec. 1 i.e.w. 698 II Sec. 2 and 705 I, respectively. See BOCKLI, Aktienrecht, § 13, N 85.}

\footnote{1386}{See WERNLI, Basler Kommentar, CO 709, N 8; KRNETA, CO 709, N 358; HOMBURGER, Zürcher Kommentar, CO 709, N 194 with reference to the empirical study of BRUNNER, p. 106; FORSTMOser/MEIER-HAYoz/NOBEl, § 27, N 82. (“sind einschlägige statutarische Bestimmungen äusserst selten”; FN 44: “Am ehesten finden sie sich noch bei privaten Aktiengesellschaften”); MÜNCH, p. 63 et seqq.}

\footnote{1387}{For further references, see BOCKLI, Aktienrecht, § 13, N 69; WERNLI, Basler Kommentar, CO 709, N 8; KRNETA, CO 709, N 359; HOMBURGER, Zürcher Kommentar, CO 709, N 214; FORSTMOser/MEIER-HAYoz/NOBEl, § 27, N 82.}

\footnote{1388}{See also KRNETA, CO 709, N 360.}
discussed below, are more advantageous than creating additional classes of shares, which can make the firm’s capital structure opaque and could be viewed negatively by potential IPO investors.

1.3.2 Board Representation Rights via the Articles of Association

1.3.2.1 Legal Concept

If the company’s share capital consists of only one share class, or if it has several classes of shares, and the PEMI does not control the absolute majority of the votes of one class, and therefore is not ensured board representation (or if the PEMI seeks to obtain more than one board seat), the articles of association can provide additional representation rights and thus allocate additional board seats, for the protection of minorities or individual groups of shareholders.1389 If stated in the articles of association, such rights entitle the PEMI to propose one or more candidates, either expressed as a number or a percentage of the total board seats, for election to the board of directors.

1.3.2.2 Qualifying Conditions

The articles of association may freely define shareholder groups1390 and provide them with board representation rights.1391 Shareholder groups can be defined in terms of number of shares,1392 number of votes,1393 or in proportion to the total share capital. Equally conceivable are references to certain characteristics of shares or shareholders, for example, shareholders of bearer and registered shares, employees,1394 family shareholders/PEMIs, or series of A and B shares allotted to different shareholder groups.1395 The latter is recommended if the parties intend to tie the representation rights to shares and avoid ambiguity in cases of changes in the shareholder base or the formation of different shareholder groups (e.g., if the PEMI or family shareholders sell their shares to non-family members or other than private equity investors).1396

1389 CO 709 II.
1390 See HOMBURGER, Zürcher Kommentar, CO 709, N 197a.
1391 See BAUEN/VENTURI, § 1, N 54.
1392 See BAUEN/BERNET, p. 258, N 732, FN 66.
1393 See FORSTMOser, Schnittstelle, p. 395.
1394 See BÖCKLI, Aktienrecht, § 13, N 77; WERNLI, Basler Kommentar, CO 709, N 24; FORSTMOser/MEIER-HAYOZ/NOBEL, § 27, N 89 et seq.
1395 See BÖCKLI, Aktienrecht, § 13, N 77; WERNLI, Basler Kommentar, CO 709, N 24.
1396 See FRICK, § 12, N 1379.
1.3.2.3 **Election and Removal**

With respect to the election and removal of board representatives of groups of shareholders, see the remarks relating to the representatives of classes of shares (see Section IV.E.1.3.1.3).

1.3.2.4 **Limitations**

Apart from the limitations resulting from the inalienable powers of the general meeting to elect and remove board members (at least to the extent outlined by the Swiss Federal Supreme Court\(^{1397}\), the granting of board representation rights to minorities and other groups of shareholders via the articles of association is subject to the principle of equal treatment. The designation of shareholder groups granted board representation rights must be based on objectively justified criteria.\(^{1398}\) A characterization based upon members of the owner family and minority shareholders is principally lawful.\(^{1399}\) The principle of equal treatment would, however, be violated if only a particular group of shareholders, but not all groups of comparable importance or characteristics, would be granted a representation right.\(^{1400}\)

1.3.2.5 **Assessment of Legal Tool**

The relevancy of the statutory provision stipulating that the articles of association may grant specific representation rights to minorities or individual groups of shareholders has been questioned by legal scholars because, subject to mandatory legal provisions, shareholders are entitled to freely decide on board composition and the respective election procedures even without such express statutory provision.\(^{1401}\) Moreover, it is argued that the majority of shareholders will rarely voluntarily concede board representation rights to minority shareholders.\(^{1402}\) However, this latter assumption is not necessarily true with respect to private equity minority investors. PEMIs have the power to negotiate for this ex ante or otherwise they can walk away from the proposed deal. Attaining board representation rights as stated in the articles of association has the advantage of being effective for all shareholders and not only among the parties to a

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\(^{1397}\) See BGE 66 II 43 (E. 6c).

\(^{1398}\) For further references, see WERNLI, Basler Kommentar, CO 709, N 25; KRNETA, CO 709, N 366.

\(^{1399}\) See WERNLI, Basler Kommentar, CO 709, N 24; HOMBURGER, Zürcher Kommentar, CO 709, N 197.

\(^{1400}\) See HUGUENIN JACOBS, p. 184.

\(^{1401}\) See BRUNER, p. 82.

\(^{1402}\) See MUNCH, p. 58.
shareholders’ agreement. However, precisely because the representation rights of groups of shareholders as stated in the articles of association are not mandatory, PEMIs can only rely on such rights if they have de facto veto power against unfavorable amendments or removal of those rights (e.g., by stipulating high quorum and majority vote requirements for respective resolutions). Hence, PEMIs (ex ante) should take respective precautions to ensure that such rights cannot be withdrawn against their will once they have invested in the firm. Moreover, of note is that if board representation rights are conferred to the shareholders holding a certain percentage of the share capital, PEMIs may effectively be forced to contribute to subsequent capital increases to avoid dilution and losing their rights of representation. It is therefore advisable from the PEMI’s perspective to define representation rights in absolute terms (e.g., for shares of class B held by the PEMI) and – additionally – to secure representation rights via a shareholders’ agreement.

1.3.3 Board Representation Rights via Voting Agreements

1.3.3.1 Legal Concept

Probably the most prevalent method for PEMIs to ensure board representation is via voting agreements with fellow shareholders. Contractually, the parties may agree on the size and composition of the board as well as the allocation of board seats whereby all or certain groups of shareholders receive the right (possible only after consultation with the other shareholders) to nominate a certain number of directors to the board, to remove these board members from office, and to appoint other candidates in their place. The parties typically mutually undertake to cast their votes in the elections of the board of directors at the general meeting in favor of each other or each others’ proposed representatives unless a candidate does not fulfill mandatory and, if applicable, contractually agreed-upon eligibility criteria, or is obviously unsuitable or a threat to corporate interests.

1403 See Section III.B.1.3.
1404 See WYSS, Aktionärbindungsvertrag, p. 514.
1405 See BÖCKLI, Aktienrecht, § 13, N 79; BAUEN/VENTURI, § 1, N 55; WERNLI, Basler Kommentar, CO 709, N 28; VON BÜREN/STOFFEL/WEBER, 125, N 590; KRNATA, CO 709, N 382; HOMBURGER, Zürcher Kommentar, CO 709, N 197; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 27, N 95.
1406 See WERNLI, Basler Kommentar, CO 707, N 31; FRICK, § 12, N 1384. For contract templates, see STREIFF/PELLEGRINI/VON KAENEL, p. 339 et seq.; KNECHT/KOCH, p. 245.
1.3.3.2 Assessment of Legal Tool

For an assessment of voting agreements among shareholders and the related benefits and drawbacks, see Section IV.D.3.3.5.11. Although the most widely used tool to obtain board representation rights, contractual board representation rights should be combined, to the extent possible, with corresponding instruments at the corporate level for the representation rights to be effective for all shareholders and not only for the parties to the voting agreement.\(^{1407}\)

1.3.4 Board Representation via Cumulative Voting and Proportional Representation Voting

1.3.4.1 Legal Concept

Another legal tool to ensure that the PEMI’s interests are represented on the board of directors is the stipulation of special procedures to be observed by the general meeting for the election of board members.\(^{1408}\) Alternative election procedures other than a straight voting system,\(^{1409}\) such as cumulative voting and proportional representation voting, allow the PEMI to obtain de facto influence on the board of directors’ composition.\(^{1410}\)

Cumulative voting is a voting system in which shareholders are entitled to multiply the number of votes (not shares\(^{1411}\)) they are entitled to cast by the number of directors to be elected, and cast the product of the multiplication for a single candidate or distribute their votes among two or more candidates.\(^{1412}\) By casting all of their votes for a single or a few

\(^{1407}\) See also BAUEN/VENTURI, § 1, N 55.

\(^{1408}\) The law does not stipulate precise details on how to carry out elections and allows the general meeting ample scope to determine suitable procedures. Such election procedures may be introduced based on CO 709 II. See WERNLI, Basler Kommentar, CO 709, N 27 (“Das Wahlverfahren kann im Rahmen des Gesetzes frei gestaltet werden.”); for further references to legal expert opinion, see GLANZMANN, Cumulative Voting, p. 406; KÄCH, p. 55; KUNZ, Zwischenhalt, p. 403, FN 20. In detail on the different procedural options, see MÜLLER/LIPP/PLÜSS, p. 47 and 536 et seqq.

\(^{1409}\) See WERNLI, Basler Kommentar, CO 709, N 27; HOMBURGER, Zürcher Kommentar, CO 709, N 196.

\(^{1410}\) See WERNLI, Basler Kommentar, CO 709, N 27; HOMBURGER, Zürcher Kommentar, CO 709, N 196.

\(^{1411}\) See TANNER, Quoren, § 2, N 52.

\(^{1412}\) See BÖCKLI, Aktienrecht, § 13, N 80 et seq.; DUBS/TRUFFER, Basler Kommentar, CO 698, N 16a; WERNLI, Basler Kommentar, CO 709, N 27; WATTER/MAIZAR, p. 429; GLANZMANN, Cumulative Voting, p. 402; GARZA, p. 647; KUNZ, Minderheitschutz, § 6, N 111 et seqq.; RUFFNER, Grundlagen, p. 188 et seqq.; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 27, N 94; BÜRGI, Zürcher Kommentar, CO 708, N 70; SCHUCANY, Stimmenkumulierung, p. 129 et seqq.
candidate(s), PEMIs are much more likely to elect at least a minority of board members.\footnote{1413} 

**Example.** A family firm has two shareholders – the owner family holding 70 shares (70\% of the total shares) and a PEMI holding 30 shares (30\% of the shares). Each share is of the same nominal value and entitles holders to one vote. Five board members are up for election and each of the two shareholders nominates five candidates. Under a majority voting system, the five candidates representing the owner family will be elected since the family shareholder can outvote the PEMI on each position. Under cumulative voting, the owner family can cast a total of 70 \times 5 = 350 votes and the PEMI a total of 30 \times 5 = 150 votes. If the PEMI casts all votes for one candidate, this candidate will be elected.\footnote{1414} 

Under the cumulative voting system the number of votes required to elect one or more board members is a function of board size. For example, more than one-third of the voting stock is required to determine one board member in a board of two, more than one-fourth in a board of three members, and more than one-sixth in a board of five.

*Proportional representation voting*\footnote{1415} is a voting system in which the board seats are distributed among the different groups of shareholders in proportion to their votes.\footnote{1416} As a result, the PEMI is represented on the board of directors in proportion to the percentage of his/her capital investment (assuming fully paid up shares and no voting shares).\footnote{1417} Under such a voting system, a candidate is elected if a certain proportion of the total votes (calculated by dividing the number of votes cast by the number of board members to be elected) are cast in the candidate’s favor.\footnote{1418}

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\footnote{1413}{\textit{See} McCahery/Vermeulen, p. 47; Easterbrook/Fischel, p. 63 (“Cumulative voting permits shareholders to cast multiple votes for a single candidate, so that a candidate may be elected by less than a majority of the shares.”); Bohrer, § 8, N 321.}

\footnote{1414}{The number of votes necessary to elect a certain number of board members can be calculated according to the formula \( y > \frac{x \times n}{d + 1} \), where \( y \) is the number of votes required to assure election of \( n \) directors, \( x \) is the total number of votes in the election; and \( d \) the total number of directors to be elected in the election, see Glanzmann, cumulative voting, p. 403; Bohrer, § 8, N 322.}

\footnote{1415}{In German Proporzverfahren, Proporzsystem, Proportionalwahl, Wahlproporz. For further references, see Bürgi, Zürcher Kommentar, CO 708, N 70; Münch, p. 59 et seq.}

\footnote{1416}{See Münch, p. 60 with reference to Kloetl, p. 8.}

\footnote{1417}{See Homburger, Zürcher Kommentar, CO 709, N 196; Bürgi, Zürcher Kommentar, CO 708, N 69 et seq.; Käch, p. 55; Bürgi, Minderheitsschutz, p. 91.}

\footnote{1418}{See Münch, p. 59.}
Example. If the PEMI controls 30% of the votes, under proportional representation voting, the PEMI is entitled to nominate one director in a board of five members. \(^{1419}\)

1.3.4.2 Assessment of Legal Tool

Voting procedures do not confer a specified right to board representation, but rather de facto power to influence board composition. Although Swiss corporate law allows alternative election procedures other than a straight voting system, alternative voting procedures are rarely used in practice.\(^{1421}\) Proportional representation voting can be difficult to arrange and appears feasible only in cases of simple ownership structures.\(^{1422}\) Moreover, proportional representation voting allows for board representation only if the size of the board is large enough to reflect the PEMI’s proportional voting power.\(^{1423}\) Cumulative voting is easier to implement and therefore seen an effective election procedure to assist PEMIs gain board representation.\(^{1425}\) Yet, also with respect to cumulative voting, some caveats must be noted. Firstly, for cumulative voting to enable PEMI board representation, more than one board member must be up for election simultaneously, or else the majority will control the election.\(^{1426}\) Secondly, to prevent the controlling shareholder from single-handedly amending the articles of association to abolish cumulative voting, high quorum and majority vote requirements should also be inserted in the articles of association with respect to resolutions amending the stipulated voting procedures, so that the PEMI effectively obtains veto power against unfavorable amendments. Moreover, it should be expressly stated that a

\(^{1419}\) The number of votes necessary to elect a certain number of board members can be calculated according to the formula \(y > (x \ast n) / d\), where \(y\) is the number of votes required to assure election of \(n\) directors, \(x\) is the number of votes in the election; and \(d\) the total number of directors.

\(^{1420}\) See FN 1408.

\(^{1421}\) See BOCKLI, Aktienrecht, § 13, N 80; BOHRER, § 8, N 324; RUFFNER, Grundlagen, p. 189 (with respect to cumulative voting).

\(^{1422}\) See SCHUKANY, Stimmenkumulierung, p. 130 (pointing to the substantial need for preparation and the complicated calculation necessary in order to determine the candidates elected which is hardly feasible at the general meeting). Of the same opinion are HOMBURGER, Zürcher Kommentar, CO 709, N 196; BÜRGI, Zürcher Kommentar, CO 708, N 69 et seq.; BÜRGI, Minderheitsschutz, p. 91; KÄCH, p. 55. For a simplified version of the proportional representation election system, see MÜNCH, p. 60 et seq.

\(^{1423}\) For example, if the PEMI controls 20% of the votes, the board of directors must comprise of at least five members to ensure representation.

\(^{1424}\) See HOMBURGER, Zürcher Kommentar, CO 709, N 196; BÜRGI, Zürcher Kommentar, CO 708, N 70; MÜNCH, p. 60.

\(^{1425}\) See RUFFNER, Grundlagen, p. 154; SCHUKANY, Stimmenkumulierung, p. 130.

\(^{1426}\) See BÖCKLI, Aktienrecht, § 13, N 80; TANNER, Quoren, § 2, N 50.

\(^{1427}\) See MCCAHERY/VERMEULEN, p. 47.
board member cannot be removed unless the number of votes sufficient to elect him/her under cumulative voting is also cast in favor of his/her removal.\footnote{1428} Generally, cumulative voting is not only a suitable tool to enhance the PEMI’s voice in board member elections, but can also be applied to other general meeting resolutions.\footnote{1429}

1.3.5 Protection against Removal via High Resolution Requirements

If PEMIs are represented on the board of directors, whether based on legal representation rights or the controlling shareholder’s voluntary support, they may want to secure their status by increasing the resolution requirements for removing board members. Owing to the mandatory nature of the inalienable power of the general meeting to remove directors at any time without cause,\footnote{1430} whether quorum and majority vote requirements can be increased, and if so, the extent to which they can be, is debated by legal scholars. As outlined in Section IV.D.3.3.4.6, while legal scholars are divided,\footnote{1431} the Swiss Federal Supreme Court has ruled that increasing the majority vote requirements for resolutions at the general meeting regarding the removal of board members is possible, provided that such a majority does not render a dismissal impossible.\footnote{1432}

The increase in resolution requirements can be in the PEMI’s interests since it may confer de facto veto power and prohibit the controlling shareholder from removing the PEMI’s board representative(s) single-handedly without valid reasons. Yet, high quorum and majority vote requirements for removing board members can also lead to difficult situations in which directors, who are disliked by the majority at the general meeting, remain in office and carry the conflicts of the different groups of shareholders further into board level and thereby hamper its efficient functioning.\footnote{1433} Therefore, if the shareholders decide to increase the resolution requirements, they should explicitly allow for a facilitated removal, for valid reasons, which, in the interest of legal certainty, should be specified. Moreover, instead of increasing the resolution requirements for the removal of single board members, the parties may opt for another solution, whereby the articles of

\footnote{1428}{See O’NEAL/THOMPSON, § 3.43; GARZA, p. 647.}
\footnote{1429}{See TANNER, Quoren, § 2, N 50.}
\footnote{1430}{CO 705.}
\footnote{1431}{Some authors argue in favor of the possibility to increase quorum and majority vote requirements for the removal of board members and even allow for unanimity (e.g., KUNZ, Minderheitschutz, § 12, N 91; ZÄCH/SCHLEIFFER, p. 265, FN 8; TANNER, Quoren, §§ 5, N 28). Others are against any increase of the statutory resolution requirements (e.g., ROTH PELLANDA, p. 90, N 170; GEILINGER, p. 48).}
\footnote{1432}{See FN 1018.}
\footnote{1433}{Cf. WERNLI, Basler Kommentar, CO 710, N 11a; BÖCKLI, Aktienrecht, § 13, N 64.}
association provide for a high majority vote requirement for the removal of multiple directors (e.g., equivalent to the Pemi’s total number of board seats), but still allow for the removal of singular board members by an absolute majority vote.\textsuperscript{1434}

\textbf{1.3.6 Eligibility Criteria for Board Members}

\textbf{1.3.6.1 Composition of the Board of Directors}

To ensure that the respective shareholder group’s nomination of one or more representatives is not only based on the individual candidate’s relationship with the respective shareholder group (i.e., family membership, seniority, power, and loyalty to the group’s interests), but equally on the candidate’s professional competences (critical to the company’s success) and personal integrity,\textsuperscript{1435} clear eligibility criteria should be established. Moreover, in addition to focusing on the selection of singular candidates, shareholders should also pay attention to a well-balanced composition of the board of directors as a whole. Hence, it is important to consider both the characteristics of individual board candidates (e.g., age, educational background, professional qualifications, business and international experience, character, values, nationality, level of independence, potential conflicts of interest, political allegiances) and of how these characteristics combined will influence the board as a whole (e.g., the ratio between executive and non-executive members and between independent board members and representatives). Moreover, personal chemistry among the board members is crucial.\textsuperscript{1436} The right mixture of directors shapes the spirit of the team, determines its ability to handle conflicts, and nurtures mutual trust.\textsuperscript{1437}

\textbf{1.3.6.2 Implementation of Eligibility Criteria}

Beyond the statutory minimum requirements, the articles of association may set out additional eligibility requirements for board members.\textsuperscript{1438}

\begin{footnotesize}
\textsuperscript{1434} See Wernli, Basler Kommentar, CO 710, N 11a; similarly, but more reluctant, Müller/Lipp/Plüss, p. 52.

\textsuperscript{1435} Cf. Amstutz, Macht und Ohnmacht, p. 183; Bühler, Regulierung, § 11, N 1333; Müller/Lipp/Plüss, p. 20; Krneta, CO 717, N 239; Baumann, p. 150 et seq.

\textsuperscript{1436} See ibid, p. 139, N 267.

\textsuperscript{1437} See Roth Pellannda, p. 109, N 205.

\textsuperscript{1438} See Böckli, Aktienrecht, § 13, N 43 et seqq.; Wernli, Basler Kommentar, CO 707, N 30; cf. also Krneta, CO 707, N 60 et seqq.
\end{footnotesize}
Requirements may also be included in the organizational regulations, in which case these requirements do not constitute binding eligibility criteria because the freedom of choice of the general meeting, the electoral body, must not be limited by the organizational regulations. Criteria stipulated in the organizational regulations are effectively only for the board of directors to observe when proposing board candidates. Moreover, eligibility requirements for board members can be decided via contractual arrangements as part of shareholders’ agreements. In this case, the parties signal their expectations with regard to the mutually proposed representatives or stipulate specific eligibility criteria for such representatives.

### 1.3.6.3 Types of Eligibility Criteria

The eligibility criteria for board member candidates can be classified in professional and personal requirements. Professional eligibility criteria can relate to the board candidate’s educational background and professional qualifications; professional experiences and skills (general business experience and/or specialist expertise, relating to a specific industry or geographical region, or specific corporate functions such as product knowledge, financial, marketing, legal, taxes, etc.), financial literacy (a minimum for the chairman of the board and the audit committee members), and professional networks. Personal eligibility criteria include criteria such as minimum and/or maximum age, level of independence, absence of potential conflicts of interest and affiliation.
with competitors or potential competitors, personal character/cultural fit, interpersonal skills, personal commitment to the board mandate, nationality and residence, and family membership. The PEMI’s board representative(s) should meet particularly high standards with respect to management experience and/or financial literacy since these are two primary areas in which PEMIs can add value to family firms. Another eligibility criterion of importance in relation to private equity representatives is the ability to commit certain defined resources (e.g., networks or special expertise). Conversely, the owner family’s representatives should have appropriate professional experience and skills necessary to adequately exercise the board mandate. Under no circumstances should board membership and even more participation in the executive management be used purely to achieve personal aims or financial gains. It is also important to ensure that the board of directors has adequate age diversity and that it makes timely succession plans. Aside from board members representing shareholder groups, a suitable number of board seats should be allocated to independent third-party board members who can help the board make objective decisions and act, when necessary, as referees for previous full-time employees of the company, the company’s lawyers, bankers, and consultants, persons with significant business dealings with the company, with ties to the auditors, and major shareholders and their respective family members are not considered interdependent. On independence, see BÜHLER, Regulierung, § 11, N 1333; WERNLI, Basler Kommentar, CO 707, N 30; MÜLLER/LIPP/PLÜSS, p. 704; ROTH PELLANDA, p. 91 et seq., N 171; WATTER/ROTH PELLANDA, Zusammensetzung, p. 65 et seqq.; KRNETA, CO 707, N 108 et seq.

These criteria prohibit directors from sitting on the board of directors of competitors and from engaging in other dealings with competitors that may result in conflicts of interest. See ROTH PELLANDA, p. 162, N 322. Important traits are, inter alia, integrity, assertiveness, communication and teamwork skills, leadership skills, openness to dialogue, the ability to deal with conflicts, and the ability to give and accept criticism. See MÜLLER/LIPP/PLÜSS, p. 19, 69 (referring to controller personality, creative or critical thinker); KRNETA, CO 707, N 113; DIETRICH, Brevier, p. 15. In light of the board’s ultimate management responsibility, directors should be able to apply strategic reasoning and have vision, have planning and decision-making capabilities, communication and interpersonal skills and be able to establish contacts and build networks. See TRICKER, p. 267. The proposed candidate must be willing and realistically be able to devote adequate time. The company may therefore limit the number of directorships or similar mandates that each director can hold, e.g., “no more than five”. See KRNETA, CO 707, N 114 et seqq.; DIETRICH; Brevier, p. 15. On the discussion of limiting the number of board mandates, see BÖCKLI, Aktienrecht, § 13, N 14; BAUEN/VENTURI, § 1, N 8; AMSTUTZ, Macht und Ohnmacht, p. 139; MÜLLER/LIPP/PLÜSS, p. 9, 16. See WERNLI, Basler Kommentar, CO 707, N 30; PLÜSS, p. 19. See WERNLI, Basler Kommentar, CO 707, N 30 (only in family firms). See Section II.A.3.2.2. See FORSTMOSER, KMU, p. 503, FN 148.
between representatives and neutralize conflicts between different shareholder groups.

1.3.6.4 Limitations

The right of the general meeting to elect board members can only be restricted (and only to a limited extent) via the articles of association. Provisions in the articles of association must not limit the general meeting’s inalienable power to elect the members of the board at its core. Provisions that limit the election of the general meeting to candidates proposed or approved by the board of directors are null and void. Moreover, when defining eligibility criteria, the general principles of law must be observed, including the protection of board members’ personal rights and the principles of objectivity.

1.3.7 Term of Office for Board Members

In closely held companies with fixed majorities, the term of office for board members is of minor importance since the respective representatives are typically reappointed by the shareholders they represent. Depending on the specific circumstances, it may be wise to provide for a longer term (up to six years) in the articles of association than the statutory term of office to reduce the administrative burden associated with re-election and to ensure that certain leading figures remain on the board of directors for an extended period of time because of their intimate and broad knowledge of the company, representational functions, and/or because their presence signals stability and continuity to the business world. On the other hand, refreshing the board’s composition at regular intervals is beneficial for various reasons: to plan for succession in good times and bring in ‘fresh blood’ thereby challenging established principles and procedures. A shorter term of office is also beneficial for certain potential directors who can sit on the board for just a limited period due to time and other

1456 See BÖCKLI, Aktienrecht, § 13, N 48.
1457 CO 706b. Ibid.
1458 CC 27 II. See WATTER/ROTH PELLANDA, Zusammensetzung, p. 82; for further references on admissible and inadmissible requirements, see MÜLLER/LIPP/PLÜSS, p. 14; KÄCH, p. 47.
1459 See FN 801.
1460 The articles of association may, however, not provide for an automatic re-election of the board members because such a rule would infringe upon the general meeting’s inalienable election authority, see WERNLI, Basler Kommentar, CO 710, N 3.
1461 See ROTH PELLANDA, p. 199, N 400; NEUBAUER/LANK, p. 117.
1462 See ROTH PELLANDA, p. 199, N 399; KRNETA, CO 707, N 68; NEUBAUER/LANK, p. 118.
restraints. In addition to setting a suitable term of office, the articles of association may also contain further rules associated with the term of office, such as staggered terms or the barring of re-election. The suitability of such provisions must be assessed on a case-by-case basis.

2 Scope of Minority Investor Voice on the Board of Directors

2.1 Statutory Framework

As at the general meeting, the PEMI’s voice in corporate decision making on the board of directors is a function of the decisions made by the board of directors, which, in turn, depend on the body’s powers. The matters decided by the board of directors based on the statutory division of powers determine the objective scope of the PEMI’s (indirect through its board representatives) potential de jure voice in corporate decision making.

The board of directors, together with the executive management, runs the company and represents the firm externally. The board is authorized to adopt resolutions on all matters that are not assigned by law or the articles of association to the general meeting (statutory presumption of the board’s default authority). In essence, the directors are authorized to make any management decision as long as it does not result in a (de facto) liquidation or a change in the corporate purpose. Generally, Swiss corporate law allows for the delegation of management duties, but there is a defined set of non-delegable and inalienable powers that cannot be

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1463 See ROTH PELLANDA, p. 198, N 398.
1464 See BÖCKLI, Aktienrecht, § 13, N 16 (“Amtszeit-Guillotine”).
1465 See WERNLI, Basler Kommentar, CO 710, N 3.
1466 CO 716 II. Corporate management is understood to comprise all activities aimed at fulfilling the corporate purpose, see WATTER/ROTH PELLANDA, CO 716, N 9. With respect to the GmbH, CO 810 I.
1467 CO 718 I. In the GmbH, each managing officer has the power to represent the company (CO 814).
1468 CO 716 I. With respect to the GmbH, CO 810 I.
1469 See GLANZMANN, Aktienrechtsrevision, p. 677. With respect to the GmbH, see NATER, p. 125.
1470 The majority of legal scholars interpret CO 716a as incomplete, see BÖCKLI, Aktienrecht, § 13, N 287; BAUEN/VENTURI, § 4 N 406 et seqq.; BAUEN/BERNET, p. 162, N 471; MEIER-HAYOZ/FORSTMOSER, § 16 N 410; KRNETA, CO 716a; N 1174; BERTSCHINGER, Arbeitsteilung, § 4, N 161; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 30, N 30 and 58 et seqq.; KAMMERER, p. 198. In addition to the duties listed in CO 716a I, further non-delegable and inalienable duties of the board of directors mentioned by law are, among others, the collection of payments for shares not fully paid up (CO 634a I), various duties in connection with capital increases (see CO 650 I, 651 IV, 652e, 652g, 653g, 653i), and the appointment of holders of procuration and other authorized representatives (CO 721). For a detailed catalogue, see BÖCKLI, Aktienrecht, § 13, N 287. Of another opinion, WATTER/ROTH
delegated upwards to the general meeting, downwards to any subordinate authority, or withdrawn from the board by the articles of association or by a resolution of the general meeting. In a GmbH, the non-delegable and inalienable powers of the managing officers largely correspond to those of the board of directors, with one exception: top management is appointed by the meeting of members if the articles of association so provide.

According to the Swiss Code of Obligations the non-delegable and inalienable powers of the board of directors include:

**Ultimate management responsibility.** The board of directors has the ultimate corporate management responsibility. It formulates strategic goals and corporate policy, thereby establishing the regulatory frame-

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**PELLANDA, Basler Kommentar, CO 716a, N 2** (describing CO 716a as an exhaustive catalogue of the board’s powers; the duties just mentioned may be delegated to board committees).

1471 See BÖCKLI, Aktienrecht, §13, N 281; ROTH PELLANDA, p. 220, N 449; KRNETA, CO 716, N 1159; DRUEY/GLANZMANN, § 13, N 14; WATTER/ROTH PELLANDA, Basler Kommentar, CO 716a, N 1 (with certain exceptions listed in CO 716, N 7). The board of directors may, however, assign the preparation and implementation of its resolutions as well as the supervision of business transactions to board committees or individual board members provided that adequate reporting to its members is ensured (CO 716a II).

1472 If the shareholders do not approve of the decisions and behavior of the board of directors or singular members thereof any longer they may remove respective directors (CO 705 I), deny the discharge (CO 698 II Sec. 5) and amend the corporate purpose (CO 698 II Sec. 1 i.e.w. 701 Sec. 1), see ROTH PELLANDA, p. 220 et seq., N 450. Equally in a GmbH, where it is also possible to make certain decisions subject to approval by the meeting of members, see WATTER/ROTH PELLANDA, Basler Kommentar, CO 810, N 5.

1473 CO 810 II, 804 III.

1474 CO 810 II.

1475 CO 716a I. See, in detail on such core powers, MÜLLER/LIPP/PLÜSS, p. 137 et seqq.; HOMBURGER, Zürcher Kommentar, CO 716a, N 530 et seq. With respect to the exclusive powers of the managing officers in a GmbH, CO 810 II, see WATTER/ROTH PELLANDA, Basler Kommentar, CO 810, N 5.

1476 CO 716a I Sec. 1. In German, Oberleitung. For the term in detail, see BÖCKLI, Aktienrecht, § 13, N 303 et seqq.; WATTER/ROTH PELLANDA, Basler Kommentar, CO 716a, N 4; MÜLLER/ LIPP/PLÜSS, p. 142; WATTER, Verwaltungsratsausschüsse, p. 185 et seq. With respect to the GmbH, CO 810 II Sec. 1. On the ultimate management responsibility in a GmbH, see SIFFERT/FISCHER/PETRIN, CO 810, N 4; NUSSBAUM/SANWALD/SCHIEDEGGER, CO 810, N 7; in detail, NATER, p. 149 et seq. The rules governing the GmbH focus less on the implementation of strategy via directives to executive managers, and more on the managing officers scrutinizing their own direction, see WATTER/ROTH PELLANDA, Basler Kommentar, CO 810, N 7.

1477 See ROTH PELLANDA, p. 225, N 463. In detail on corporate strategy, KRNETA, CO 716, N 1177; realistically also MEIER-HAYOZ/FORSTMOUSER, § 16, N 415 ("Der nebenamtlich tätige Verwaltungsrat einer mittleren oder grossen Gesellschaft wird niemals in der Lage sein, die Strategie von Grund auf selbst zu entwickeln. Er kann und muss sich darauf beschränken, die Vorschläge der Geschäftsleitung zu analysieren, zu modifizieren, zu ergänzen, schliesslich zu genehmigen oder nötigenfalls zur Überarbeitung zurückzuweisen.").
work – the firm’s principles, norms, and rules. It determines the means for achieving these goals, allocates the resources, and it provides the necessary directives to management to carry out these goals along with ensuring a financial balance between the company’s objectives and its means in view of the targeted risk profile. The board also supervises management in achieving these goals and intervenes if need be; beyond this, it also sets the tone for the firm’s corporate culture. The definition of the firm’s strategic business areas and decisions on major investments and divestments are examples of this ultimate management responsibility. Yet, the day-to-day management of the firm does not constitute an inalienable duty of the board of directors and may thus be delegated to executive managers.

Determination of the corporate organization. The board of directors defines and implements the firm’s organizational structure in the organizational regulations. This duty includes determining the governance model, hierarchical structure, and key management positions; the definition of respective responsibilities and obligations including reporting, and guidelines for the organization of corporate processes. The inalienable duty relates to both the definition of the board’s internal organization and to those of the directly subordinated executive management level. The organization of management positions not directly subordinated and the organization within the executive management may be delegated downwards. The general meeting cannot adopt the organizational regulations in lieu of the board of directors, nor can it

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1478 See KRNETA, CO 716, N 1180.
1479 See ROTH PELLANDA, p. 227, N 465.
1480 See, for further references, ROTH PELLANDA, p. 228, N 467; WATTER, Verwaltungsratsausschüsse, p. 185 et seq.
1481 See BÖCKLI, Aktienrecht, § 13, N 306; FORSTMOSER/MEIER-HAYOZ/NOHEL, § 30, N 32.
1482 See BÖCKLI, Aktienrecht, § 13, N 306.
1483 See BERTSCHINGER, Arbeitsteilung, § 4, N 139.
1484 See GNOS/VISCHER, p. 751; MEIER-HAYOZ/FORSTMOSER, § 16, N 414.
1485 CO 716a I Sec. 2. With respect to the GmbH, CO 810 II Sec. 2, with further references, see NATER, p. 150 et seq.
1486 See WATTER/ROTH PELLANDA, Basler Kommentar, CO 716a, N 10. On the governance models, see Section IV.E.5.1.5.3.
1487 See WATTER/ROTH PELLANDA, Basler Kommentar, CO 716a, N 10; WATTER, Verwaltungsratsausschüsse, p. 186.
1488 See MÜLLER/LIPP/PLÜSS, p. 143.
1489 With respect to the GmbH, see NATER, p. 151 et seq.
1490 Debated by legal scholars, but expressly regulated in D-CO 716c II Sec. 1, see Section IV.E.5.1.1. With respect to the GmbH, see SIFFERT/FISCHER/PETRIN, CO 810, N 7; NATER, p. 150.
1491 See BÖCKLI, Aktienrecht, § 13, N 356; WATTER/ROTH PELLANDA, Basler Kommentar, CO 716a N 10; with further references KRNETA, CO 716, N 1211; WATTER, Verwaltungsratsausschüsse, p. 186. With respect to the GmbH, see NATER, p. 150 et seq.
reserve the right, in the articles of association or via resolution, to approve any adoption or amendment of the organizational regulations by the board of directors. Anything to the contrary would constitute an infringement of the board of directors’ non-delegable and inalienable duty to determine the firm’s organization.

**Financial management.** The board of directors determines the accounting system, the financial controls, and the financial planning of the firm. The accounting system role is to keep an account of the company’s financial performance over time. It also serves as an information and management tool and provides the board of directors with a comprehensive and timely insight into the firm’s finances, financial development, and status. On this basis, the board of directors takes necessary measures and prepares appropriate corporate decisions, respectively. Financial control must be guaranteed by a suitable monitoring organization. Financial planning includes the definition of financial goals where, inter alia, sufficient liquidity must be ensured and the targeted ratio of equity and debt financing determined. Thereby, the firm’s financial security, independence, and flexibility shall be safeguarded.

**Appointment and dismissal of top management.** The board of directors appoints and replaces the persons entrusted with the firm’s executive management and representation. The non-delegable duty relates only to managers directly subordinated to the board of directors. The appointment of further positions may be delegated.

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1492 See BÖCKLI, Aktienrecht, § 13, N 293; MÜLLER/LIPP/PLÜSS, p. 65; ROTH PELLANDA, p. 98, N 183; MEIER-HAYOZ/FORSTMOSER, § 16, N 439; KRNETA, CO 716b, N 1723 (“Der VR ist allein für den Erlass des Organisationsreglementes zuständig. Die GV hat keine Möglichkeit, sich statutarisch seine Genehmigung vorzubehalten.”); HOMBURGER, Zürcher Kommentar, CO 716a, N 519; KAMMERER, p. 92; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 11, N 26. See BÖCKLI, Aktienrecht, § 13, N 332. However, cf. ZWICKER, p. 55 et seq. (pointing out that, by way of exception, the general meeting may hold an approval right with respect to – and only – the provisions in the organizational regulations that interfere with its powers, such as the stipulation of an age limit for members of the board of directors, which affects the general meeting’s right to elect the board of directors).

1493 See BÖCKLI, Aktienrecht, § 13, N 332. However, cf. ZWICKER, p. 55 et seq. (pointing out that, by way of exception, the general meeting may hold an approval right with respect to – and only – the provisions in the organizational regulations that interfere with its powers, such as the stipulation of an age limit for members of the board of directors, which affects the general meeting’s right to elect the board of directors).

1494 CO 716a I Sec. 3. With respect to the GmbH, CO 810 II Sec. 3, see NUSSBAUM/SANWALD/SCHEIDEGER, CO 810, N 9; NATER, p. 153 et seq.

1495 See MÜLLER/LIPP/PLÜSS, p. 162; WATTER, Verwaltungsratsausschüsse, p. 186.

1496 See WATTER/ROTH PELLANDA, Basler Kommentar, CO 716a, N 18; WATTER, Verwaltungsratsausschüsse, p. 187.

1497 See MÜLLER/LIPP/PLÜSS, p. 151 et seq.

1498 CO 716a I Sec. 4. Not applicable with respect to the GmbH since top management is appointed by the meeting of members if the articles of association so provide.

Ultimate supervision. Where management functions are delegated, the board of directors supervises the decisions and operations of the executive management from a normative perspective; that is, in view of the firm’s compliance with the law, its articles of association, regulations, directives, and corporate objectives, and in view of the decisions’ appropriateness with respect to economic, technical, and social aspects. This includes the implementation of a well-functioning communication system and appropriate risk monitoring.

Matters concerning the general meeting. The board of directors prepares the general meeting, drafts or orders the drafting of the annual report, and implements the general meeting’s resolutions.

Notification of potential insolvency. The board of directors notifies the court in the event of over-indebtedness.

2.2 Assessment of Legal Status and Further Need for Protection

As the scope of the Pemi’s voice at the board of directors level through its board representatives is a function of the division of powers vis-à-vis the general meeting and management, the Pemi may have an interest to adapt such allocation of powers depending on which body it has the most influence on.

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1500 CO 716a I Sec. 5. With respect to the GmbH, CO 810 II Sec. 4. There is a slight difference in terminology. The rules governing the GmbH speak of “supervision” instead of “ultimate supervision” (CO 716a I Sec. 5 versus CO 810 II Sec. 4). See MEIER-HAYOZ/FORSTMOSE, § 18, N 21 (interpreting such a difference to mean that the board of directors of a stock corporation is accorded a greater retreat from managerial functions than the managing officers of a GmbH). Compare also “fully or partly delegated” and “parts of the management” (CO 716b I versus CO 810 II Sec. 4). See FORSTMOSE/PEYER/SCHOTT, p. 27 et seq., N 37; NATER, p. 155; WATTER/ROTH PELLANDA, Basler Kommentar, CO 810, N 10. Of another opinion, SIEFERT/FISCHER/PETRIN, CO 810, N 11. On the supervision authority in general, see NUSSBAUM/SANWALD/SCHIEDEGGER, CO 810, N 10; NATER, p. 154 et seq.

1501 See BAUEN/VENTURI, § 4, N 461.

1502 See WATTER, Verwaltungsratsausschüsse, p. 187.

1503 See BÖCKLI, Aktienrecht, § 13, N 375; WATTER/ROTH PELLANDA, Basler Kommentar, CO 716a, N 6 (citing risk assessment in connection with the ultimate management responsibility); MÜLLER/LIPP/PLÜSS, p. 201 et seq.; BAUEN/BERNET, p. 246, N 707 (finding that the board of directors is responsible for setting up a system of control, but risk management may be delegated).

1504 CO 716a I Sec. 6. With respect to the GmbH, CO 810 II Sec. 5 and 6. See NATER, p. 155 et seq.

1505 CO 716a I Sec. 7. With respect to the GmbH, CO 810 II Sec. 7. See NATER, p. 157.
2.3 Legal Structuring Options

2.3.1 Usurpation of Powers by the Board of Directors

There is practically no scope for the parties to diminish the statutory powers of the general meeting via the articles of association. Hence, the board of directors cannot usurp any powers assigned to the general meeting by mandatory law.

2.3.2 Delegation of Powers to the Board of Directors

Only to a very limited extent can the general meeting transfer certain of its expressly assigned powers to the board of directors via the articles of association. The general meeting is certainly not permitted to transfer any of its inalienable powers to the board of directors, such as the declaration of dividends, the approval of the annual financial statements, or the election of directors and auditors, even if the board of directors may propose certain candidates for election. A provision in the articles of association pursuant to which a task of the general meeting would be reduced to approving respective proposals of the board of directors or which would predicate decisions of the general meeting on the consent of the board or a third party would constitute a violation of the basic structure of the stock corporation.

3 Minority Investor Voting Power on the Board of Directors

3.1 Statutory Framework

Regarding decision taking, each member of the board of directors formally participates by casting his/her vote for a resolution. In fact, it is the directors’ duty to participate in decision making. The PEMI board

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1506 See Section IV.D.2.1.
1507 See Schaad, Basler Kommentar, CO 689, N 31.
1508 For example, in case of an authorized capital increase (CO 652g) and a capital increase subject to a condition (CO 653g) the board of directors is in charge of amending the articles of association.
1509 See Section IV.D.2.1.
1510 See Böckli, Aktienrecht, § 13, N 296; Krneta, CO 716, N 1164.
1511 See Baun/Venturi, p. 135; Böckli, Aktienrecht, § 13, N 297; Watter/Roth Pellan, Basler Kommentar, CO 716, N 4.
1512 See Dubs, Beschlussfassung, p. 363.
1513 See Wernli, Basler Kommentar, CO 713, N 6; Krneta, CO 713, N 722 et seq. (mentioning the duty to vote except in case of a conflict of interest).
representatives’ voting power at the board of directors – the extent to which they can influence and possibly even control board of directors’ decisions – depends on (i) the proportion of board seats representing the PEMI’s interests, (ii) the quorum and majority vote requirements for passing board resolutions, along with (iii) factual aspects such as the level of presence at board meetings. The voting right of each board member is fixed by law to one vote. Factual aspects are taken as a given in this analysis.

3.1.1 Board Size and Minority Investor Board Seats

Based on Swiss corporate law, the board of directors comprises one or more natural persons1514 who are elected by an absolute majority of votes represented at the general meeting.1515 By default, the PEMI, controlling a minority of votes and facing a controlling shareholder, cannot appoint any representative with certainty under the majority rule.

3.1.2 Quorum and Majority Vote Requirements for Director Decisions1516

3.1.2.1 Quorum Requirements

Swiss law does not stipulate any requirement as to the level of attendance at board of directors meetings.1517 The board of directors is quorate if only one member is present.1518 An exception exists, however, for plenary meetings, which require the attendance of all board members.1519

3.1.2.2 Majority Vote Requirements

Board resolutions are adopted by a simple majority of the votes cast1520 which applies to all subject matters passed by the board of directors. While the resolution threshold (the relative majority) and its calculation basis (votes cast) may be amended, the measuring unit (directors) is manda-

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1514 CO 707 I and II.
1515 See Section IV.D.3.1.2.3.
1516 For the basics of resolution requirements, see Section IV.D.3.1.2.1.
1517 See BAUEN/BERNET, p. 163, N 475; with a detailed explanation, TANNER, Quoren, § 8, N 27 et seqq.
1518 See BAUEN/VENTURI, § 3, N 297; TANNER, Quoren, § 8, N 32. The same applies to the meetings of the managing officers in a GmbH, see NUSSBAUM/SANWALD/SCHIEDEGGER, CO 809, N 18; NATER, p. 117.
1519 In analogous application of CO 701. See TANNER, Quoren, § 8, N 33.
1520 CO 713 I. With respect to the GmbH, CO 809 IV.
Unanimous consent of all directors is required to pass resolutions via written consent. The requirement of unanimity applies, however, only to the way in which a particular decision shall be reached (i.e., the procedure of a circular resolution), not the content of the decision.

### 3.1.2.3 Veto Rights

Other than passing resolutions via written consent, PEMI board representative(s) cannot be granted ad personam veto rights at the board level. Ad personam veto rights may only be granted via contractual agreements. The same is principally true with respect to the managing officers in a GmbH. However, by granting a veto right to GmbH members with respect to resolutions of the meeting of members and provided that the articles of association stipulate that the managing officers shall submit certain decisions to the meeting of members for approval, veto rights concerning resolutions of managing officers can be structured indirectly in a GmbH.

### 3.2 Assessment of Legal Status and Further Need for Protection

By being represented on the board of directors, the PEMI enhances access to information, improves monitoring, and by participating in discussions may influence board decisions via *soft-steering*. However, board representation in itself, does not say much about the de facto influence that the PEMI, through its board representatives, has on decision making at the board level. As a result of the majority rule, in cases of severe disagreement on a business decision, the PEMI’s board representatives who are likely to represent the minority at the board are not in a position to control or veto the respective decision by law.

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1522 CO 713 II.

1523 See, in detail, TANNER, *Quoren*, § 8, N 34 et seqq.


1526 See WEINER/LEE, p. 55.
3.3 Legal Structuring Options

If PEMIs wish to enhance their voice allowing them de facto say, at least with respect to critical business decisions, one fundamental strategy they can use at the shareholder level is to enhance voting power via voting shares, voting caps, and participation certificates. These options, however, are not possible at the board level since, pursuant to the mandatory one-director-one-vote principle, each director can only cast one vote. Direct or indirect voting privileges for individual board members are not allowed. Only the chairperson of the meeting can cast a decisive vote in case of a tie unless provided otherwise in the articles of association, which may disallow the chairperson the casting vote for all or certain resolutions, or it may be assigned to a different person. In attempting to enhance their voting power, PEMIs must therefore use alternative instruments: they may negotiate for (i) a greater share of board seats, (ii) suitable quorum and majority vote requirements, so that the PEMI board representatives’ attendance is necessary to constitute a quorum or to pass a resolution, and (iii) contractual shareholder control agreements.

3.3.1 Number of Minority Investor Board Seats

The articles of association may stipulate an exact number of board seats or a minimum or maximum number depending on the degree of flexibility the shareholders would like with respect to the possibility of future changes in board size. A minimum or maximum number allows the general meeting to change the number of board seats without having to comply with the

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1527 In German, Kopfstimmprinzip. See BGE 71 I 187 (E. 5., justifying this rule by stating that the directors are primarily elected because of their personality and the associated trust). See BAUEN/VENTURI, § 3, N 297; BÖCKLI, Aktienrecht, § 13, N 127; WERNLI, Basler Kommentar, CO 713, N 8; HOMBURGER, Zürcher Kommentar, CO 713, N 293; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 31, N 22. The same principle applies to decision making of the managing officers in a GmbH, see WATTER/ROTH PELLANDA, Basler Kommentar, CO 809, N 18; NUSSBAUM/SANWALD/SCHEIDEGGER, CO 809, N 14; NATER, p. 118.

1528 See BÖCKLI, Aktienrecht, § 13, N 127; FRICK, § 12, N 1447; WERNLI, Basler Kommentar, CO 713, N 8; KRNETA, CO 707, N 284; HOMBURGER, Zürcher Kommentar, CO 713, N 293; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 31, N 22. With respect to the GmbH, see SIFFERT/FISCHER/PETRIN, CO 809, N 11.

1529 The chairperson of the meeting is the person presiding the board meeting and does not necessarily coincide with the chairman of the board of directors. See BÖCKLI, Aktienrecht, § 13, N 106; BAUEN/BERNET, p.163, N 475; HOMBURGER, Zürcher Kommentar, CO 713, N 312; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 31, N 30.

1530 CO 713 I. With respect to the GmbH, 809 IV.

1531 See BÖCKLI, Aktienrecht, § 13, N 50; WERNLI, Basler Kommentar, CO 707, N 5; MÜLLER/LIPP/PLÜSS, p. 3.
Part Two: Legal Framework and Tools

procedure for amending the articles of association.\textsuperscript{1532} On the other hand, a fixed number in the articles of association is appropriate if the board seats are firmly divided between different shareholder groups. Particularly if the board seats are allocated by a shareholders’ agreement, the respective contractual arrangement can thereby be reflected at the corporate level. In such case, PEMIs should make certain that a high quorum and/or majority vote requirement or other veto arrangement applies to shareholder decisions that amend the number of directors as stated in the articles of association.\textsuperscript{1533} This avoids the risk that the PEMI’s voting power at the board level is diluted if the size of the board is increased based on a majority vote controlled by the majority shareholder.

As PEMIs do not have board representation rights by law, the number of board seats secured by them is a question of negotiation. Typically, the number more or less corresponds to the PEMI’s equity stake relative to the share capital. But also an asymmetrical allocation is possible,\textsuperscript{1534} and may be the result of factors such as the size of the company, the stage of the firm’s development, industry dynamics and complexity, financial risks, the organization of the board (e.g., committee structure), the distribution of tasks, an appropriate mix of age, skills and experience, the absolute amount invested, and political dynamics. For instance, it is conceivable that the family shareholders holding the absolute majority of votes at the general meeting deliberately could put themselves in a minority position at the board level and fill the majority of board seats with people with substantial business experience who can make valuable contributions to corporate management. \textsc{Pearce} and \textsc{Barnes} recommend that when allocating board seats, the parties (i.e., the controlling shareholder and the PEMI) should also regulate if and to what extent the parties’ board representation rights change if they retire from management positions or if their equity stakes fall below a certain threshold (e.g., 10\% of the share capital).\textsuperscript{1535} To avoid overly large and cumbersome boards when a private equity minority investment is syndicated, certain members of the syndicate may accept an observer seat. Observers usually have the right to attend and speak, but they are not allowed to vote. The acceptance of observer status appears reasonable where PEMI

\textsuperscript{1532} \textit{See} BAUEN/VENTURI, § 1, N 48; WERNLI, \textit{Basler Kommentar}, CO 707, N 5; ROTH PELLANDA, p. 213, N 437; KRNETA, CO 707, N 26.

\textsuperscript{1533} \textit{See}, for further references, FRICK, § 12, N 1386; KRNETA, CO 707, N 27; O’NEAL/THOMPSON, § 4.26.

\textsuperscript{1534} So observed by TREZZINI with respect to venture capital investments, \textit{see} TREZZINI, p. 273.

\textsuperscript{1535} \textit{See} PEARCE/BARNES, p. 140.
interests are already represented on the board and when syndicate members broadly share common interests.\footnote{See Trezzini, p. 272.}

Generally, the impact of the PEMI’s number of board seats on the PEMI’s voting power at the board level must be assessed in view of the quorum and majority vote requirements applicable to board resolutions. For example, whether having one or two seats on a board of five directors (where the remaining board seats are controlled by the majority shareholder’s representatives) has little effect on de facto voting power since in both cases the PEMI’s representatives cannot veto any decisions under the relative majority rule. Yet, two board seats confer veto power if the resolution threshold is increased to two-thirds of votes for certain important resolutions. Hence, the number of board seats that the PEMI is allocated must be decided in combination with the respective quorum and majorities required for fundamental decisions.

3.3.2 Quorum and Majority Vote Requirements

3.3.2.1 Purpose

The considerations on the purpose of quorum and majority vote requirements in the context of shareholder resolutions in Section IV.D.3.3.4.2 are also applicable to board resolutions. Principally, quorum requirements prevent the controlling shareholder’s board representatives from capitalizing on the PEMI board representatives’ absence from board meetings. Via high majority vote requirements the PEMI board representatives may obtain veto power against certain resolutions.

3.3.2.2 Validity

While the absolute majority vote requirement for general meeting resolutions may be amended,\footnote{CO 703.} the question as to whether the relative majority applicable to board resolutions\footnote{CO 713 I.} is mandatory or dispositive is debated by legal scholars.\footnote{For an overview of legal expert opinion, see Forstmoser, Eingriffe, p. 175, FN 40.} While Druey rejects any amendment of the relative majority vote requirement, others find that only resolutions of the board of directors that must be taken, so-called core resolutions, are
mandatorily subject to the majority of votes cast. The majority of authors, however, argues in favor of the dispositive nature of the statutory relative majority vote requirement and, hence, finds the stipulation of different resolution requirements admissible.

3.3.2.3 Introduction and Removal

Quorum and majority vote requirements for board resolutions that deviate from the statutory rule are primarily stipulated in the organizational regulations. Whether they can also be implemented via the articles of association is contested. While some legal scholars accept this, such a possibility is rejected by others because the determination of the corporate organization – including aspects concerning board decision making – is a non-delegable and inalienable power of the board of directors who devises the organizational regulations. The Draft Law expressly stipulates the

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1540 See DRUEY/GLANZMANN, § 13, N 65; BÖCKLI, Aktienrecht, § 13, N 121 et seq. (allowing a qualified minority only for singular decisions of particular importance. In his opinion, the minority only has a need for influence where conflicts of interest are likely: “Denn auch ein wegen eines Quorums nicht zustande gekommener Leitungsentwurf ist ein Entschied. Es ist unhaltbar, dass im Ergebnis ... eine Minderheit des Verwaltungsrates ständig darüber bestimmt, was die Gesellschaft nicht tun soll, wobei weder sie als Minderheit noch die Mehrheit des Verwaltungsrates ihrerseits darüber bestimmen kann, was die Gesellschaft tun soll;” “Präsenzquoren, die über das Erfordernis der Anwesenheit der Hälfte aller Mitglieder hinausgehen, bedrohen jedoch die Entscheidungsfähigkeit des Verwaltungsrats gerade in dringenden Fällen und sind daher bedenklich”); also see BÖCKLI, Kernkompetenzen, p. 53. In agreement, BAUEN/VENTURI, § 3, N 300; WALDBURGER, p. 190. Cf. KRNETA, CO 713, N 774 (arguing that qualified majority vote requirements should be limited to important matters).

1541 Arguing in favor of the dispositive nature are, among others, WERNLI, Basler Kommentar, CO 713, N 8; MEIER-HAYOZ/FORSTMOSER, § 16, N 450; TREGZINI, p. 273; HOMBURGER, Zürcher Kommentar, CO 713, N 277 et seq.; FORSTOMSER, Eingriffe, p. 175. Cf. also FORSTOMSER/MEIER-HAYOZ/NOBEL, § 31, N 25, FN 11 (finding it admissible to replace the relative majority by an absolute majority. Whether the threshold can be changed as well is left open). With respect to the GmbH, see WATTER/ROTH PELLANDA, Basler Kommentar, CO 809, N 19; NATER, p. 117 et seq.

1542 In favor of an implementation in both the organizational regulations and the articles of association are BÖCKLI, Aktienrecht, § 13, N 120 (for majority vote requirements) and § 13 N 122 (for quorum requirements); BÖCKLI, Kernkompetenzen, p. 53; BAUEN/VENTURI, § 3, N 298; WERNLI, Basler Kommentar, CO 713, N 6a; TREGZINI, p. 273 et seq.; NOBEL in FORSTOMSER/MEIER-HAYOZ/NOBEL, § 31, N 19, FN 6 and § 31, N 19, FN 6); NOBEL, Klare Aufgaben, p. 531; SCHENKER, Familiengesellschaften, p. 17; TANNER, Quoren, § 8, N 54, FN 206. Of another opinion, i.e., arguing solely in favor of a stipulation in the organizational regulations are ROTH PELLANDA, p. 67 et seq., N 125; KRNETA, CO 713, N 770, 774; BÖSIGER, p. 13; HOMBURGER, Zürcher Kommentar, CO 713, N 292; KAMMERER, p. 153 et seq.; FORSTOMSER and MEIER-HAYOZ in FORSTOMSER/MEIER-HAYOZ/NOBEL, § 30, N 66 and § 31, N 19, FN 6; MEIER-SCHATZ, Zusammenarbeit, p. 824; FORSTOMSER, Eingriffe, p. 174 et seq. With respect to the GmbH, respective provisions may be stipulated in both the organizational regulations and the articles of association, see CO 776a II Sec. 6 and NUSBAUM/SANWALD/SCHEIDEGGER, CO 809, N 18 (with respect to quorum requirements); KÜNG/CAMP, CO 809, N 7; NATER, p. 117.
former. In the interest of legal certainty, the parties may implement parallel provisions in both the articles of association and the organizational regulations. Analogous to the rules applicable to the general meeting, a more stringent majority vote requirement may be introduced observing the envisioned majority when amending the organizational regulations and/or the articles of association. As for abolishing previously increased majority vote requirements, the PEMI may ask the board to expressly declare the Siegwart Rule, which provides protection against facilitations of majority vote requirements by the controlling shareholder.

3.3.2.4 Structuring Options

For the PEMI to obtain additional power to influence decision making at the board level, a number of options exist for structuring the resolution requirements.

(i) Quorum Requirements

Quorum requirements may be introduced for board resolutions to ensure that no important resolutions can be passed at the board level without the

\[1543\] See FN 463.
\[1544\] D-CO 627 Seq. 20.
\[1545\] See FN 933.
\[1546\] See Section IV.D.3.3.3.6.
\[1547\] See WALDBURGER, p. 189 (finding the stipulation of quorum requirements not only lawful, but oftentimes virtually desired from the perspective of the principle of equal treatment in order to ensure a debate among as many board members as possible and in order to prevent accidental decisions due to bad presence); equally, TANNER, Quoren, § 3, N 51. More critically, WERNLI, Basler Kommentar, CO 713, N 7 (finding quorum requirements lawful with the reservation that such requirements must not pose a risk to the board’s decision-making capacity; deemed as problematic are thresholds above 50%). Reluctant, BÖCKLI, Aktienrecht, § 13 N 122 (stating that a requirement of the presence of more than half of all board members jeopardizes the decision-making capacity of the board. At maximum, he allows for a quorum requirement of two thirds. In his view, the presence of all members cannot be validly stipulated); critically also KRNETA, CO 713, N 765, 767, 771 (“Präsenzquoren bringen somit mehr Nachteile als Vorteile. Sie machen allenfalls in kleineren Gesellschaften Sinn, wenn verschiedene Aktionärsgruppen aufgrund von einem ABV Sitz im VR zugeordnet wurde. In solchen Fällen könnte bei Fehlen eines Präsenzquorum durch ein gezieltes Ansetzen der VR-Sitzungen versucht werden, einzelne Aktionärsgruppenvertreter bei der Beschlussfassung auszuschalten, weil man weiß, dass sie zu diesem Zeitpunkt nicht erreichbar sind.”). Even if its admissibility is accepted, many legal experts recommend to exempt from quorum requirements all resolutions that establish subscriptions and payment in full for shares and resolutions amending the articles of association (CO 651a I, 652g and 653g) because those resolutions are only formal routine matters, see BÖCKLI, Aktienrecht, § 13, N 122 et seq.; KRNETA, CO 713, N 769; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 31, N 21. With respect to quorum requirements for resolutions made by the managing officers of a GmbH, see NUSSBAUM/SANWALD/SCHEIDEGER, CO 809, N 18.
PEMI board representatives’ attendance and thereby prevent the controlling shareholder representatives from capitalizing on their absence from board meetings. While both the calculation basis (total board members) and the measuring unit (directors) are given, the quorum threshold may be set sufficiently high so that the presence of at least one of the PEMI board representatives is required for the meeting to be a quorum.

(ii) Majority Vote Requirements

In addition or alternative to stipulating quorum requirements, the majority vote requirement for passing resolutions at the board of directors may be changed. Possible structuring levers are the threshold and calculation basis. Since each board member has by law one vote, the measuring unit applicable to resolutions of the board of directors is, however, fixed.

Resolution Thresholds. Two central questions arise in regard to changing the statutory resolution threshold to be observed for passing resolutions at the board of directors. Firstly, can the statutory resolution threshold be lowered so that only a minority of votes is sufficient to pass a resolution? Secondly, to what extent can the statutory resolution threshold be increased and, more specifically, can certain resolutions require unanimous consent?

For the same reasons as presented in Section IV.D.3.3.4.4, this author considers minority thresholds at the board level lawful with respect to specific resolutions only. If a minority threshold is set based on the PEMI’s number of board seats, the minority investor effectively obtains active voice in these resolutions.

Qualified majority thresholds are introduced by setting the threshold higher than the statutory majority of votes cast. If set sufficiently high, the PEMI will obtain veto power. While deemed admissible with respect to board resolutions by some authors, others raise concerns in light of the

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1548 This risk particularly exists at the board level because matters not placed on the agenda can principally be resolved upon because determining and sending out an agenda before a meeting is merely an administrative rule. Hence, there is a potential for abusing the absence of the PEMI’s presence in order to pass certain resolutions rejected by him. See Wernli, Basler Kommentar, CO 713, N 7; Krneta, CO 713, N 789.

1549 See Forstmoser/Meier-Hayoz/Nobel, § 31, N 20 (“Besondere Bedeutung kommt den Regeln zur Beschlussfähigkeit bei Gesellschaften mit einem paritätischen Aktionariat oder einem starken Minderheitsaktionär zu: Hier wird das Präsenzquorum nicht selten so angesetzt, dass die Beschlussfähigkeit nicht gegeben ist, wenn nicht wenigstens ein ‘Vertreter’ jeder Aktionärsgruppe (bzw. des Minderheitsaktionärs) anwesend ist.”).

1550 See Tanner, Quoren, § 8, N 45.

1551 Also arguing for the admissibility of minority requirements, Tanner, Quoren, § 8, N 53; Trezini, p. 274.

1552 CO 713 I.
danger that a minority of directors can behave obstructively for opportunistic reasons and can continually bring down proposals necessary for the company’s successful operations, thereby putting the firm’s functionality and the firm’s operations and growth in jeopardy.\(^{1553}\) To mitigate this risk, the parties can agree that certain decisions are subject to increased qualified majority vote requirements only if the matters to be decided exceed certain defined thresholds (e.g., the incurrence of a certain level of debt or beyond a certain financial leverage ratio).

The requirement of the board members’ *unanimous consent* presents the highest possible increase of the resolution threshold conceivable. If legal scholars have voiced reservations regarding inordinate increases in the qualified majority thresholds, then the introduction of a provision in the organizational regulations requiring unanimous consent of all board members for certain decisions is subject to even more fierce debate among legal scholars.\(^{1554}\) For an assessment, see also Section IV.E.3.3.2.6.

**Calculation basis.** Aside from changing the statutory resolution threshold, the statutory calculation basis may also be amended. To increase the requirements for decision making, the board members present at the meeting can be defined as a calculation basis instead of votes cast.\(^{1555}\) A further increase can be caused by using the criterion of all board members as a vote calculation basis. In such cases, the votes of the PEMI’s board

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\(^{1553}\) Finding qualified majority vote requirements principally admissible for certain or all resolutions of the board of directors are WERNLI, *Basler Kommentar*, CO 713, N 8; VON SALIS-LÜTOLF, *Finanzierungsverträge*, § 12, N 1359; HOMBURGER, *Zürcher Kommentar*, CO 713, N 303. Cf. also FORSTMOSER/MEIER-HAYOZ/NOBEL § 31, N 25, FN 11 (generally accepting qualified majorities, but posing the question whether certain resolutions that must be passed can be made subject to a qualified majority threshold); BÖCKLI, *Aktientrecht*, § 13, N 120a, 121 (accepting qualified majorities, e.g., of two thirds of the votes cast, only if stipulated for certain important resolutions, e.g., significant investments, merger and acquisitions, but not in general for all resolutions of the board).

\(^{1554}\) See WERNLI, *Basler Kommentar*, CO 713, N 8 (allowing for unanimous consent if confined to certain critical resolutions; but deemed hardly useful); KRNETA, CO 713, N 776 (endorsing the possibility of providing for unanimous consent in small companies with respect to certain extraordinary resolutions outside the normal course of business and particularly if the different shareholders or groups of shareholders are all parties to a shareholders’ agreement); equally TANNER, *Quoren*, § 8, N 53 (with reference to the person-oriented character of the board). In contrast, BÖCKLI, *Aktientrecht*, § 13, N 121b (rejecting a requirement of unanimous consent because it results in a situation in which the minority could permanently dictate what the company should not do, but not determine what the company should do). Equally against unanimous consent are WALDBURGER, p. 190 et seq.; TRIGO TRINDADE, p. 141. With respect to the GmbH, see NATER, p. 118 (arguing in favor of the admissibility of unanimous consent among the managing officers even though he recommends applying such a requirement restrictively); NUSSBAUM/SANWALD/SCHEIDEGGER, CO 809, N 16 (in favor of the admissibility of unanimous consent for singular decisions).

representative(s) not attending the board meeting count as no votes cast for any resolution. Such measure is, however, deemed problematic by BÖCKLI since it negatively impacts the board’s decision-making capability.\footnote{BÖCKLI, \textit{Aktienrecht}, § 13, N 119.} On the other hand, to facilitate decision making with respect to ordinary decisions,\footnote{Decisions other than those listed in CO 704 I.} yes and no votes cast can be defined as a calculation basis. In such cases, board members can submit blank votes that will not be counted as no votes.\footnote{See TANNER, \textit{Quoren}, § 4, N 89.}

(iii) Consent of Board Members Representing a Class of Shares

Another method by which to structure quorum and majority vote requirements is by basing them on the number of board members representing certain classes of shares or groups of shareholders. For example, the parties can stipulate that at least one director appointed by each class of shares or each group of shareholders or the representative(s) of particular classes of shares or shareholder groups must be present (in the case of a quorum requirement) or, in the case of a majority vote requirement, must consent to a board resolution in addition to the majority vote requirement as defined by corporate law or in the articles of association, to validly pass a resolution.\footnote{Requiring the presence or consent of particular board representatives is controversial. In favor, FRICK, § 12, N 1446 (with respect to quorum requirements); TREZZINI, p. 274 \textit{et seq.} (finding the requirement of consent of board members representing a certain class of shares admissible if stipulated in addition to the regular majority vote requirements).} Since the latter practice, the requirement of consent of particular board members, represents preferential treatment, such requirement must be objectively justified by corporate interests (e.g., by the particular knowledge or industry experience of the board member required for certain decisions).

(iv) Ad Personam Veto Rights

Board members (and managing officers in a GmbH) must not be granted ad personam veto rights against board resolutions (or resolutions of the managing officers) at the corporate level.\footnote{See FN 1524.} However, at the contractual level, the PEMI may negotiate for ad personam veto rights for its board representatives.\footnote{See Section IV.E.3.3.3.} Moreover, in a GmbH, veto rights against managing officers’ decisions can be structured indirectly by stipulating in the articles of association that certain decisions of the managing officers must be
submitted to the meeting of members for approval and that the PEMI has a veto right at such a level.\textsuperscript{1562}

3.3.2.5 \textit{Content}

The question as to what board decisions PEMIs consider important and therefore would want veto power is, of course, highly dependent on the particular situation and PEMI. Yet, the following list of issues provides examples of what issues PEMIs may find important. At center stage are strategic decisions and personnel decisions concerning top management.\textsuperscript{1563} Examples of board resolutions subject to increased resolution requirements include:\textsuperscript{1564}

\begin{itemize}
\item Appointment and replacement of key employees,
\item Determination and changes of the firm’s employment and compensation policy including establishing any profit sharing, bonus, or other incentive scheme (including pension and share option schemes),
\item Any major company acquisitions or dispositions of stocks, assets, or business entities outside the annual budget,
\item Formation and closure of subsidiaries, factories, and business units as well as the entry or exit of business lines,
\item Formation, entry into, termination of, or withdrawal from any partnership, consortium, joint venture, or any other unincorporated association,
\item Purchase, sale, and encumbrance of real estate,
\item Modification, termination, or renewal of any material contractual agreement (e.g., leases, consultancy agreements, contracts with senior employees),
\item Commencing or settlement of material litigation,
\item Approval of the annual budget and deviations thereof, and changes to the business plan,
\end{itemize}

\textsuperscript{1562} See FN 1525.
\textsuperscript{1563} For similar lists, see FRICK, § 12, N 1449; VON SALIS-LÜTOLF, \textit{Finanzierungsverträge}, § 12, N 1371.
\textsuperscript{1564} See FRICK, § 12, N 1449; VON SALIS-LÜTOLF, \textit{Finanzierungsverträge}, § 12, N 1371.
→ Incurrence of debt, restructuring of debt, or other arrangements with creditors,

→ Granting of any pledge, mortgage, charge or other security,

→ Capital increases authorized by the general meeting,\textsuperscript{1565}

→ Public offerings provided that the decision-making authority rests with the board of directors,\textsuperscript{1566}

→ Entering into transactions, arrangements, or agreements involving the company, directly or indirectly, for the direct or indirect benefit of a shareholder, director, employee, or any connected person of any of the foregoing,

→ Amendments of the organizational regulations,

→ Transactions outside of the ordinary course of business other than at arm’s length (including, but not limited to, political or charitable gifts or donations)

→ Changes to accounting and tax policies, and

→ Key corporate policies (e.g., risk management, health and safety, public relations).

### 3.3.2.6 Limitations

Raising and lowering the statutory resolution requirement are subject to certain limitations.

**General limitations.** Provisions in the organizational regulations raising or lowering the statutory resolution requirement must neither infringe upon mandatory corporate law nor the articles of association,\textsuperscript{1567} nor constitute an abuse of law\textsuperscript{1568}. Secondly, quorum and majority rules that discriminate against or disadvantage certain board members for reasons not in the firm’s interest, such as requiring the attendance or consent of a particular board member (ad personam veto rights), are unlawful if stipulated in the articles of association or organizational regulations.\textsuperscript{1569} However, the PEMI may

\textsuperscript{1565} In case the general meeting has authorized or instructed the board of directors to do so, see \textit{VON SALIS-LÜTOLF, Finanzierungsverträge}, § 12, N 1371.

\textsuperscript{1566} Cf. \textit{FRICK}, § 11, N 1190; § 12 et seq., N 1449; \textit{VON SALIS-LÜTOLF, Finanzierungsverträge}, § 12, N 1371.

\textsuperscript{1567} See FN 800; \textit{TANNER, Quoren}, § 8, N 53.

\textsuperscript{1568} See FN 803.

\textsuperscript{1569} See WALDBURGER, p. 190.
negotiate for contractual ad personam veto rights for its board representatives. Moreover, veto power may be achieved, for instance, by stipulating a sufficiently high quorum or majority vote requirements.

**Limitations concerning the measuring unit.** For decision making at the board of directors, the one-director-one-vote principle is mandatory and direct or indirect voting privileges for individual board members are not allowed.\(^{1570}\)

**Limitations flowing from maintaining functionality and decision-making capacity of the board of directors.** The problem of high quorum and majority vote requirements impeding a firm’s functioning and decision-making capacity is outlined in Section IV.D.3.3.4.6. In view of board resolutions, the consequences of impeded functionality are particularly severe as the board of directors is the firm’s most powerful organ and makes the most important corporate decisions.\(^{1571}\) On the other hand, as TANNER points out, particularly with respect to the board of directors as a principally person-oriented organ, it can be reasonable and desirable to introduce high quorum and majority vote requirements for important resolutions and even require unanimous consent for particular decisions, thereby emphasizing the person-oriented character of the organ.\(^{1572}\) Moreover, the risk of blockage is mitigated since the board members that engage in blockade politics could be held liable for breaching the directors’ duty of loyalty.\(^{1573}\) Despite the fact that high quorum and majority vote requirements could hamper the firm’s decision-making capability, they can be especially judicious and rational if two interest groups are represented on the board of directors of a closely held company and resolutions are pending that equally affect both of their fates substantially.\(^{1574}\) For the same reasons as outlined in Section IV.D.3.3.4.6 companies should have the right and the ability to decide if structuring solutions deviating from the statutory rules are more suitable.

**3.3.2.7 Assessment of Legal Tool**

**Introducing quorum requirements.** Quorum requirements can be useful to prevent the controlling shareholder’s board representatives to take advantage of the PEMI board representatives’ absence to push through controversial resolutions. On the other hand, the firm’s functionality and

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\(^{1570}\) See FN 1528.

\(^{1571}\) See Section IV.E.2.1. See TANNER, Quoren, § 5, N 26.

\(^{1572}\) TANNER, Quoren, § 8, N 53.

\(^{1573}\) See WERNLI, Basler Kommentar, CO 713, N 8.

\(^{1574}\) See KRNETA, CO 713, N 775.
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decision-making capacity is jeopardized if high quorum requirements apply and if the PEMI board representatives’ regular absence prevents the passing of positive resolutions. Although PEMI board representatives risk liability charges for breach of directors’ duties, for example, by missing board meetings, high quorum requirements should be used with caution.\textsuperscript{1575} To mitigate this risk and still ensure that board meetings, at least at the first attempt, are not quorate without the PEMI board representatives’ presence, the parties may agree on a high quorum requirement and that if this is not attained the board meeting shall be adjourned to a later date where no minimum quorum requirement applies.

\textit{Lowering majority vote requirements}. Lowering the majority vote requirements for decision making – for example, to relative majorities based on \textit{yes} and \textit{no} votes instead of votes cast or to a minority resolution threshold – can grant the PEMI’s board representatives an active voice. The downside of such instruments, from the PEMI’s perspective, is that it benefits all board members and hence, other groups of shareholders with board representatives in excess of the respective threshold also obtain active voice at the board level. Moreover, minority thresholds run counter the principles of stability and representativeness of resolutions. Hence, even though considered lawful, lowering the resolution requirements is rarely in the PEMI’s interest. At best, they may be suited in relation to certain exit-related decisions.

\textit{Raising majority vote requirements}. The desire to run a company by consensus is rarely feasible.\textsuperscript{1576} Discrepancies will inevitably arise and in such cases, the board of directors must be able to react quickly in the interest of the firm’s competitiveness. Nonetheless, PEMIs need assurance that the controlling shareholder’s board representatives will not abuse their majority power. The solution is to devise a delicately balanced control structure with the right mixture of flexibility and rigidity, a challenging goal. By raising the resolution requirements for critical resolutions, the PEMI board representatives can gain veto power, while the firm’s decision-making capacity regarding day-to-day business matters is upheld. The tools to do so are high majority vote thresholds, a calculation basis based on the number of directors present at the meeting rather than votes cast, and requiring consent of board members representing particular or every class(es) of shares. Even if high majority vote requirements that effectively confer veto power to PEMI board representatives are deemed admissible by this author, they should only be employed restrictively and only with

\textsuperscript{1575} Equally, \textit{BAUEN/VENTURI}, p. 100, N 301.

\textsuperscript{1576} \textit{See MONKS/MINOW}, p. 165.
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respect to fundamental matters. Moreover, potential risks regarding the firm’s decision-making capacity should be addressed by implementing suitable deadlock-breaking devices.

3.3.3 Shareholder Control Agreements

3.3.3.1 Legal Concept

Shareholder control agreements are contracts concerning matters considered within the board of directors’ control of the corporation. They are often part of shareholders’ agreements in which case the obliged shareholder commits to instruct his/her representative(s) on the board of directors in accordance with the terms of the agreement, or, if a board member him/herself, the obliged shareholder directly exercises his/her board mandate, insofar as lawful, in a specific manner on issues regulated by the terms of the agreement. Shareholder control agreements may also be concluded with third-party board members in relation to the board mandate. It is equally conceivable that members of a GmbH can conclude control agreements with managing officers.

From a legal perspective, agreements concerning shareholder decisions (e.g., how to select board members and how to instruct board representatives concerning particular matters) must be strictly distinguished from agreements with board members concerning directors’ decisions (even if formally part of a shareholders’ agreement). The former bind the obliged party in the shareholder capacity and are subject to the limitations

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1577 See BAUEN/VENTURI, § 3, N 299.
1578 Cf. Section IV.D.3.3.4.8.
1579 See O’NEAL/THOMPSON, § 4.3.
1580 See FRICK, § 12, N 1457; NUSSBAUMER/VON DER CRONE, p. 139; VON SALIS-LÜTOLF, Finanzierungsverträge, § 12, N 1475.
1582 See NUSSBAUM/SANWALD/SCHIEDEGGER, CO 806, N 22; NATER, p. 36, FN 193; BÄHLER, p. 159 et seq. Of another opinion, see HANDSCHIN/TRUNNINGER, § 13, N 73.
1583 Cf. BAZZANI, p. 23 (not expressly distinguishing between both aspects, is writing: “Darüber hinaus können die Parteien des Aktionärbindungsvertrags beispielsweise vereinbaren, dass sie jemanden aus ihrer Mitte in den Verwaltungsrat wählen, mit der Verpflichtung, das Verwaltungsratsmandat nach Weisungen in Form von gemeinsam gefassten Beschlüssen zu führen.”). Cf. BÖCKLI, Aktienrecht, § 13, N 632, 632a (speaking of a “qualitativen Quantensprung” and qualifying directors’ agreements a direct “Usurpation von Führungsfunktionen in der Aktiengesellschaft” and illegal because the parties to the shareholders’ agreement effectively function as a “secret board of directors” and are thus to be deemed as de facto organs).
discussed in Section IV.D.3.3.5.6; the latter bind the obliged party in his/her capacity of board member.\textsuperscript{1584} The distinction is critical since the scope for directors to enter into contractual obligations on how to exercise their board mandate and vote on certain matters is much more limited as a result of their duty of loyalty to the company than for shareholders who are under no obligation to safeguard or promote the company’s interests.\textsuperscript{1585} The latter type of agreements (herein called \textit{board of directors’ agreements} or \textit{shareholder control agreements in a narrow sense}\textsuperscript{1586}) is discussed in this section.

3.3.3.2 Purpose

The scope for broadening the powers of the general meeting at the expense of the board of directors’ powers is fairly limited,\textsuperscript{1587} and if the PEMI is not represented on the board of directors and wants to obtain influence on corporate decisions within the board’s realm, shareholder control agreements are a suitable legal tool to do so. Similarly, if the PEMI is represented on the board of directors, but is not in a de facto position to veto or control board decisions, shareholder control agreements concluded with non-PEMI affiliated directors can enhance the PEMI’s voice in board matters.\textsuperscript{1588}

3.3.3.3 Validity

The validity of board of directors’ agreements – PEMIs’ contractual agreements with board members – is a contentious issue among legal scholars. The controversy concerns the risk of conflict between a director’s position and duties toward the company, and his/her obligations as a party to the contractual agreement (called \textit{double obligation nexus}\textsuperscript{1589}). Principally, the board member who is bound by a board of directors’...
agreement has rights and obligations equal to any other board member.\textsuperscript{1590} In case of conflict, this board member must place the company’s interests over those of the contractually entitled party.\textsuperscript{1591} Subject to debate is whether a director’s discretionary powers allow consideration of any outside guidelines or instructions within this narrow corset. At one end of the spectrum, board of directors’ agreements are generally regarded as unlawful interferences with the board members’ duty of loyalty and unfettered discretion, the statutory division of powers pursuant to which the board of directors shall manage the corporate affairs, and the principle of equal treatment of shareholders.\textsuperscript{1592} The board of directors’ obligation is to serve all shareholders in pursuit of their collective economic gain. A director’s contractual tie to a particular shareholder or third party is not deemed compatible with this notion.\textsuperscript{1593} On the other hand, O’NEAL and THOMPSON astutely point out, particularly with respect to closely held firms, that “the concept of the board … as a body separate and apart from the shareholders, with unfettered independence and discretion in the conduct of corporate affairs, is a fiction.”\textsuperscript{1594} Prevailing Swiss expert opinion\textsuperscript{1595} and jurisprudence\textsuperscript{1596} consider board of directors’ agreements

\textsuperscript{1590} See WERNLI, Basler Kommentar, CO 707, N 26; BAUEN/VENTURI, § 1, N 66.
\textsuperscript{1591} Hence, the obliged board member’s duty of loyalty to the company takes priority over the duty of loyalty to the contractually entitled party. See the decision of the Swiss Federal Supreme Court of 14 October 2003, 4C.143/2003 (E. 6). For further references, see BAUEN/VENTURI, § 4, N 519; WERNLI, Basler Kommentar, CO 707, N 26; WATTER/ROTH PELLANDA, Basler Kommentar, CO 717, N 17a; BAZZANI, p.10 et seq.; with further reference on legal expert opinion, KRINETA, CO 717, N 1885, 1889; FORSTMENER/MEIER-HAYOZ/NOBEL, § 31, N 38.
\textsuperscript{1592} Particularly, scholars of the older legal doctrine reject board of directors’ agreements, see, \textsuperscript{internet:oldest} inter alia, CAFLISCH, p. 139 et seqq., particularly p. 144; VON STEIGER, Stellung, p. 37 et seq.; VON PLANTA, Doppelorganschaft, p. 602 et seqq.; VON BÜREN, Konzern, p. 173, FN 563 (finding board of directors’ agreements unlawful unless in connection with group companies and in situations in which a fiduciary board member represents a legal entity. For further references to the legal literature, see BAZZANI, p. 9, FN 52; GRONER, p. 286, FN 1371. With respect to the GmbH, see HANDSCHIN/TRUNNINGER, § 13, N 73 (finding voting agreements with managing officers generally unlawful).
\textsuperscript{1593} CAFLISCH, p. 145 et seq. (“dass die Verwaltung nur als Instrument der Aktionärsgeamtheit zur Verfolgung der gemeinschaftlichen wirtschaftlichen Zwecke gedacht ist.”).
\textsuperscript{1594} O’NEAL/THOMPSON, §4.4.
\textsuperscript{1595} In favor of admissibility are, inter alia, WERNLI, Basler Kommentar, CO 707, N 26; WATTER/ROTH PELLANDA, Basler Kommentar, CO 716a, N 3; FRICK, § 12, N 1456; MÜLLER/LIPP/PLÜSS, p. 14; BAZZANI, p. 9 with references on legal expert opinion in FN 57; HAAB, p. 385; KRINETA, CO 707, N 163 et seqq. with further references in N 172; LIPS-RAUBER, p. 81; LAZOPOLLOS, Interessenkonflikte, p. 73 et seq.; VON SALIS-LÜTOLF, Finanzierungsverträge, § 12, N 1470 et seqq.; HINTZ-BÜHLER, p. 10; LANG, p. 58; STIRNEMANN, p. 586; DRUEY, Stimmbindung, p. 13 et seq.; HOMBURGER, Zürcher Kommentar, CO 717, N 927 with a detailed overview of legal expert opinion in N 921 et seqq.; FORSTMENER/MEIER-HAYOZ/NOBEL, § 28, N 175 et seqq. and § 31, N 36 et seqq.; APPENZELLER, p. 39 and 49 et seq. More critical, BÖCKLI, Aktienrecht, § 13, N 624 with
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principally admissible, but their limitations are subject to fierce debate (see Section IV.E.3.3.3.6).

3.3.3.4 Legal Nature

Contractual agreements in which a member of the board of directors undertakes to exercise his/her board mandate in the interest of a PEMI and to follow instructions are of mandate-like character. Yet, the qualification as a mandate can only be made in view of a particular voting agreement to be assessed, not in general since board of directors’ agreements may contain negative covenants which cannot be the principal subject matter of mandates. Nevertheless, in most cases, the laws on mandates are directly or analogously applicable.

3.3.3.5 Content

As part of a board of directors’ agreement, the committed board member may agree to exercise his/her mandate pursuant to agreed-upon guidelines (e.g., to safeguard the PEMI’s interests) or to reach certain defined objectives. Moreover, these agreements may relate to particular matters such as those of strategic importance to the firm, or the appointment of persons entrusted with management and representation duties. Contentious among legal scholars is whether directors can also commit to follow the express instructions of the entitled party. For an overview of transactions that PEMIs may deem important, see Section IV.E.3.3.4.5.

3.3.3.6 Limitations

Despite their largely accepted validity by scholars and the courts, board of directors’ agreements are subject to stricter limitations than shareholders’ agreements as a function of the directors’ duties toward the firm. As the members in a GmbH, unlike the shareholders in a stock corporation, also owe a duty of loyalty to the company, voting agreements involving both

Further references on legal expert opinion in FN 1608; BÖCKLI, Aktionärbindungsverträge, p. 486. With respect to voting agreements with managing officers in a GmbH, see FN 1582.


See the decision of the Swiss Federal Supreme Court of 23 June 2003, H 217/02 (E.5.2.1); decision of the Commercial Court of Zurich of 22 November 1959, ZR, No. 70, 1959.

See FN 1095.

See Section IV.E.3.3.3.6.

See Section IV.D.4.1.
members and managing officers of a GmbH are both subject to the stricter limitations discussed below.

General limitations. Board of directors’ agreements are subject to the general limitations of contracts; that is, they must not violate mandatory law, public policy, bonos mores, or basic personal rights (i.e., not represent an unreasonable intrusion in the mandatee’s personal affairs\(^\text{1601}\)), and they must not be impossible to carry out, or otherwise the contract is null and void.\(^\text{1602}\) Moreover, they must adhere to the principle of good faith, the prohibition of abusing the law, and the principle of exercising rights with consideration.\(^\text{1603}\) Clearly, board of directors’ agreements must not undermine the statutory decision-shaping process at the board level and must enable the board to react to changing information.\(^\text{1604}\)

Limitations flowing from the duties of loyalty and care. Limitations of board of directors’ agreements also flow from the directors’ duties of loyalty and care.\(^\text{1605}\) Despite the existence of a double obligation nexus,\(^\text{1606}\) the obliged board member must always place the company’s interests over those of the contractual party to whom he/she has committed himself/herself.\(^\text{1607}\) This is so because, regardless of the chronological order in which the board mandate is accepted and the board of directors’ agreement is concluded, board membership always serves as the starting point and the center of the contractual arrangement. Those giving instructions to committed board members based on the contractual agreement cannot expect any further protection of their specific interests from the committed board members than is permissible by corporate law.\(^\text{1608}\) Hence, only within the scope of a board member’s discretionary powers, that is, the extent to which an independent board member has discretion, to be pursued loyally and carefully in the company’s interest, are directors allowed to follow instructions.\(^\text{1609}\) Instructions that preclude the

\(^{1601}\) CC 27 II; \(\text{see} \) K\(\text{ÄCH}, \) p. 15.

\(^{1602}\) \(\text{See} \) FN 1116.

\(^{1603}\) On the principle of good faith, \(\text{see} \) FN 1204. On the prohibition of abusing the law \(\text{see} \) FN 803. On the principle of objectivity (and exercising rights with consideration), \(\text{see} \) FN 801. Also \(\text{see} \) FELLMANN, Basler Kommentar, CO 397, N 82 et seq.; WEBER, Basler Kommentar, CO 397, N 7.

\(^{1604}\) \(\text{See} \) FN 1121 (with respect to shareholders’ agreements, but analogously applicable to board of directors’ agreements).

\(^{1605}\) On these duties, \(\text{see} \) Sections IV.E.4.1.1 and 4.1.2. \(\text{See} \) FRICK, \(\text{§} \) 12, N 1461; HINTZ-BÜHLER, p. 10 et seq.; FORSTMOSER/MEIER-HAYOZ/NOBEL, \(\text{§} \) 31, N 38; APPENZELLER, p. 49 et seq.

\(^{1606}\) \(\text{See} \) FN 1589.

\(^{1607}\) \(\text{See} \) FN 1591.

\(^{1608}\) \(\text{See} \) NUSSBAUMER/VON DER CRONE, p. 142.

\(^{1609}\) \(\text{See} \) decision of the Swiss Federal Supreme Court of 23 June 2003, H 217/02 (E.5.2.1: “Drittweisungen dürfen aber vom abhängigen oder delegierten Verwaltungsrat insoweit
obliged board member from acting in the company’s best interests are unlawful\textsuperscript{1610} and do not bind the respective board member.\textsuperscript{1611}

Limitations flowing from the duty of equal treatment. Board members are generally subject to the duty of equal treatment of shareholders.\textsuperscript{1612} Lips-Rauber finds that board of directors’ agreements infringe upon this duty when companies have a heterogeneous shareholder structure (i.e., diverging shareholders’ interests).\textsuperscript{1613} Contrary to this viewpoint, this author holds that, in the case of heterogeneous interests, board of directors’ agreements in closely held firms do not generally qualify as impermissible based on the principle of equal treatment as these agreements could be used to promote the voice of minority shareholders vis-à-vis the controlling shareholder’s absolute voting power, thereby contributing to a more balanced distribution of power at the board level, which in turn enhances the company’s attractiveness for outside investors, thus enabling the firm to benefit from both access to financial capital and the value-added services\textsuperscript{1614} that PEMIs contribute. As access to these resources is a legitimate corporate interest, 


\textsuperscript{1611}In case of unlawful instructions, the instructed board member has the mandatory right not to follow the instructions. See the decision of the Commercial Court of Zurich of 18 February 1997 and of 20 August 1999, ZR, No. 98, 1999, p. 244, 259. In case of inappropriate instructions the board member is, however, obliged to give notice to the person giving instructions based on his/her duties of loyalty and care. See Lazopoulos, Interessenkonflikte, p. 75, 193. Yet, even if the representative fails to do so, he/she does not become liable for damages vis-a-vis the entitled party, see Wernli, Basler Kommentar, CO 707, N 37; Forstmoser/Meier-Hayoz/Nobel, § 31, N 38, 40.

\textsuperscript{1612}See Section IV.E.4.1.3.

\textsuperscript{1613}Lips-Rauber, p. 81.

\textsuperscript{1614}See Section II.A.3.2.2.
differential treatment, if it occurs, may be justified, provided that all the other requirements of differential treatment are also met.\textsuperscript{1615}

\textit{Limitations flowing from the non-delegable and inalienable duties of the board of directors}. Scholars heatedly debate whether and to what extent board of directors’ agreements may relate to the board of directors’ non-delegable and inalienable powers.\textsuperscript{1616} (e.g., agreements relating to the determination of the company’s strategy, organization, choice of top management, important financial aspects). According to one view, any direct instructions to board members concerning matters falling within the directors’ non-delegable and inalienable powers are unlawful because they contravene the basic structure of the corporation, particularly the concept of third-party management.\textsuperscript{1617} Moreover, the person entitled to give instructions would become a de facto organ, which BÖCKLI deems against the law.\textsuperscript{1618} BÖCKLI argues that directors must form their own opinions in the company’s interest and vote accordingly, at least with respect to the non-delegable and inalienable tasks.\textsuperscript{1619} The only legally binding commitment which board members can enter into is to exercise their discretion in accordance with the interests and objectives as stated in the contractual agreement, but they do not have any obligation to exercise their board mandate according to the direct instructions they receive from the entitled party.\textsuperscript{1620} Other legal scholars do not distinguish between the natures of duties as long as the instructions only address matters within the director’s legitimate discretion, are in the company’s interests, and are compatible with mandatory law and the duties of loyalty and care to the

\textsuperscript{1615} See Section IV.E.4.1.3.3.
\textsuperscript{1616} CO 716a I. See Section IV.E.2.1.
\textsuperscript{1617} See BÖCKLI, Aktienrecht, § 13, N 458 (“Im Bereich der Kernaufgaben der Art. 716 Abs. 2, Art. 716a und Art. 716b kann sich der Verwaltungsrat ausserhalb des Bereiches seines freien Ermessens schlechterdings nicht rechtsgültig vertraglich dazu verpflichten, Weisungen einer andern Person oder Personengruppe ... zu befolgen”); BÖCKLI, Aktionärbindungsvertrag, p. 485 et seq. See also FRICK, § 12, N 1462; MÜLLER/LIPPS/PLÜSS, 13 et seq.; p. 241 (“Diese Weisungen sind ... nur insoweit verbindlich, als sie nicht gegen Gesetz, Statuten oder die Interessen der Gesellschaft verstossen, und dem Verwaltungsrat keine einseitigen, verbindlichen Vorgaben im Bereich seiner unübertragbaren und unentziehbaren Aufgaben gemäss Art. 716a OR machen.”); LANG, p. 60 et seq. (“Im Bereich der unübertragbaren und unentziehbaren Aufgaben ist es demnach ausgeschlossen, dem Verwaltungsrat aufgrund eines abgeschlossenen Aktionärbindungsvertrags direkte Weisungen zu erteilen.”). Cf. HOMBURGER, Zürcher Kommentar, CO 717, N 929 (finding binding instructions generally unlawful), equally, BERTSCHINGER, Arbeitsteilung, § 4, N 167.
\textsuperscript{1618} See BÖCKLI, Aktienrecht, § 13, N 625.
\textsuperscript{1619} See ibid, § 13, N 628.
\textsuperscript{1620} See BÖCKLI, § 13, N 631 (“Der Verwaltungsrat kann sich dazu verpflichten, grundsätzlich gemäss den ihm bekannt gegebenen Interessen eines Dritten als Auftraggeber zu handeln, solange diese Drittinteressen mit denen der von ihm verwalteten Gesellschaft vereinbar sind und diese Interessenlage den übrigen Mitgliedern des Verwaltungsrats bekannt ist”); BÖCKLI, Aktionärbindungsverträge, p. 486.
firm.1621 This author also endorses this view. Rather than the non-delegable and inalienable powers, the members’ duty of loyalty should be applied as a demarcation line to distinguish whether a board of directors’ agreement is admissible. Moreover, contractual agreements do not transfer any powers1622 and the directors’ liability is not affected, but, as the case may be, is extended to the entitled contractual party as a de facto organ.1623

With respect to the GmbH, legal authors argue that while members can conclude voting agreements related to their inalienable duties,1624 managing officers are not allowed to do so in the area of their non-delegable and inalienable duties.1625 This author does not recognize this differentiation because both are subject to a duty of loyalty and it is not apparent why the respective powers exclusively assigned to each organ should hold different weight.1626 In the author’s view, both members and managing officers should be able to conclude voting agreements that relate to their exclusive powers, provided that they adhere to the limitations outlined above; that is, the agreements must be limited to the scope of the individual’s duty of loyalty and commitment to pursue the company’s best interests.

3.3.3.7 Form

Cf. Section IV.D.3.3.5.7.

3.3.3.8 Legal Effects

Board of directors’ agreements are effective inter partes.1627 They neither oblige nor entitle the company or third parties.1628 They restrict the obliged board members with respect to what they are allowed to do under the agreement, not what they can do in practice. As a result, actions in breach

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1621 See WATTER/ROTH PELLANDA, Basler Kommentar, CO 716a, N 3 (not distinguishing based on CO 716a I, but based on a company-internal and company-external viewpoint. In outside relationships, the board of directors must fully protect the company’s interests; internally a tie is generally possible). Also see WERNLI, Basler Kommentar, CO 707, N 26; BAZZANI, p. 23; GRONER, p. 286 et seqq.; LIPS-RAUBER, p. 64 et seqq.; LAZOPoulos, Interessenkonflikte, p. 73 et seqq.; p. 76, FN 373; VON SALIS-LÜTOLF, Finanzierungsverträge, § 12, N 1482; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 28, N 175, 177, N 36 et seqq.; APPENZELLER, p. 39; FORSTMOSER, Verantwortlichkeit, N 698.

1622 See HOMBURGER, Zürcher Kommentar, CO 716a, N 528.

1623 See APPENZELLER, p. 39.

1624 CO 804 II. See NATER, p. 37.

1625 CO 810 II. See NUSSBAUM/SANWALD/SCHEIDEgger, CO 806, N 22; NATER, p. 37.

1626 CO 803; CO 812 II.

1627 See BÜRGI, Zürcher Kommentar, CO 692, N 42; NUSSBAUMER/VON DER CRONE, p. 139 et seq.

1628 See VON SALIS-LÜTOLF, Finanzierungsverträge, § 12, N 1472; FRICK, § 12, N 1460.
of the agreement are valid vis-à-vis the company.\textsuperscript{1629} If a board member breaches an agreement, he/she is liable for damages and, if the agreement so provides, must pay a contractual penalty unless the breach was necessary to serve the company’s interests. Furthermore, if PEMIs exercise decisive influence on the corporate will via board of directors’ agreements, they risk being qualified as de facto corporate organs and being subject to the same liability as formal organs.\textsuperscript{1630}

3.3.3.9 Duration

\textit{Cf.} Section IV.D.3.3.5.9.

3.3.3.10 Enforcement

If the obliged board member has not infringed on the contractual agreement, but an infringement is imminent, the entitled party may request the court for specific performance. If the obliged director has already violated the agreement, specific performance is no longer possible and damages are often difficult to prove – both of which demonstrates the practical difficulties of legally enforcing board of directors’ agreements. The precautionary measures that can be implemented are even more limited than those with respect to shareholders’ agreements and practically confined to stipulating a contractual penalty to be paid in case of non-fulfilment of contractual duties regardless of the exact damage. The problem with contractual penalties for violating board of directors’ agreements is that typically directors cannot pledge shares to guarantee the obligation. Moreover, albeit their deterrent effect, they cannot prevent a breach of the contract as such and contractual penalties deemed excessive can be reduced by a court.\textsuperscript{1631}

3.3.3.11 Assessment of Legal Tool

In light of legal scholars’ different views as to whether and to what extent board of directors’ agreements are lawful and the difficulties in enforcing the contractual provisions, board of directors’ agreements stand on shaky legal grounds. Concluding such contracts can be useful to clarify the parties’ interests and expectations. However, in doubt, PEMIs should not rely upon this instrument alone to protect their voice at the board level,

\textsuperscript{1629} See BÖRGI, \textit{Zürcher Kommentar}, CO 692, N 42.
\textsuperscript{1630} For further details, see FN 1708.
\textsuperscript{1631} See FN 1165.
particularly if these contracts go beyond the mere duty of safeguarding interests and provide for concrete instructions or agreements with respect to the board of directors’ non-delegable and inalienable duties, which, from the PEMI’s perspective, are most relevant. As a result, PEMIs seeking to enhance their voice at the board level should employ other instruments discussed in this section, in addition to concluding board of directors’ agreements with third-party directors or directors affiliated with the controlling shareholder, that is, they should negotiate for a greater share of board seats to be filled with their representatives, obtain veto power (and even active voice) via appropriately structured resolution requirements, and use the – admittedly – limited means of the general meeting of influencing board decisions (e.g., by narrowly defining the corporate purpose\textsuperscript{1632}), provided that the PEMI has more voting power at the general meeting than at the board level.

4 Minority Investor Duties at Board of Directors Level

4.1 Statutory Framework

The reverse side of management and control rights of the board of directors (and the managing officers in a GmbH) is that each board member and individual entrusted with management duties owes the duties of care and loyalty to the company and a duty of equal treatment to the shareholders.\textsuperscript{1633} Directors are liable for any damage caused if they willingly or negligently violate these duties.\textsuperscript{1634} PEMIs (and their board representatives) should have a precise understanding of these directors’ duties so as to realize the extent to which PEMI interests may be pursued when exercising the board mandate.

4.1.1 Duty of Care

4.1.1.1 Legal Concept

By virtue of the duty of care, each board member (and managing officer in a GmbH) and all third parties engaged with management duties shall carry out their responsibilities with due care.\textsuperscript{1635} The standard of care in

\textsuperscript{1632} For these and other means of influence, see Section IV.D.2.3.
\textsuperscript{1633} CO 717. With respect to the managing officers, CO 812, 813.
\textsuperscript{1634} CO 754 I.
\textsuperscript{1635} CO 717 I. With respect to the GmbH, CO 812 I. Such duty of care corresponds to the directors’ duty of care in a stock corporation, see WATTER/ROTH PELLANDA, Basler Kommentar, CO 812, N 5; MEIER-HAYOZ/FORSTMOER, § 18, N 124.
Switzerland is wholly objective.\textsuperscript{1636} Each board member owes the degree of care, skill, and diligence that would be exercised by a properly acting ordinary person in a comparable situation.\textsuperscript{1637} Relevant is the state of knowledge at the time of decision making without taking into account any future events.\textsuperscript{1638} The standard of care applies to both actions and omissions.\textsuperscript{1639} Subjective lacks of knowledge, experience, time, and/or dependence on a major shareholder are not valid justifications for poor decisions that led to negative outcomes for the firm.\textsuperscript{1640} Yet, the objective standard of care referring to a properly acting ordinary board member sets only a lower limit. Although the law does not stipulate special qualifications for board membership, a director with particular expertise or experience known to the company is expected to share these with the company. Moreover, the standard of care in the respective field of expertise is higher.\textsuperscript{1641} Therefore, a qualified objective test is applied where the individual director’s general knowledge, skills, and experiences are taken into account.\textsuperscript{1642} It follows that PEMI board representatives who are elected to the board of directors specifically based on their knowledge and experience, for instance, in financial matters, are subject to a stricter standard of care with regard to financial and accounting matters than someone appointed in this capacity as a scientist.\textsuperscript{1643} If PEMI board

\textsuperscript{1636} See the decision of the Swiss Federal Supreme Court of 19 June 2002, 4.C 201/2001 (E. 2.1.1); BGE 122 III 195 (E. 3a); BGE 113 II 52 (E. 3a); BGE 109 V 86 (E. 6); BGE 99 II 176 (E. 1). Also prevailing expert opinion, see BÄUERLE/VENUTI, § 2, N 178; BÖCKLI, \textit{Aktienrecht}, § 13, N 575; WATTER/ROTH PELLANDA, \textit{Basler Kommentar}, CO 717, N 5; KRNETA, CO 717, N 1796; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 28, N 21; FORSTMOSER, \textit{Verantwortlichkeit}, N 292. Of another opinion, HOMBURGER, \textit{Zürcher Kommentar}, CO 717, N 821 (“ist ein ‘objektivierter Verschuldensmaßstab’ anzuwenden,” but “Es ist die Vorsicht geboten, welche die VR-Mitglieder in eigenen Angelegenheiten beobachten”).

\textsuperscript{1637} See the decision of the Swiss Federal Supreme Court of 19 June 2002, 4.C 201/2001 (E. 2.1.1); BGE 109 V 86 (E. 6: “was jedem verständigen Menschen in gleicher Lage und unter gleichen Umständen als beachtlich hätte einleuchten müssen”). See BÖCKLI, \textit{Aktienrecht}, § 13, N 575; KRNETA, CO 717, N 1796; HUGUENIN JACOBS, p. 208; similarly WATTER/ROTH PELLANDA, \textit{Basler Kommentar}, CO 717, N 3; BOHRER, § 5, N 179; HOMBURGER, \textit{Zürcher Kommentar}, CO 717, N 771.

\textsuperscript{1638} See BÖCKLI, \textit{Aktienrecht}, § 13, N 581; WATTER/ROTH PELLANDA, \textit{Basler Kommentar}, CO 717, N 6; KRNETA, CO 717, N 1821.

\textsuperscript{1639} See BÖCKLI, \textit{Aktienrecht}, § 13, N 566 et seq.; WATTER/ROTH PELLANDA, \textit{Basler Kommentar}, CO 717, N 3; MÜLLER/LIPP/PLÜSS, p. 238.

\textsuperscript{1640} See BÄUERLE/VENUTI, § 1, N 13; KRNETA, CO 707, N 58; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 28, N 21; DIETRICH, \textit{Brevier}, p. 26 (“Subjektive Entscheidungsgründe wie Zeitmangel, Unerfahrenheit, Fachkenntnismangel und verschuldete Abwesenheit finden keine Berücksichtigung. Beurteilungsmassstab ist einzig und allein das Verhalten von gewissenhaften und vernünftigen Menschen; wobei jedoch die konkrete Situation einbezogen wird.”).

\textsuperscript{1641} See the decision of the Swiss Federal Supreme Court of 19 June 2002, 4.C 201/2001 (E. 2.1.1). Also see WATTER/ROTH PELLANDA, \textit{Basler Kommentar}, CO 717, N 5.

\textsuperscript{1642} See WATTER/ROTH PELLANDA, \textit{Basler Kommentar}, CO 717, N 5.

\textsuperscript{1643} See BÄUERLE/VENUTI, § 2, N 178.
representatives fail to give reasonable attention and care, for instance, by missing meetings without valid reasons or by not exercising the standard of care reasonably expected in light of their knowledge, experience, or qualification, then they are at risk of being held liable.

4.1.1.2 Aspects of Due Care

Due care relates to the following: (i) care in accepting the mandate – the duty to decline board membership due to lack of knowledge or time to perform the duties, or conflict of interest, 1644 (ii) care in choosing the corporate organization such as the duty to design and implement an appropriate organizational structure, a suitable internal control system, and risk management; 1645 (iii) care in performing duties, including, the duty to prepare, regularly attend, and actively participate in board meetings, 1646 and the duty to participate in the implementation of decisions; 1647 (iv) care in financial matters, such as the duty to check the creditworthiness of business partners; to abstain from making payments at a price below fair market value, 1648 to spread risks appropriately and to avoid bulk risks, 1649 to monitor liquidity; 1650 and to seek expert advice if need be; 1651 (v) care in selecting, instructing, and supervising senior management and to intervene in case of adversarial developments; 1652 and (vi) care in tax matters and social insurance contributions 1653. To conform to the standard of due care, BÖCKLI formulates the following guidelines: Do not infringe upon any mandatory provisions or act contrary to the corporate purpose, act in good faith in the interests of the firm, follow proper procedures when making decisions, do not participate in voting if conflicted, and make decisions that are principally comprehensible and objectively justifiable. 1654

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Chapter IV: Voice

4.1.2 Duty of Loyalty

4.1.2.1 Legal Concept

The duty of loyalty requires each board member and third parties engaged with management duties (i) to safeguard the company’s interests and not to pursue their own or a third person’s interests to the detriment of the company. Particularly, PEMI board representatives must subordinate PEMI interests to those of the company and may only take them into consideration where there is room for discretion. (ii) Board members are obliged to abstain from social and business situations or actions that could give rise to a direct or indirect conflict of interest. In addition, they must not exploit any property, information, or business opportunity that could lead to the company’s detriment, and if unavoidable, they must take appropriate measures. In particular, they must abstain from self-dealing transactions. (iii) Board members likewise have a duty to abstain from competing with the company. (iv) If facing a direct and intensive

1655 CO 717 I. On the company’s interests in detail, see HOMBURGER, Zürcher Kommentar, CO 717, N 772 et seqq., 837 (characterizing the duty of loyalty as a duty to safeguard the company’s interests, “Interessenwahrungspflicht”); WATTER/ROTH PELLANDA, Basler Kommentar, CO 717, N 15 et seq. (mentioning the corporate purpose, including a sustainable increase in the corporate value, as a general guideline); KRNETA, CO 717, N 1851, 1886 (defining the duty of loyalty as the duty to refrain from doing anything causing damages to the company) and N 1792 et seq. (“muss die AG … in der Regel gewinnstrebig sein und der VR hat seine Bemühungen ständig auf die Steigerung des Beteiligungswertes des vom Aktionär investierten Kapitals auszurichten … Dabei steht nicht das kurzfristige spekulative Gewinnrealisieren im Vordergrund, sondern das dauerhafte Gedeihen des Unternehmens.”); RUFFNER, Grundlagen, p. 167 et seqq.; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 28, N 25. With respect to the GmbH, see GASSER/EGGENBERGER/STÄUBER, Orell Füssli Kommentar, CO 812, N 4; SIFFERT/FISCHER/PETRIN, CO 812, N 5; NUSSBAUM/SANWALD/SCHIEDEGGER, CO 812, N 3.

1656 See WATTER/ROTH PELLANDA, Basler Kommentar, CO 717, N 15; FRICK, § 12, N 1454; BAUEN/BERNET, p. 165 et seq., N 481; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 28, N 29.

1657 See FRICK, § 12, N 1454; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 28, N 31.

1658 On procedures how to deal with conflicts of interest, see Section IV.E.4.3.2.

1659 See Section III.E.4.3.2.

1660 While legal scholars principally recognize a duty to abstain from competing with the company flowing from the duty of loyalty, the exact content and scope of such duty is unclear. The aim is generally to ensure that board members do not seize corporate opportunities belonging to the company for their own advantage. It is therefore advisable to define the term competitive activity and to specify the duty in the organizational regulations and contractually, see BÖCKLI, Aktiengesetz, § 13, N 613. Generally, board members must neither found a personal enterprise competing with the company of which they are a director nor sit on the board of a competing company. On the duty to abstain from competing, see BÖCKLI, Aktiengesetz, § 13, N 611 (with reference to a “direkte, aktive und lokalisierbare Wettbewerbsfähigkeit.” “Entgegen einer Meinung in der Literatur, darf niemand in den Verwaltungsräten zweier sich direkt und substantiell konkurrierender Gesellschaften sitzen.”); BAUEN/BERNET, p.166, N 482; BOHRER, § 5, N 189; WATTER/ROTH PELLANDA,
conflict of interest\textsuperscript{1661} the board member must not participate in any manner whatsoever when a decision on the critical transaction is reached.\textsuperscript{1662} Finally, the duty of loyalty comprises the obligation for all members of the board and executive managers to observe confidentiality with regard to corporate matters and all information gained in their roles and interactions with the company.\textsuperscript{1663} Such obligation prohibits them not only from disclosing confidential facts, but also from giving sensitive documents (e.g., transaction records, meeting minutes, correspondence) to third parties or allowing third parties to inspect such documents.\textsuperscript{1664} This commitment to confidentiality not only applies to the business secrets protected by the Swiss Criminal Code, but to any proprietary information that is not common knowledge, and which the company does not intend to disclose, and the disclosure of which would prejudice the company’s legitimate interests and likely harm the company.\textsuperscript{1665} Corporate documents in the possession of board members must be stored such that they are not accessible by third parties.\textsuperscript{1666} Yet, via a board resolution, singular board members or executive managers may be exempted from the duty of confidentiality on a case-by-case basis if this is in the company’s interest.\textsuperscript{1667}

\textit{Basler Kommentar}, CO 717, N 18 (referring to both a direct competition and sitting on the board of a competitor or holding a significant stake in a competitor except where such facts where known to the general meeting when appointing the respective board member); \textit{Krneta}, CO 717, N 1912, 1920 (holding that if a competitive situation arises during the course of the board mandate the respective board member is obliged to inform the board of directors immediately. In addition, the general meeting must be informed before any potential re-election); \textit{Homburger, Zürcher Kommentar}, CO 717, N 888; \textit{Forstmoser/Meier-Hayoz/Nobel}, § 28, N 35 et seqq. (“Der Umfang des Konkurrenzverbots richtet sich nach den konkreten Umständen.”).

\textsuperscript{1661} See Böckli, \textit{Aktienrecht}, § 13, N 643.

\textsuperscript{1662} On the duty to abstain from decision making, see Böckli, \textit{Aktienrecht}, § 13, N 643 et seqq.; Wernli, \textit{Basler Kommentar}, CO 707, N 31a; Lips-Rauber, p. 111 et seqq.; Forstmoser/Meier-Hayoz/Nobel, § 28, N 34 et seqq.


\textsuperscript{1664} See Watter/Roth Pellanda, \textit{Basler Kommentar}, CO 717, N 20c; Käch, p. 106 et seq.; Homburger, Zürcher Kommentar, CO 717, N 842.


\textsuperscript{1666} See Watter/Roth Pellanda, \textit{Basler Kommentar}, CO 717, N 20c; Homburger, Zürcher Kommentar, CO 717, N 842.

\textsuperscript{1667} See Homburger, Zürcher Kommentar, CO 717, N 843.
Equally, the managing officers and third parties in charge of GmbH management are subject to the duty of loyalty to the company, and the aforementioned considerations concerning the directors’ duty of loyalty apply analogously. Also, the GmbH members are subject to a duty of loyalty. Likewise, it is possible to allow for exceptions to members’ and managing officers’ general duty of loyalty and, if applicable, the prohibition to compete on a case-by-case basis provided that all the other members agree in writing or, if the articles of association so provide, that the meeting of members approves such exception. Different from the GmbH members’ duty of loyalty, however, the managing officers’ loyalty includes both a duty to abstain and also a duty to take actions where necessary in the company’s interest. The managing officers’ prohibition of competition at the corporate level is valid only so long as the respective managing officer is in charge of the company’s management. If the duty to abstain from competing with the company shall prevail beyond that point, it must be stated in contractual agreements between the company and the managing officers or third parties with managerial functions.

4.1.2.2 Minority Investor Representatives on the Board of Directors

PEMI representatives on the board of directors exercise their mandates in their own name and accept their own responsibility for their votes. Hence, they are not agents as regulated by commercial law, but members of the board of directors with rights and obligations equal to all other board members and subject to the same corporate liability. They owe the
same duty of care and loyalty to the firm and must give preference to its interests over those of the PEMI.\textsuperscript{1678} Only within the scope of the discretionary powers – the extent to which an independent board member has discretion, to be pursued loyally and carefully in the company’s interest\textsuperscript{1679} – can the PEMI board representative attend to the interests of the shareholders he/she represents.\textsuperscript{1680} Certainly, members of the board of directors can have different views on corporate strategy and focus on different objectives (e.g., financial returns, social or environmental concerns, or preserving the firm’s heritage) based on factors such as their social backgrounds, knowledge and education, and propensity for risk – and these different views and objectives can all be interpreted as in the company’s interests.\textsuperscript{1681} However, the directors representing certain (groups of) shareholders are particularly exposed to liability risk\textsuperscript{1682} because, based
on jurisprudence and certain legal scholars, the normally applied assumption of dutiful conduct is dropped if a director has a conflict of interest, and hence PEMI board representatives must be cautious if conflicted. As a result of these limitations, the PEMI’s voice at the board level through his/her representatives should not be viewed as a direct extension of the PEMI’s voice as shareholder.

Legal scholars fiercely debate if and to what extent board representatives are suspended from their duty of confidentiality vis-à-vis the shareholders they represent. Legal scholars agree that board members must keep absolute business secrets confidential. Other clear-cut cases are those in which the company has nothing to hide and no intention of secrecy. More difficult to assess is disclosure of information that falls within the grey area. With respect to a representative of a legal entity or commercial undertaking, the Swiss Federal Supreme Court in 2006 held that the representative must observe confidentiality vis-à-vis the shareholders he/she is representing.

In direct contrast, the Swiss Federal Council followed from the nature of the relationship between the legal entity or commercial undertaking and its natural representative on the board of directors that the representative can reveal information to the former on the board’s work. Legal scholars are divided on this duty of confidentiality point, both with respect to the scope of information that may be given to an outside entity (i.e., to a PEMI from

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1683 BGE 130 III 213 (E. 2.2.2: “dass strenge Massstäbe anzulegen sind, wenn ein Verwaltungsrat nicht im Interesse der Gesellschaft, sondern in eigenem, in demjenigen von Aktionären oder von Drittpersonen handelt”); BGE 113 II 52 (E. 3a). With respect to a liquidator’s liability, see 4C.139/2001 E. 2a/bb (“Dazu kommt, dass bei einem Handeln unter Interessenkonflikt die sonst geltende Vermutung zu Gunsten eines pflichtgemässen Handelns entfällt und statt dessen Pflichtwidrigkeit zu vermuten ist”); 4C.235/2006 (E. 3.3).

1684 See BAZZANI, p. 30 et seq.; STUTZ/VON DER CRONE, p. 106; with further references LAZOPoulos, Interessenkonflikte, p. 175; HUNGERBÜHLER, p. 200; VON DER CRONE, Interessenkonflikte, p. 8.

1685 In the legal literature, absolute and relative business secrets are distinguished. Absolute business secrets (e.g., banking secret) are secrets which relate to third parties and which the company, based on a confidentiality agreement, must not disclose. Relative business secrets (e.g., customer information) are maintained confidential in the company’s interest. Here, disclosure is, however, in principle possible. On both terms in detail, see BÖCKLI, Aktienrecht, § 12, N 155; FRICK, § 12, N 1368 et seq.; BÖCKLI/BÜHLER, Vorabinformationen, p. 105; MAROLDA MARTINEZ, p. 36 et seq. and 154 et seqq.; STÜCKELBERGER, p. 44 et seqq.; KUNZ, Minderheitsenschutz, § 12, N 24; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 40, N 175 et seqq.; FORSTMOSER, Meinungsausserungsrechte, p. 95; GABRIELLI, p. 30 et seq.; with further references, Horber, Informationsrecht, p. 243 et seq., N 777, FN 1268; EPPEMBERGER, p. 168 et seqq.

1686 See LIPS-RAUBER, p. 90.

its board representative) and what kind of representative is entitled to do so. On the one hand, scholars argue that the suspension of confidentiality is necessary in some cases since the represented shareholder can give proper instructions to the board representative only if he/she possesses the necessary factual information. Therefore, some legal experts find that giving out confidential information and documents is lawful to the extent that it is necessary and suitable for the represented (receiving) party to issue instructions provided the represented shareholder is so entitled. Others scholars are critical of such an ‘upward’ movement of information. In reality, directors often chat with the shareholders they represent about

With regard to the representative of a legal entity or commercial undertaking, against any ‘upward’ movement of information is Böckli, Aktienrecht, § 13, N 477 (“Eine starke Einschränkung der Informationsdurchlässigkeit ‚nach oben‘ muss … von der Gesellschaft auch im Sonderfall des Art. 707 Abs. 3 durchgesetzt werden”); BAUEN/VENTURI, § 4, N 519; LIPS-RAUBER, p. 90 et seq.; PLÜSS, p. 79, FN 418). Less restrictive, FORSTMOSER, Interessenkonflikte, p. 17 (arguing in favor of a restriction at least in cases of factual and potential business relations between the firm and such legal person). In favor of passing information subject to limitations are FORSTMOSER/MEIER-HAYOZ/NOBEL§ 28, N 46 (finding disclosure problematic, but admissible if the corporate organs of the delegating company are subject to confidentiality themselves); LAZOPoulos, Interessenkonflikte, p. 105 et seq. (arguing in favor of relaxing these insofar as it is of significance for issuing instructions, whereby the company interests are in no way to be contradicted and the shareholder is also sworn to secrecy; also see KRNETA, CO 707, N 145, 148; WATTER/ROTH PELLADA, Neuerungen, p. 132; WENNINGER, p. 166; HOMBURGER, CO 717, N 934 et seq. (allowing to pass information if such is in the interest of the company and necessary and suitable to safeguard the interest of the shareholder); equally, KÁCH, p. 125 et seq.

With regard to the representative of a class of shares or a group of shareholders, prevailing legal opinion holds that he/she must not disclose further information to the shareholders he/she represents because passing information would constitute an unjustified privilege of the represented shareholders and because it could damage the company since the shareholders themselves are not subject to confidentiality. See Böckli, Aktienrecht, § 13, N 668; WERNLI, Basler Kommentar, CO 709, N 18; WATTER/ROTH PELLANDA, Basler Kommentar, § 717, N 21; KRNETA, CO 709, N 368; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 28, N 48; WENNINGER, p. 168. However, cf. HOMBURGER, CO 717, N 934 et seq. (allows the representatives of classes of shares to inform the shareholders they represent if such is in the interest of the company and necessary and suitable to safeguard the interest of the respective shareholders).

With regard to the fiduciary representative, a number of legal scholars argue in favor of a restricted information right, see WATTER/ROTH PELLANDA, Basler Kommentar, CO 716a, N 3; CO 717, N 21; FRICK, § 12, N 1463; BAUEN/VENTURI, § 1, N 67 (finding that confidential information may in principle only be passed by the fiduciary member to the instructing shareholder as long as the entire board is aware of the fiduciary relationship and in the absence of any objections from another board member); LAZOPoulos, Interessenkonflikte, p. 105 et seq. (arguing again in favor of relaxing these insofar as it is of significance for issuing instructions, whereby the company’s interests are in no way to be contradicted and the shareholder is also sworn to secrecy. For natural persons, he sees a tacit obligation to secrecy, but an explicit clause is advisable to be sure); LIPS-RAUBER, p. 94 (requiring for the transfer that there are no confidentiality interests worthy of protection or no confidentiality will and the information is necessary for issuing instructions); HOMBURGER, CO 717, N 934 (finding an orientation of the entrustor on the board’s work admissible insofar as his/her interests are concerned. The entrustor himself is subject to confidentiality and liable of any damages resulting from a breach thereof).
what has been discussed at board meetings if it serves the shareholders’ interests with no real sense of any wrongdoing.  

4.1.3 Duty of Equal Treatment

4.1.3.1 Legal Concept

The duty of equal treatment requires each director of a stock corporation (managing officer in a GmbH) and third parties engaged in management duties to treat the shareholders (members in a GmbH) in the same circumstances equally. The principle of equal treatment does not, however, relate to shareholders as persons but to their equity stakes. Therefore, on this issue, NOBEL suggests speaking of the principle of equal treatment of shares, rather than of shareholders.

4.1.3.2 Obligors

The principle of equal treatment serves as a benchmark for the actions of corporate organs. Resolutions of the general meeting are challengeable if they discriminate against or disadvantage certain shareholders for reasons not in the firm’s interest. Moreover, board members and third parties engaged in corporate management must observe the principle of equal treatment. Even though not addressed to the individual shareholders directly, the principle of equal treatment functions as a constraint on the

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1690 See BÖCKLI, Aktienrecht, § 13, N 72, FN 179; realistically also FORSTMOSER/MEIER-HAYOZ/NOBEL, § 28, N 49 (“In der Praxis wird diese Schranke kaum beachtet.”); also see WENNINGER, p. 170 (leaving the question on the passing of information open because in practice the violation of stock corporation confidentiality by the entrustor hardly causes any problems).

1691 See, on this topic in general, inter alia, HUGUENIN JACOBS.

1692 See BGE 117 II 290, 312 (E. 6b: “En principe, les actionnaires ont droit au même traitement.”). See BÖCKLI, Aktienrecht, § 13, N 679; VON SALIS, p. 25; HUGUENIN JACOBS, p. 31 (“Das aktienrechtliche Gleichbehandlungsprinzip besagt, dass die Aktionäre nach Massgabe ihrer Rechte gleich zu behandeln sind.”). With respect to the GmbH, CO 813. See WATTER/ROTH PELLANDA, Basler Kommentar, CO 814, N 3; MEYER-HAYOZ/FORSTMOSER, §18, N 124.

1693 See NOBEL, Finanzmarktrecht, § 10, N 184; cf. also BÖCKLI, Aktienrecht, § 13, N 679.

1694 See PERAKIS, p. 30; HÜNERWADEL, p. 90. However, the individual shareholder must observe the principle of equal treatment if exercising effective and decisive influence on corporate decision making and therefore qualifying as a de facto organ of the company, see FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 30. On de facto organs, see Section IV.E.4.1.4.

1695 CO 706 II Sec. 3. With respect to the GmbH, CO 808c i.e.w. CO 706 II Sec. 3.

1696 CO 717 II. Analogously, the managing officers and third parties in charge of the management of a GmbH shall, under equal circumstances, give equal treatment to the members (CO 813).
controlling shareholders’ pursuit of private benefits of control\textsuperscript{1697} in that such benefits are made possible by corporate organs who must abstain from unjustified differential treatment of shareholders.

### 4.1.3.3 Admissibility of Differential Treatment

With regard to the shareholder rights susceptible to being proportionally modified, that is, financial and voting rights, shareholder equality is relative in that it is proportional to the shareholder’s capital participation.\textsuperscript{1698} With regard to indivisible rights\textsuperscript{1699} (e.g., the right to participate in the general meeting, the minimum right to one vote, the right of action, and information rights), the question as to whether and under what circumstances differential treatment is lawful is answered differently by legal experts. Some authors hold that with regard to indivisible rights, the principle of equal treatment is absolute.\textsuperscript{1700} Other authors advocate relative equal treatment and find a departure from the principle admissible, even for information rights, provided that certain conditions are met. According to VON SALIS, differential treatment must be (i) objectively justified in relation to the company’s interests, (ii) adequate and necessary to achieve the objective(s) pursued, (iii) the least affecting means to achieve a goal, and (iv) such that unequal effects on shareholders are proportional in relation to the company’s interests.\textsuperscript{1701} According to Swiss Federal Supreme Court jurisprudence, differential treatment is permissible where necessary to pursue the corporate purpose in the interests of all shareholders, where it is


\textsuperscript{1698} See BÖCKLI, Aktienrecht, § 13, N 680; WATTER/ROTH PELLANDA, Basler Kommentar, CO 717, N 23; BAUEN/BERNET, p. 91, N 284; MEYER-HAYOZ/FORSTMOSER, § 16, N 146; KRNETA, CO 717, N 1922; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 51; HUGUENIN JACOBS, p. 38.

\textsuperscript{1699} These rights are not granted based on the nominal value or number of shares held or based on particular shareholder characteristics. See, inter alia, HUGUENIN JACOBS, p. 70 and 188.

\textsuperscript{1700} See KUNZ, Minderheitenschutz, § 8, N 56 et seq., particularly N 78; GABRIELLI, p. 19 et seq.; HUGUENIN JACOBS, p. 70 and 244.

not arbitrary, and constitutes an appropriate means of achieving a justified end.¹⁷⁰²

Both in a stock corporation and a GmbH, differential treatment in the initial articles of association is accepted because it is based on the founders’ unanimous consent.¹⁷⁰³ Thereafter, protection results from the statutory requirements of disadvantaged shareholders to consent to unfavorable amendments (e.g., in case of the removal of preferred shares).¹⁷⁰⁴ The rules governing the GmbH explicitly state the admissibility of differential treatment if the disadvantaged members consent, for example, to the subsequent introduction of an obligation to make supplementary financial contributions, to provide ancillary performances, or the introduction of veto rights for the benefit of certain members.¹⁷⁰⁵ The principle of relative equal treatment allows members of the board of directors (and managing officers in a GmbH) to consider the individual circumstances and provide the necessary scope for considering a person-oriented ownership structure.¹⁷⁰⁶

4.1.4 De Facto Organs

The duties of loyalty, care, and equal treatment apply to board members and third-party executive managers officially empowered with management tasks. The Swiss Federal Supreme Court ties these duties to function within the corporate organization rather than to appointment.¹⁷⁰⁷ According to its rulings, not only formal organs, but any person or corporate entity with a

¹⁷⁰² See the decision of the Swiss Federal Supreme Court of 5 March 2003, 4C.242/2001 (E. 3.3: “Die vom Gesetz verlangte Gleichbehandlung gilt indessen nicht absolut, sondern nur relativ, indem davon abgewichen werden darf, soweit dies für die Verfolgung des Gesellschaftszweckes im Interesse der Gesamtheit aller Aktionäre unumgänglich notwendig ist.”); BGE 117 II 290, 312 (E. 6b: “Un traitement différencié peut ainsi être licite à condition de ne pas être arbitraire, mais de constituer un moyen approprié pour atteindre un but justifié. L’égalité de traitement de tous les actionnaires n’implique, notamment, pas que les conséquences économiques soient les mêmes pour tous.”); BGE 95 II 157, 162 et seq. (E. 9a.: “Une différenciation de traitement est aussi doré au plus, mais elle ne peut être en contradiction avec le but recherché. L’égaleité de traitement de tous les actionnaires n’implique, notamment, pas que les conséquences économiques soient les mêmes pour tous.”); BGE 91 II 298, 301 (E. 2: “Une solche unterschiedliche Behandlung bzgl. des Bezugsrechts der Aktionäre darf daher … nur vorgenommen werden, soweit sie zur Erreichung der gerechtfernten Zweckes ist.”); BGE 91 II 298, 301 (E. 2: “Eine solche unterschiedliche Behandlung bzgl. des Bezugsrechts der Aktionäre darf daher … nur vorgenommen werden, soweit sie zur Verfolgung des Gesellschaftszweckes unerlässlich ist.”).

¹⁷⁰³ CO 629 I; CO 777 I. Cf. WATTER/ROTH PELLANDA, Basler Kommentar, CO 717, N 24 et seq. (finding differential treatment acceptable if a shareholder waives the application of the principle. However, it would be unlawful to stipulate in the the articles of association that the board of directors was not obliged to observe the principle of equal treatment).

¹⁷⁰⁴ CO 656f1IV.

¹⁷⁰⁵ CO 797, 807 II. See WATTER/ROTH PELLANDA, Basler Kommentar, CO 813, N 5.


¹⁷⁰⁷ See HARRIS, p. 102.
firm relationship with the company and that exercises effective and decisive influence over the formation of the company’s will by virtue of possessing independent decision making autonomy in an essential sphere of responsibility formally reserved for the company’s directors and officers are subject to the same obligations as de facto organs.\textsuperscript{1708} If a PEMI instructs its board representative(s) and thereby exercises significant influence on the formation of the corporate will the PEMI is at risk of being qualified as a de facto organ and subject to the same liability as formal organs.\textsuperscript{1709} The PEMI thus faces unlimited liability with the whole of its property if its influence over the board’s will results in damage to the corporation, its shareholders,

\textsuperscript{1708} See BGE 128 III 92 (E. 3a: “Organhaftung nach Art. 754 aOR erfasst nicht nur die Mitglieder des Verwaltungsrates, sondern alle mit der Geschäftsführung betrauten Personen. Als mit der Verwaltung oder Geschäftsführung betraut im Sinne dieser Bestimmung gelten nicht nur Entscheidungsgremien, die ausdrücklich als solche erkannt sind, sondern auch Personen, die tatsächlich Organen vorbehaltene Entscheide treffen oder die eigentliche Geschäftsführung besorgen und so die Willensbildung der Gesellschaft massgebend mitbestimmen”); BGE 124 III 418 (E. 1b); BGE 122 II 225 (E. 4b: “Erforderlich ist vielmehr, dass er die Willensbildung des Unternehmens zu beeinflussen vermag”); BGE 117 II 570; BGE 114 V 78 (E. 3); BGE 114 V 213 (E. 3); BGE 107 II 349 (E. 5a); BGE 104 II 190 (E. 3b). With respect to the GmbH, see BGE 126 V 237 (E. 4: “Als mit der Geschäftsführung befasst gelten nicht nur Personen, die ausdrücklich als Geschäftsführer erkannt worden sind (sog. formelle Organe); dazu gehören auch Personen, die faktisch die Funktion eines Geschäftsführers ausüben, indem sie etwa diesem vorbehaltene Entscheide treffen oder die eigentliche Geschäftsführung besorgen und so die Willensbildung der Gesellschaft massgebend beeinflussen (materielle oder faktische Organe”). In its report, the Swiss Federal Council (see Federal Council report, BBI (1983), p. 935) defines de facto organs as follows: “Als faktisches Organ gilt der Hauptaktionär, der sich in die Geschäftsführung einmischt, der Treugeber oder Hintermann, der dem fiduziarischen Verwaltungsrat Weisungen erteilt, alle stillen und verdeckten Verwaltungsräte, alle verborgenen Direktoren sowie jedermann, der, ohne gewählt oder besonders bezeichnet worden zu sein, dauernd und selbstständig für die Gesellschaft und ihr Unternehmen wichtige Entscheide fällt.” See BÖCKLI, Aktienrecht, 13, N 625; § 18, N 109 et seqq. (deeming de facto organs as unlawful); WATTER/ROTH PELLANDA, Basler Kommentar, CO 717, N 21; KRNETA, CO 707, N 150 and CO 754, N 2067; BERTSCHINGER, Arbeitsteilung, § 4, N 108; FORSTMOSER, Organisationsreglement, p. 46 (“wonach Organfunktionen ausübt, wer in massgebender Weise an der Willensbildung der AG teilnimmt und korporative Aufgaben selbstständig erfüllt, wer die eigentliche Geschäftsführung besorgt und so die Willensbildung der Gesellschaft massgebend mitbestimmt”). On de facto organs, see also BAUEN/VENTURI, § 7, N 679; KAMMERER, p. 30 et seqq.; HÖNERWADEL, p. 98 (finding that not only a person with regular and continuous influence, but also one-off influence can qualify as a de facto organ if such influence is significant). With respect to the GmbH, see WIDMER/GERICKE/WALLER, Basler Kommentar, CO 827, N 5.

\textsuperscript{1709} Pursuant to CO 754 I all persons engaged in the management of a company can be held liable. Formal organs that are subject to liability as stated in CO 754 et seqq. are members of the board of directors elected by the general meeting and entered into the Commercial Register (see KRNETA, CO 754, N 2065; LAZOPoulos, Interessenkonflikte, p. 28; KÄCH, p. 35; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 37, N 3). Material organs are organs that obtain their position not originally, i.e., directly based on corporate law, but through delegation, see KRNETA, CO 754, N 2065; LAZOPoulos, Interessenkonflikte, p. 29; KÄCH, p. 35.

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or its creditors.\textsuperscript{1710} The exertion of influence confined to the mere exercise of voting rights at the general meeting\textsuperscript{1711} and/or counseling board members does, however, not qualify as exerting influence; only the usurpation or transfer of board of directors’ responsibilities.\textsuperscript{1712} Likewise, the position as majority or major shareholder does not automatically garner the status of a de facto organ; only if power is actually used and a considerable influence is exercised on corporate management may the PEMI be considered a de facto organ.\textsuperscript{1713} Major shareholders not exerting such influence are not subject to a duty of loyalty, but they must still observe the duties of good faith and not to abuse legal rights.\textsuperscript{1714}

4.2 Assessment of Legal Status and Further Need for Protection

Legal scholars and jurisprudence have placed the duties of loyalty, care, and equal treatment into concrete terms – yet, some ambiguity remains. Therefore, the parties (majority shareholders and PEMIs) may want to specify their board representatives’ duties by defining clear guidelines in case conflicts of interest arise, and by implementing procedures for self-dealings, and rules on abstention from decision making, on how to handle documents in possession of board members, confidentiality undertakings, and non-compete obligations.

\textsuperscript{1710} See HANDSCHIN, \textit{Swiss company law}, p.132.
\textsuperscript{1711} See BÖCKLI/BÜHLER, \textit{Vorabinformationen}, p. 108.
\textsuperscript{1712} On the difficult question what degree of influence is required to qualify as a de facto organ, see LIPS-RAUBER, p. 145. According to the Swiss Federal Supreme Court, instructions in individual cases are not sufficient. The court requires that a person continuously makes decisions that go beyond the firm’s daily business and impact its business results independently, see BGE 128 III 29 (E. 3a: “Weder ein Handeln im Einzelfall noch eine bloss hilfsweise Tätigkeit in untergeordneter Stellung vermag hingegen die spezifische Organhaftung zu begründen.”); BGE 128 III 92 (E. 3a: “Während insbesondere eine blosse Einflussnahme von Organen … regelmässig keine Organverantwortung gegenüber der Tochtergesellschaft begründet, entsteht eine fak. Organschaft in der Tochtergesellschaft jedenfalls dann, wenn sich (übertragene oder usurpierte) Zuständigkeiten bilden”); BGE 117 II 570 (E. 3: “Eine blosse Mithilfe bei der Entscheidfassung genügt nicht. … Die aktienrechtliche, organschaftliche Verantwortlichkeit greift dagegen nur dann Platz, wenn die Kompetenzen der Beteiligten wesentlich über die Vorbereitung und Grundlagenbeschaffung hinausgehen und sich zu einer massgebenden Mitwirkung bei der Willensbildung verdichten.”).
\textsuperscript{1714} See BÖCKLI/BÜHLER, \textit{Vorabinformationen}, p. 108. See also FN 1205.
4.3 Legal Structuring Options

4.3.1 Duty of Confidentiality

As a consequence of the uncertainties of whether PEMI board representatives may pass on information, PEMIs are well advised to (i) expressly agree with their board representatives on the obligation to report back and communicate all information that they obtain as board members, including all information relevant to monitoring the investment and for giving instructions provided that the directors do not consider such information harmful to the company’s interest and as long as it is lawful under their own responsibilities; and (ii) to ask the board of directors in its entirety for authorization of the PEMI board representative(s) to do so. Conversely, PEMIs typically agree to maintain confidentiality with respect to any business secret or information of a confidential nature concerning the business or affairs of the company except if any applicable statutory or accounting requirements state otherwise. PEMIs also agree not to use such information other than for the purpose of monitoring, exercising their shareholder rights, and giving directions to their board representatives.1715

4.3.2 Dealing with Conflicts of Interest

As outlined in the theoretical foundations in Chapter II, private equity minority investments hold significant potential for conflicts of interest among the shareholders and the corporate agents nominated by them, which is why it is important for PEMIs to have appropriate procedures in place to effectively address such conflicts and prevent them from escalating to a serious fallout between the parties.

The most critical conflicts-of-interest situations with respect to the board of directors are transactions of board members concerning their personal interests or the interests of related parties,1716 namely self-dealing and related-party transactions. Self-dealing refers to situations in which the company is represented by a person with whom it concludes a contract.1717 Related-party transactions are transactions in which the company’s agent (a board member or manager) enters into a contract on behalf of the company with a related third party. The problem with these transactions is that the person directly or indirectly benefiting is an agent of the company and therefore able to control the company’s approval of such transactions. As a

1715 For more details on confidentiality agreements, see Section V.D.3.2.
1716 See FORSTMOSER, Organisationsreglement, p. 60.
1717 CO 718b.
result, the usual presumption that both parties of a transaction routinely pursue their own interests does not hold because the agent acting on behalf of the company is likely to look out for his/her own interests. Hence, such transactions call for specific rules. The law requires contracts between the company and its representatives to be in writing, except in case of daily business matters where the company’s financial obligation does not exceed CHF 1,000. In addition to this formal requirement, the Swiss Federal Supreme Court has defined material requirements for accepting self-dealing transactions: where the nature of such transaction ensures it is conducted at arms’ length and rules out any disadvantages to the company, and in case of a prior authorization or a later approval of board members unaffected by the transaction or the general meeting. Pursuant to the Draft Legislation, board members and third parties engaged with the firm’s management shall inform the chairman of the board without delay and thoroughly on any conflicts of interest. If necessary, the chairman informs the entire board of directors, which will then take appropriate measures necessary to safeguard the company’s interests. The organizational regulations can clarify these measures and provide for further rules such as the following, as the case may be, to be applied

1718 See BAUMS/SCOTT, p. 4.
1719 CO 718b. The written form requirement pursuant to CO 718b exists cumulatively to the other (material) requirements as stated by the Swiss Federal Supreme Court, see BÖCKLI, Aktienrecht, § 13, N 605e; WATTER/ROTH PELLANDA, Basler Kommentar, CO 718b, N 9. The same applies in the GmbH, CO 814 IV i.c.w. 718b.

1720 For example, such may be the case if the value of a particular transaction is based on a market price or a valuation of a trustworthy third party. For further references to legal expert opinion and jurisprudence, see BÖCKLI, Aktienrecht, § 13, N 603.

1721 Unclear is whether seeking the general meeting’s approval is alternatively possible or only in cases in which there is no director authorized for approval, as the case may be because they are all subject to a conflict of interest. The Swiss Federal Supreme Court seems to endorse the latter, see BGE 127 III 332 (E. 2aa); also see SCHOTT, p. 196, 206 et seq. In favor of the former, LAZOPoulos, Interessenkonflikte, p. 124 et seq.

1722 See BGE 127 III 332 (E. 2a); BGE 126 III 361 (E. 3a: “Selbstkontrahieren hat deshalb die Ungültigkeit des betreffenden Rechtsgeschäftes zur Folge, es sei denn, die Gefahr einer Benachteiligung des Vertretenen sei nach der Natur des Geschäftes ausgeschlossen oder der Vertretene habe den Vertreter zum Vertragsschluss mit sich selbst besonders ermächtigt oder das Geschäft nachträglich genehmigt”); BGE 95 II 442 (E. 5; with respect to the GmbH); BGE 89 II 321 (E. 5). See, in detail with further references to legal expert opinion, BÖCKLI, Aktienrecht, § 13, N 603. With respect to the GmbH, see SIFFERT/FISCHER/SPETRIN, CO 812, N 5.

1723 See FN 463.
1724 D-CO 717a.
1725 See WATTER/ROTH PELLANDA, Basler Kommentar, CO 718b N 13; MÜLLER/LIPP/PLÜSS, p. 222 (finding it permissible to stipulate rules on abstention from decision making in the articles of association); MÜLLER, Arbeitnehmer, p. 497 et seq.
1726 On practical rules of conduct in case of a conflict of interest, also see BÖCKLI, Aktienrecht, § 13, N 649 et seqq. When defining related-party transactions, a simple definition should be employed rather than providing a detailed list of categories of people, entities, and
only if the transaction in question exceeds a certain threshold value, for instance, CHF 10,000\textsuperscript{1727} and with regard to contracts outside the ordinary course of business. All members of the board of directors and the executive managers shall:

→ arrange his/her personal and business affairs so as to avoid, as far as possible, conflicts of interest with the company,\textsuperscript{1728}

→ document conflict-of-interest transactions in writing, which effectively is a prerequisite to allow the board of directors to carry out a subsequent examination of the business matter,

→ disclose conflicts of interest to the board chairman and if the chairman is also conflicted, to the board of directors at large,\textsuperscript{1729}

→ carry out transactions at arm’s length.\textsuperscript{1730} According to this principle, transactions between related parties must be made on the same commercial terms as if the parties were unrelated; services offered and gains must be in an appropriate ratio to each other. This ratio is easily verifiable if a market price or exchange quotation can be identified as a benchmark.\textsuperscript{1731} Alternatively, the fairness opinion of a neutral third-party expert can be used to assess the adequacy of performance and consider counter-performance.\textsuperscript{1732} As a caveat, it is important to note that using market prices or exchange quotations as benchmarks or obtaining a fairness opinion does not influence whether the transaction in question makes economic sense for the company, is necessary, or is in the firm’s best interest.\textsuperscript{1733} Moreover, obtaining a fairness opinion can be time-consuming and costly,

transactions which may exclude certain complex transactions that do not meet the definition. A good example is provided by the International Accounting Standards, § 24.

\textsuperscript{1727} See WATTER/ROTH PELLANDA, Basler Kommentar, CO 718b, N 13; MÜLLER, Arbeitnehmer, p. 497 et seq.

\textsuperscript{1728} Cf. SCBP 16; see LAZOPOULOS, Bewältigung, p. 139 et seq. With respect to the GmbH, see HANDSCHIN/TRUNIGER, § 14, N 118.

\textsuperscript{1729} Cf. SCBP 16. See FORSTMOSER, Interessenkonflikte, p. 18. With respect to the GmbH, see HANDSCHIN/TRUNIGER, § 14, N 118.

\textsuperscript{1730} Cf. SCBP 16. See BÖCKLI, Aktienrecht, § 13, N 646; WATTER/ROTH PELLANDA, Basler Kommentar, CO 717, N 15; GIGER, p. 364 et seqq.; RUFFNER, Grundlagen, p. 239 et seqq.; see LAZOPOULOS, Bewältigung, p. 139 et seq; FORSTMOSER, Interessenkonflikte, p. 18; VON DER CRONE, Interessenkonflikte, p. 9.

\textsuperscript{1731} See VON der Crone, Interessenkonflikte, p. 9.

\textsuperscript{1732} See ROTH PELLANDA, p. 174, N 347; FORSTMOSER, Interessenkonflikte, p. 18; VON der Crone, Interessenkonflikte, p. 9.

\textsuperscript{1733} See VISCHER/BORSARI, p. 380, FN 27; LAZOPOULOS, Interessenkonflikte, p. 119; VON DER CRONE, Interessenkonflikte, p. 9.
seek approval by disinterested directors, by an approval committee, the entire board of directors, or a corporate body (on the same level or superior to the board of directors).

Despite being a (relatively) cheap tool, note again, that this instrument is of a procedural nature and does not assess the material adequateness of the transaction to be evaluated. In the case of disinterested directors, there is a danger that they are nonetheless dependent on the beneficiaries’ goodwill (even if no direct financial benefit is gained from the transaction) in view of their continued presence on the board of directors. BAUMS and SCOTT astutely point out that disinterested is not the same as independent in attitude and action.

abstain from decision making on the critical transaction; that is, from voting and, if suitable, also from prior discussions and any other behavior influencing decision making. In the case of a permanent conflict of interest, the respective director or executive manager should withdraw from the board of directors.

In setting rules on abstention, of note is that conflicts of interest are not eo ipso harmful, but can also contribute to an exchange of knowledge to the company’s benefit. Moreover, the affected board member should not be allowed to avoid responsibility by simply abstaining from voting. In addition, ROTH PELLANDA correctly points out that abstention from voting is a purely procedural instrument and is not suitable to assess the correctness or acceptability of the transaction that the board is evaluating.

By comparison, GmbH members are obliged by law to abstain

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1734 See BGE 127 III 332 (E. 2b.aa: “kann grundsätzlich jeder einzelne Verwaltungsrat in seiner Eigenschaft als nebengeordnetes Organ ein Insichgeschäft eines anderen Mitglieds des Verwaltungsrates genehmigen”).

1735 The approval of the board of directors in its entirety is required concerning matters falling within the board of directors’ non-delegable and inalienable powers listed in CO 716a I. Concerning these matters, the approval must not be delegated to a board committee. See LAZOPOULOS, Interessenkonflikte, p. 143.

1736 Particularly on the general meeting’s approval, see FN 1721 and LAZOPOULOS, Interessenkonflikte, p. 124 et seqq.

1737 Cf. SCBP 16. Cf. BGE 126 III 361 (E. 3a); see VISCHER/BORSARI, p. 380, FN 27; VON DER CRONE, Interessenkonflikte, p. 8 et seq.

1738 See LAZOPOULOS, Interessenkonflikte, p. 128.

1739 See BAUMS/SCOTT, p. 4.


1741 Cf. SCBP 16.

1742 See ROTH PELLANDA, p. 176, N 350 et seq.

1743 See ibid, p. 177, N 354.
from voting on certain resolutions that could result in a conflict of interest between themselves and the company.\textsuperscript{1744} In addition to the resolutions stipulated by law,\textsuperscript{1745} part of legal experts find it lawful if the articles of association stipulate a duty of the managing officers to abstain from voting in additional situations, as long as it is objectively justified, which should be the case for manifest conflicts of interest between these officers and the firm,\textsuperscript{1746}

→ be prepared that the members of the board of directors overturn decisions or retain decisions at the outset.\textsuperscript{1747} Yet, the possibility of the Sword of Damocles of a corrective action of the board may negatively affect its bargaining position vis-à-vis third parties with regard to transactions that are in the company’s interests.\textsuperscript{1748}

In light of the benefits and drawbacks of these measures, an arrangement should be made that fits the particular investment situation and combines both instruments that focus on procedure and those that focus on the material adequacy of transactions.

4.3.3 Non-Compete Obligations

While legal scholars principally recognize a duty of board members (and managing officers in a GmbH) and executive managers to abstain from competing with the company based on their duty of loyalty,\textsuperscript{1749} the exact content, scope, and consequences of such duty are ambiguous and should therefore be specified in the organizational regulations or via contract.\textsuperscript{1750}

When defining, the term compete, the following elements can serve as guidelines.\textsuperscript{1751} Under the non-compete clause, to compete means that board members cannot engage in the following:

\textsuperscript{1744} CO 806a.
\textsuperscript{1745} CO 806a.
\textsuperscript{1746} Cf. FN 697.
\textsuperscript{1747} See WATTER/ROTH PELLANDA, Zusammensetzung, p. 76.
\textsuperscript{1748} Cf. FN 654.
\textsuperscript{1749} See Section IV.E.4.1.2. For managing officers in a GmbH, CO 812 III.
\textsuperscript{1750} Provisions in the organizational regulations are only legally binding provided that they specify the content of the duty of loyalty; prohibitions beyond must be agreed upon via contract, see BÖCKLI, Aktienrecht, § 13, N 613.
\textsuperscript{1751} See KNECHT/KOCH, p. 247; WATTER/ROTH PELLANDA, Basler Kommentar, CO 717, N 18; KRNETA, CO 717, N 1912; cf. also HOMBURGER, Zürcher Kommentar, CO 717, N 886.
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→ either solely or jointly, with or on behalf of any person directly or indirectly, carry on or be engaged in any business that competes with, supplies to, or buys from the company,

→ solicit the custom of any person who is or has been for a defined period of time a customer of the company for the purpose of offering goods or services competing with those of the company,

→ sit on the board of directors or be an employee of a competitor, supplier, or customer,

→ acquire a substantial financial interest in a competitor, supplier, or customer for an extended period; an exception: the holding of securities trading on a recognized stock exchange is allowed.

A determining factor must be whether the respective board member or executive manager can actually influence the competitor’s (or supplier’s or customer’s) behavior, which must be assumed if his/her financial or other engagement significantly enhances the competitor’s position, thus damaging the competitiveness of the target company.  

The non-compete clause should not only address direct competitors, but also suppliers and customers because the knowledge of a board member or executive manager can cause a supplier or customer to ask for more favorable terms and conditions, or demand to be treated as an equal to other suppliers or customers of whose business terms he/she obtains knowledge.

5 Organizational Aspects of the Board of Directors Influencing Voice

5.1 Statutory Framework

Aspects of board organization indirectly influencing the PEMI’s voice at the board of directors include, inter alia, administrative details concerning the convening and holding of board meetings, the position and powers of the chairman of the board, the delegation of management tasks, provisions on board committees and advisory boards, voting procedures, information rights, and reporting structures.

1752 See Homburger, Zürcher Kommentar, CO 717, N 886.
1753 See Krneta, CO 717, N 1915.
1754 See, for more contents, Böckli, Aktienrecht, § 13, N 331; Forstmoser/Meier-Hayoz/Nobel, § 11, N 8 et seqq.
5.1.1 Authority

One controversy in this area is whether the non-delegable and inalienable duty to determine the organization of the firm relates only to the company’s organization below board level or whether it also includes the board’s internal organization (e.g., the internal allocation of tasks, committee structures, operating and decision-making procedures, quorum and majority vote requirements, meeting intervals, exchange of information, reporting structures, etc.). In other words, the extent to which the general meeting can influence the board of director’s organization is debated. As a result, the articles of association may regulate aspects of board organization directly and, for instance, formulate quorum and majority vote requirements applicable to board resolutions. According to this view, the board of directors can determine its internal organization as long as the articles of association do not prescribe specific rules. The majority of corporate law scholars, however, argue in favor of the board of directors’ organizational autonomy and subsume the power to determine its own organization under its non-delegable and inalienable duty to establish the organization of the firm.

1755 CO 716a I Sec. 2.
1756 For an overview of the issue, see Böckli, Kernkompetenzen, p. 50 et seqq.
1757 See, for further references, Wernli, Basler Kommentar, CO 712, N 4; Ehrat, Mehr Klarheit, p. 791, FN 33; cf. also Hirsch, p. 9 et seq.
1758 For further references, see Wernli, Basler Kommentar, CO 712, N 4, CO 713, N 6a. Also cf. Böckli, Aktienrecht, § 13, N 120, 122; Böckli, Kernkompetenzen, p. 53 et seq. (holding that, in general, it is up to the board, and not the general meeting, to determine its internal organization; however, he allows the general meeting to specify quorum and majority vote requirements for passing board resolutions in the articles of association). For further authors of this opinion, see also FN 1542.
1760 See Bauern/Venturi, § 3, N 233 et seq.; Böckli, Aktienrecht, § 13, N 101 et seqq., N 104 (“Der Verwaltungsrat konstituiert sich selbst.”) with certain exceptions (see FN 1758); Meier-Hayoz/Forstmoser, § 16, N 49; Watter/Roth Pellan, Zusammensetzung, p. 75, FN 148; Roth Pellan, p. 65, N 120; Krneta, CO 712, N 469, CO 716a, N 1208, 1220; Von der Crone/Carbonara/Martinez, p. 405; Homberger, Zürcher Kommentar, CO 712, N 254 et seq.; CO 716a, N 554; Kammerer, p. 147 et seq., 153 et seqq.; Forstmoser/Meier-Hayoz/Nobel, § 29, N 3 (“selber für seine eigene Organisation zuständig”); § 30, N 36, 65 et seq. (of another opinion, however, Nobel); Hungerbühler, p. 24 (“Statutarische Vorschriften über die Arbeitsteilung oder das Verfahren im Verwaltungsrat sind nach dieser Auffassung nicht zulässig”); Meier-Schatz, Zusammenarbeit, p. 824 (“Wie aber der Verwaltungsrat im einzelnen die Aufgaben und Funktionen unter sich aufteilt, ist allein seine Sache und entzieht sich der Kompetenz der Generalversammlung.”);
Pursuant to such view, the board of directors is solely authorized and responsible to determine its organization (*principle of self-organization*). Some legal scholars argue that in light of the principle of parity, each organ has the right to determine its own organization.¹⁷⁶¹ Moreover, it would be illogical if the board of directors was authorized to determine the firm’s organization, but not its own organization and had to observe respective instructions of the general meeting.¹⁷⁶² In addition, the ability to determine its own organization is necessary for the board of directors to perform its duties self-dependently and not to blur the statutory concept of board members’ liability.¹⁷⁶³ Finally, in an e contrario interpretation of Swiss corporate law, some scholars argue that the only aspects concerning the internal organization of the board that the articles of association may reserve for the general meeting are the election of the chairman of the board¹⁷⁶⁴ and the ability to retract the casting vote from the chairperson of the board meeting.¹⁷⁶⁵ Nevertheless, in legal practice, rules concerning board organization can be found in both the articles of association and organizational regulations.¹⁷⁶⁶ The Draft Legislation¹⁷⁶⁷ explicitly addresses this contentious issue by providing that the internal organization and, as the case may be, the establishment of board committees should be regulated by organizational regulations set out by the board of directors.¹⁷⁶⁸ It follows that PEMIs not represented on the board of directors have practically no corporate level de jure voice when it comes to establishing an adequate organization of the board, and must rely upon the board of directors to do so. However, via contractual agreements, PEMIs may influence board organization to some degree; for example, by setting committee structures, as long as the restraints on the board members’ discretion do not negatively affect the company’s interests.¹⁷⁶⁹

¹⁷⁶¹ WUNDERER, p. 95 *et seq.*; FORSTMOSER, *Eingriffe*, p. 174. With respect to the GmbH, see SIFFERT/FISCHER/PETRIN, CO 810, N 7; NATER, p. 150.


¹⁷⁶⁴ See BAUEN/VENTURI, § 3, N 236; ROTH PELLANDA, p. 66 *et seq.*, N 122; MEIER-SCHATZ, Zusammenarbeit, p. 824 *et seq*.

¹⁷⁶⁵ CO 712 II. For such argument, see ROTH PELLANDA, p. 65, N 120; HOMBURGER, Zürcher Kommentar, CO 712, N 255; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 29, N 3; also cf. BAUEN/VENTURI, § 4, N 428. With respect to the GmbH, 809 III.


¹⁷⁶⁷ See FN 463.

¹⁷⁶⁸ D-CO 716c II Sec. 2.

¹⁷⁶⁹ See GRONER, p. 296. On board of directors’ agreements, see Section IV.E.3.3.3.
5.1.2 Convening Board Meetings

For the most part, directors exercise their duties in board meetings, which are generally called by the chairman on his/her own initiative or upon a substantiated request\(^\text{1770}\) by any member of the board.\(^\text{1771}\) The law stipulates neither the quantity nor the interval for convening board meetings. The organizational regulations typically provide for meetings to be convened as often as required by business.\(^\text{1772}\) Moreover, there are no formal requirements for convening board meetings, for example, for the notice period or statement of the agenda.\(^\text{1773}\) In the absence of rules in the organizational regulations, the convening period results from the principle

\(^{1770}\) The requirement to state reasons is designed to inform the other board members of the facts and circumstances that prompt the need for a board meeting and therefore allow for preparation (see WERNLI, Basler Kommentar, CO 715, N 4). In principle, it is upon the requesting board member to judge whether a meeting is necessary. The justification is not subject to rigid requirements (see HOMBURGER, Zürcher Kommentar, CO 715, N 432; VISCHER/ENDRASS, p. 407). The chairman must not reject the request for convocation based on the argument that the stated reasons are unimportant in his/her opinion. A rejection of the request is legitimate only if the request constitutes (i) an abuse of legal rights, e.g., is made for disruptive purposes (see WERNLI, Zürcher Kommentar, CO 715, N 6); (ii) it must not be targeted at a resolution that is void pursuant to CO 716 i.c.w. 706b (see VISCHER/ENDRASS, p. 408; HOMBURGER, Zürcher Kommentar, CO 715, N 431); (iii) the request must not be a repetition of a previously denied request (VISCHER/ENDRASS, p. 408; HOMBURGER, Zürcher Kommentar, CO 715, N 431); (iv) obviously unlawful or infringing bonos mores (VISCHER/ENDRASS, p. 408); (v) not or insufficiently justified, that is incomprehensible and not permit convocation (VISCHER/ENDRASS, p. 408).

\(^{1771}\) CO 715. Such right is inalienable, see BÖCKLI, Aktienrecht, § 13, N 114 et seq.; VISCHER/ENDRASS, p. 406; BAUEN/BERNET, p. 162, N 473. Neither the articles of association nor regulations may restrict the individual board member’s right to call a meeting, e.g., by requiring a certain number of board members to support the request. However, cf. BÖCKLI, Aktienrecht, § 13, N 113a (finding it admissible if the organizational regulations require the request to be made in writing); WERNLI, Basler Kommentar, CO 715, N 5 (recommending written form for evidentiary purposes).

\(^{1772}\) See BAUEN/BERNET, p. 162, N 473. The SCBP recommends that the board should meet at least four times a year (SCBP 14). Equally, BOHRER, § 5, N 197. While board meetings in a stock corporation typically take place on a quarterly or monthly basis, meetings of the managing officers in a GmbH typically take place week by week, see NATER, p. 113.

\(^{1773}\) See BÖCKLI, Aktienrecht, § 13 N 113a; BAUEN/VENTURI, § 3, N 293; HOMBURGER, Zürcher Kommentar, CO 713, N 281 et seq. (recommending to regulate the convening of board meetings in the organizational regulations or rules of internal procedure of the board); BÜRGI, Zürcher Kommentar, CO 716, N 2 (“Die Einladung zur Verwaltungsratssitzung ist grundsätzlich formfrei. … ist die … Traktandenliste keine zwingende Voraussetzung für die Gültigkeit des Beschlusses; vorbehalten bleiben selbstverständlich anderslautende Bestimmungen in Statut oder Reglement”); HOMBURGER, Zürcher Kommentar, CO 713, N 286 (recommending as a rule to defer resolving upon matters not properly notified to the next meeting in order to allow for adequate preparation except where a matter is of minor importance, urgent, or where all board members consent to dealing with the respective matter); TANNER, Quoren, § 8, N 15 (arguing in favor of a right of each board member to oppose dealing with items not properly notified). With respect to the GmbH, see NATER, p. 113.
of good faith and depends on the urgency and organizational resources needed for preparation.\textsuperscript{1774} Active board members are expected to keep up to date on the firm’s current affairs and global and local economic issues related to the firm, to be in a position to resolve business matters at short notice.\textsuperscript{1775}

5.1.3 Holding Board Meetings

Unlike shareholders, board members have several venue options for passing resolutions: at physical meetings,\textsuperscript{1776} via telephone or video conferences,\textsuperscript{1777} and via written consent on motions that are circulated provided that no member requests discussion\textsuperscript{1778}. However, board members do not have the right to submit a prior written vote in their absence from a physical meeting.\textsuperscript{1779} There is no statutory requirement for the board of directors to resolve only agenda items.\textsuperscript{1780} Board meetings are generally led by the board chairman who is responsible for efficiently conducting meetings.\textsuperscript{1781}

\textsuperscript{1774} See VISCHER/ENDRASS, 408.

\textsuperscript{1775} See TANNER, Quoren, § 8, N 15.

\textsuperscript{1776} See WERNLI, Basler Kommentar, CO 713, N 4; TANNER, Quoren, § 8, N 14 et seq.

\textsuperscript{1777} On the permissibility, see BAUEN/VENTURI, § 3, N 310; BÖCKLI, Aktienrecht, § 13, N 136; WERNLI, Basler Kommentar, CO 713, N 4; BAUEN/BERNET, p.164, N 475; TANNER, Quoren, § 8, N 21 (requiring the consent of all board members for making resolutions via telephone conference because it represents a departure from normal procedure); equally, HOMBURGER, Zürcher Kommentar, CO 713, N 298 et seq. With respect to the GmbH, see NATER, p. 115.

\textsuperscript{1778} See WERNLI, Basler Kommentar, CO 713, N 4; KRNETA, CO 713, N 812 et seq.; in detail, HOMBURGER, Zürcher Kommentar, CO 713, N 331; TANNER, Quoren, § 8, N 19 et seq. Also in a GmbH, decisions of the members may be taken by means of written consent to motions if such procedure is regulated in the articles of association (CO 809 IV) and if no member requests an oral discussion (CO 805 IV). The same applies analogously to the managing officers. See WATTER/ROT PELLANDA, Basler Kommentar, CO 809, N 21; NUSSBAUM/SANWALD/SCHEIDEgger, CO 809, N 17; with further references, NATER, p. 114 et seq.

\textsuperscript{1779} See BAUEN/VENTURI, § 3, N 309; BAUEN/BERNET, p. 163, N 475.

\textsuperscript{1780} See FN 1773.

\textsuperscript{1781} Equally, management meetings in a GmbH are lead by the chair of the management. See HANDSCHIN/TRUNINGER, § 14, N 56; NATER, p. 114.
5.1.4 Board of Directors Chairman

5.1.4.1 Appointment and Removal

The chairman of the board is appointed by the board of directors unless the articles of association assign this power to the general meeting. In a GmbH, the chair of the management is typically elected by the meeting of members, but this power may also be delegated to the managing officers via the articles of association. The board chairman’s mandate regularly ends when the term of office expires. However, he/she can be suspended or removed from office at any time by a resolution of the board of directors or the general meeting, if the chairman of the board is elected directly by the shareholders. In both cases, the discharged chairman remains a member of the board as long as the general meeting does not revoke his/her board mandate.

5.1.4.2 Powers

Since Swiss corporate law does not regulate the chairman’s position in detail, there is considerable latitude for task allocation for the board of directors. Swiss laws on the GmbH explicitly set out certain dispositive duties of the chair of the management, which the managing officers may regulate differently. Due to the variety of corporate governance structures in firms, the chairman’s duties can vary substantially. FORSTMOSER, MEIER-HAYOZ, and NOBEL describe the role of the chairman as very diverse, ranging from a full-time company leader with a strong role in running the firm, particularly if serving simultaneously as a delegate or delegate.

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1782 The term chairman is subsequently used for the person elected for an extended period time to head the board of directors. The chairman is to be distinguished from the chairperson who only chairs a meeting for a day. See BAUEN/VENTURI, § 3, N 237; with further references, BÖCKLI, Aktienrecht, § 13, N 106. Also cf. German terminology in “Vorsitzende” (CO 713 I Sec. 2) versus “Präsident” (CO 712).

1783 CO 712 I and II.

1784 See, in detail, WATTER/ROTH PELLANDA, Basler Kommentar, CO 809, N 16; NUSSBAUM/SANWALD/SCHNEIDERER, CO 809, N 12.

1785 See, in detail, HUNGERBÜHLER, p. 46; FORSTMOSER, Organisationsreglement, p. 48.

1786 See HOMBURGER, Zürcher Kommentar, CO 712, N 257.

1787 See, in detail on the statutory duties of the chairman of the board, HUNGERBÜHLER, p. 61 et seq.; on the unwritten tasks and powers, p. 87 et seq.; also see ROTH PELLANDA, p. 278 et seq., N 588 et seq. With regard to the duties of the chair of the management in a GmbH, see WATTER/ROTH PELLANDA, Basler Kommentar, CO 810, N 14 et seq.; HANDSCHIN, Gesellschaftsanteile, p. 109.

1788 CO 810 III. See WATTER/ROTH PELLANDA, Basler Kommentar, CO 810, N 14; NUSSBAUM/SANWALD/SCHNEIDERER, CO 810, N 14.

1789 See HOMBURGER, Zürcher Kommentar, CO 712, N 258.
CEO, to playing a mere representative or administrative role. Generally, the chairman leads the board, coordinates its work and is responsible for preparing, convening, and chairing board meetings; procuring the necessary information; ensuring that the board’s decisions are implemented and the board’s tasks adequately carried out. The chairperson is explicitly given the casting vote in case of a deadlock unless the articles of association provide otherwise; he/she supervises and co-signs the minutes of board meetings; approves requests for the disclosure of information concerning specific matters outside meetings and for the inspection of company books and files; and, pursuant to the Draft Legislation, informs the board of directors in case of conflicts of interest. Further powers may be granted in the organizational regulations or follow naturally from the chairman’s leadership position. Also important is his/her role as the representative of the board of directors and link between the board of directors and the executive management. KRNETA characterizes the chairman of the board together with the CEO as “the engine and the heart” of the firm and the source of its vision and strategic goals, corporate culture, basic organization, preparator of corporate decision making, and motivator of the firm’s employees.

5.1.5 Management Organization

The board of directors is the executive body of the firm per se and responsible for its management and representation. Absent any provisions to the contrary, it runs the company as a cooperative where every board member participates in the decision-making process. However, the board has the authority to delegate responsibilities to committees or individual directors as needed. The board’s role includes overseeing the company’s strategic direction, ensuring compliance with legal and regulatory requirements, and monitoring the performance of the executive management.

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1790 FORSTMOSER/MEIER-HAYOZ/NOBEL, § 28, N 145.
1791 CO 715. With respect to the GmbH, CO 810 III Sec. 1.
1792 With respect to the GmbH, CO 819 III Sec. 1.
1793 With respect to the GmbH, CO 810 III Sec. 2.
1794 SCBP 15 I. See BAUEN/VENTURI, § 3, N 291. With respect to the GmbH, the law explicitly states that the chair of the management assures the filing of the necessary applications with the Commercial Register (CO 810 III Sec. 3).
1795 CO 713 I. With respect to the GmbH, CO 809 IV sentence 2, 776a II Sec. 6.
1796 CO 713 III. In contrast, there is no express duty to take minutes of the deliberations and resolutions made at the meetings of the managing officers in a GmbH, even though it is advisable, see WATTER/ROTH PELLANDA, Basler Kommentar, CO 809, N 22.
1797 CO 715a III and IV.
1798 See FN 463.
1799 D-717a II.
1800 With further details, see BÖCKLI, Aktienrecht, § 13, N 116; WERNLI, Basler Kommentar, CO 712, N 8; BERTSCHINGER, Arbeitsteilung, § 4, N 225.
1801 See, with further references, KRNETA, CO 712, N 484; HUNGERBÜHLER, p. 119 et seqq.
1802 See, with reference to other legal scholars, BÖCKLI, Aktienrecht, § 13, N 314a; WERNLI, Basler Kommentar, CO 712, N 9; in detail, KRNETA, CO 712, N 617 et seqq.; also MÜLLER/LIPP/PLÜSS, p. 69; BÜHLER, Regulierung, § 8, N 629.
1803 See KRNETA, CO 712, N 485.
member holds the same power in terms of decision making.\footnote{1804} Pursuant to the corporate governance model of a \textit{unitary board}, both control and management functions are jointly undertaken by the board of directors.\footnote{1805} In contrast, a GmbH does not have a board of directors in its corporate structure. By default, the GmbH members are also the managing officers of the firm and together run the business. The absence of any delegation of management tasks is, however, hardly suitable except in case of small companies or companies in special situations (e.g., liquidation).\footnote{1806} An effective structuring of corporate management, in most cases, calls for some form of delegation, both in stock corporations and GmbHs.

\subsection*{5.1.5.1 Requirements for Delegation}

Formally, the board of directors is eligible to delegate all or part of the executive management to individual members or third-party managers provided (i) it is authorized to do so by the general meeting in the articles of association and (ii) it has set out the terms of delegation in the organizational regulations\footnote{1807} (i.e., the management organization, the necessary positions, the duties, and reporting\footnote{1808}). From a material perspective, the board of directors must not delegate any of its non-delegable and inalienable powers\footnote{1810} and can therefore never limit its powers to controlling functions.\footnote{1811} Moreover, the delegation of the power of representation is confined in that at least one member of the board of directors must be empowered to represent.\footnote{1812} It is, however, possible for the board of directors to assign the preparation and implementation of board resolutions or the supervision of business transactions to committees or individual members\footnote{1813} provided the board can make proposals where

\begin{footnotesize}
\begin{enumerate}
\item[1804] CO 716b III.
\item[1805] See WATTER/ROTH PELLANDA, Basler Kommentar, CO 716b, N 1; HOFSTETTER, Corporate Governance Report, p. 38.
\item[1806] See BAUEN/VENTURI, § 3, N 356.
\item[1807] CO 716b I.
\item[1808] See KOLLER, Grundgerüst, p. 806. The Draft Legislation (see FN 463) expressly provides that the organizational regulations shall also contain a list of important business matters that require the approval of the board of directors, so-called \textit{reserved matters} (D-CO 716c II Sec. 4). It is upon the company to define which matters it wants to reserve for the board’s approval. On reserved matters, see BÖCKLI, Aktienrecht, § 13, N 437 \textit{et seqq.} and N 528; KRNETA, CO 716b, N 1741 \textit{et seq.}
\item[1809] CO 716b II. See BÖCKLI, Aktienrecht, § 13, N 189 \textit{et seqq.}; WERNLI, Basler Kommentar, CO 715a, N 8; with further references, KRNETA, CO 715a, N 908; HOMBURGER, Zürcher Kommentar, CO 715a, N 494; DREU, Verwaltungsratsmitglied, p. 51.
\item[1810] See Section IV.E.2.1.
\item[1811] See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 30, N 10.
\item[1812] OR 718 III.
\item[1813] CO 716a II. With respect to the GmbH, see NATER, p. 188.
\end{enumerate}
\end{footnotesize}
necessary, discuss the relevant basic aspects and perspectives in light of a particular decision, and, most importantly, decide on matters independently.\footnote{A mere submission of a particular decision for approval by the board of directors which confines the board to making a yes or no decision is not permissible, see BÖCKLI, Aktienrecht, § 13, N 434 et seq.}

In contrast, Swiss GmbH laws do not expressly stipulate particular rules on delegation. They only state that the articles of association may provide for rules deviating from the statutory rules on the management and representation.\footnote{CO 809 I sentence 2 i.c.w. CO 776a II Sec. 7.} Therefore, the articles of association of a GmbH may authorize the managing officers to delegate certain tasks.\footnote{See WATTER/ROTH PELLANDA, Basel Kommentar, CO 809, N 6; NATER, p. 185 et seq.; HANDSCHIN/TRUNINGER, § 14, N 21; HANDSCHIN, Gesellschaftsanteile, p. 103. Of opinion pursuant to which a basis in the articles of association is not necessarily required for delegation are SIFFERT/FISCHER/PETRIN, CO 809, N 3 and BÖCKLI, GmbH-Recht, p. 31 (however stating that the articles of association may provide that the downward delegation of duties must be approved by the meeting of members).} Different from the stock corporation, a lawful delegation in the GmbH does not require the terms of the delegation to be set out in the organizational regulations.\footnote{See GASSER/EGGENBERGER/STÄUBER, Orell Füssli Kommentar, CO 809, N 6; NATER, p. 187; WATTER/ROTH PELLANDA, Basler Kommentar, CO 809, N 6; SIFFERT/FISCHER/PETRIN, CO 809, N 3.} However, for reasons of clarity, legal certainty, and to specify details, this should nevertheless be done.\footnote{See HANDSCHIN, Gesellschaftsanteile, p. 103.} From a material perspective, the managing officers of a GmbH must not delegate any of their non-delegable and inalienable powers.\footnote{See WATTER/ROTH PELLANDA, Basler Kommentar, CO 809, N 6 and CO 810, N 5; SIFFERT/FISCHER/PETRIN, CO 809, N 3.} Moreover, the slight difference in terminology between “parts of management” in rules governing the GmbH versus “fully or partly delegated” in those of the stock corporation\footnote{CO 810 II Sec. 4 versus 716b I.} suggests that the board of directors of a stock corporation is accorded greater scope in delegating managerial functions and focus on its supervisory role than the managing officers of a GmbH.\footnote{See MEIER-HAYOZ/FORSTMOSER, § 18, N 21.} In addition, the delegation of the power of representation is confined in that at least one managing officer must be empowered to represent.\footnote{CO 814 II.}

5.1.5.2 Effects of Delegation

A rightful delegation of management functions confines the board members’ duty of care to reasonable care in selecting, instructing, and
supervising the delegate(s).\textsuperscript{1823} Even if delegating day-to-day management tasks to third parties, the board of directors is still responsible for the firm’s overall management, as the ultimate responsibility for running the firm remains firmly with the board of directors. Yet, directors are not obliged to review each and every management decision; rather, supervision of top management actions and of the general course of business suffices.\textsuperscript{1824}

A contentious issue with respect to the GmbH is if and to what extent the delegation of management powers by the managing officers limits their liability.\textsuperscript{1825} This author’s view is that a lawful delegation of management powers, with the terms set out in the organizational regulations, confines the managing officers’ duty of care to the observance of reasonable care in selecting, instructing, and supervising the delegate(s) as is the case for board members of a stock corporation. Conversely, the persons being entrusted with management functions are organs of the company and must observe the same duties of care, loyalty, and equal treatment as applicable to members of the board of directors (or managing officers in a GmbH).\textsuperscript{1826} They are liable for any damage caused if willingly or negligently violating these duties.\textsuperscript{1827}

5.1.5.3 Corporate Governance Models

When delegating management functions, Swiss corporate law provides the board of directors with considerable flexibility in establishing a corporate governance structure geared to the company’s particular circumstances and needs.\textsuperscript{1828} Apart from a unitary board model, the board of directors may choose, within the framework of its binding powers, a corporate governance

\textsuperscript{1823} CO 754 II.
\textsuperscript{1824} See KRNETA, CO 717, N 1806 with reference to BGE 114 V 219 (E. 4); BGE 108 V 199 (E. 3a); BGE 103 V 120 (E. 6); BGE 97 II 403 (E. 5b). Also see BERTSCHINGER, Arbeitsteilung, § 4, N 186 (stating that the intensity of supervision depends on factors such as the period during which the delegate has remained in his/her current position and the respective professional qualifications).
\textsuperscript{1825} Against a limitation of liability are HANDSCHIN/TRUNIger, § 25, N 48, 54, but § 14, N 22. In favor of a delegation limiting liability if set out in the organizational regulations are WIDMER/GERICKE/WALLER, Basler Kommentar, CO 827, N 8; WATTER/ROTH PELLANDA, Basler Kommentar, CO 809, N 6; SIEFFERT/FISCHER/PETRIN, CO 809, N 3; NUSSBAUM/SANWALD/SCHEIDEGGER, CO 827, N 40; HANDSCHIN, Gesellschaftsanteile, p. 103.
\textsuperscript{1826} See Section IV.E.4.1.
\textsuperscript{1827} CO 754 I. In the GmbH CO 827 i.c.w. CO 754 I.
\textsuperscript{1828} For example, needs following from the company’s size, operational and geographic areas of activity, proximity between shareholders and top management. As a result of this flexibility, the Swiss stock corporation has been characterized as a bonne à tout faire serving a plethora of different needs. See FORSTMOSER, Aufgaben, p. 485; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 29, N 10 (“Mädchen für alles”).
model similar to the *German two-tier system* in which the board of directors focuses on strategy and supervision of management while third-party managers run the firm’s day-to-day business.\footnote{1829} Alternatively, the board of directors can implement a structure similar to the *American board system* where executive directors perform management and representation functions and non-executive directors concentrate on management supervision.\footnote{1830} Furthermore, the French corporate governance model may be imitated in which the *Président-Directeur Général* assumes the roles of both chairman of the board and chief executive officer.\footnote{1831}

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\footnote{1829}{See BÖCKLI, *Aktienrecht*, § 13, N 540 et seq. (stating that a true dualistic governance model is, however, not possible under Swiss corporate law); WATTER/ROTH PELLANDA, *Basler Kommentar*, CO 716b, N 2 ("Ein rein dualistisches System ist allerdings nach schweizerischem Recht nicht zulässig, da die strategische Führung und damit auch die entsprechende Verantwortlichkeit ebenso zu den nicht delegierbaren Kompetenzen des VR gehört wie das Recht, eine erfolgte Delegation der operativen Führung ganz oder teilweise rückgängig zu machen"); equally FORSTMOSER, *Gestaltungsfreiheit*, p. 259 (pointing to the limitations in following an "Aufsichtsratsystem" in citing the non-delegable and inalienable duties of the board of directors which clearly exceed a purely supervisory role); KOLLER, *Grundgerüst*, p. 804; HOFSTETTER, *Corporate Governance Report*, p. 42; in detail, HOMBURGER, *Zürcher Kommentar*, CO 716b, N 748 et seq.; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 29, N 15 et seq.; HUBER, p. 25.}


\footnote{1831}{In detail, see BÖCKLI, *Aktienrecht*, § 13, N 551 et seq.; MEIER-HAYOZ/FORSTMOSER, § 16, N 405; KRNETA, CO 712, N 644 et seq.; FORSTMOSER, *Gestaltungsfreiheit*, p. 259; HOMBURGER, *Zürcher Kommentar*, CO 716b, N 756; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 29, N 17.}
With respect to the GmbH, four models of management organization are feasible: joint management by all members (self-management), management by one or a few members, management by outside managers, and cooperative management by both members and outside managers.\(^\text{1832}\) Even though the statutory rules on the organization of a GmbH are mostly dispositive, thereby offering the GmbH members considerable latitude to tailor the organization to the company’s specific needs, the executive management structure of a stock corporation cannot be exactly...
It is not possible to install a board of directors above the managing officers due to the non-delegable and inalienable nature of certain of their duties. It is, however, possible to introduce a second tier within the executive management of a GmbH, below the managing officers, by entrusting executive directors with parts of the management responsibilities that do not fall within the non-delegable and inalienable duties of the managing officers. Moreover, an outside advisory board may be installed to perform certain supervisory functions and provide strategic advice to the managing officers.

5.2 Assessment of Legal Status and Further Need for Protection

Not only is the PEMI’s voice in board of directors’ decision making influenced, inter alia, by how many seats it holds or what quorum and majority vote requirements apply, but also by organizational processes influencing voice. Hence, minority investors should seek to set rules and procedures that enable them to effectively exercise their (their representatives’) voice at the board level and to influence the management organization and executive managers’ decisions.

5.3 Legal Structuring Options

Firstly, no sound remedy exists for how to structure and organize the board of directors regarding division of labor. Yet, in their pre-deal negotiations, PEMIs may want to address the following aspects that affect the board of directors’ performance:

→ The firm’s management organization, appointment of executive personnel, and description of their respective powers and duties (see Section IV.E.5.3.5),

→ Rules on convening and holding board meetings, including the frequency of board meetings, timing, form of invitation, plenary meetings, use of electronic communications, etc. (see Section IV.E.5.3.1),

→ Selecting the board chairman and defining his/her respective powers and duties,

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1834 CO 810 II; see BÖCKLI, GmbH-Recht, p. 24.
1835 See HANDSCHIN, Gesellschaftsanteile, p. 103.
1836 See BÖCKLI, GmbH-Recht, p. 24.
→ Rules on the allocation of directors’ tasks and the formation and composition of committees and advisory boards (see Section IV.E.5.3.2, 5.3.3, and 5.3.4),

→ Rules on self-dealing and related-party transactions (see Section IV.E.4.3.2),

→ Reporting procedures and information rights (see Section V.D), and

→ Resolution requirements (see Section IV.E.3.3.2).

5.3.1 Board Meetings

5.3.1.1 Frequency

As corporate law does not stipulate the number and interval of board meetings per year, respective rules should be based on need, which in turn depends on the individual circumstances of the firm, such as the size of the board, the board’s tasks, the number and types of committees, the nature of the business, the company’s financial situation, stage of development, business challenges, and associated risks.\(^\text{1837}\) Even though the need for meetings may vary over time (e.g., more meetings at the start and during difficult times, less when the company is going smoothly), it is advisable to set a minimum number of board meetings per year (e.g., every other month)\(^\text{1838}\) in the organizational regulations, not so much to set definite dates, but more to establish a rough framework and thereby manage expectations of all individuals involved, and allow for adequate planning and oversight. Together with the activities of the board committees and some additional extraordinary meetings, board membership in a medium to large-sized company can be 10 or more meetings per year.\(^\text{1839}\)

5.3.1.2 Convening Board Meetings

Authorization. Generally, the chairman calls board meetings either on his/her own initiative or upon a board member’s request. The organizational

\(^{1837}\) See WERNLI, Basler Kommentar, CO 713, N 4; BOHRER, § 5, N 239; KRNETA, CO 713, N 730; DRUEY/GLANZMANN, § 13, N 59.

\(^{1838}\) See BOHRER, § 5, N 245 (suggesting that a board should have no less than six meetings per year). The SCBP recommends at least four board meetings per year (SCBP 14).

\(^{1839}\) See BOCKLI, Aktienrecht, § 13, N 14; WERNLI, Basler Kommentar, CO 713, N 4 (mentioning between four and five meetings per year as business practice); DRUEY/GLANZMANN, § 13, N 59 (mentioning a range of three to ten meetings per year).
regulations should set out who calls the meetings and who will do so in this individual’s absence; for example, the chairman, the vice chairman, or another director. In addition, each board member may be granted a right to convene board meetings directly to avoid administrative delays in case the chairman does not answer a board member’s request for a meeting.

**Form.** The organizational regulations should also prescribe the form of the convening notice. Typically, the form agreed upon is in writing, unless there is an emergency. It is advisable to explicitly allow for email, fax, and other suitable means of written communication. The board meeting notification should provide details on the time and location of the meeting and the agenda to inform all members what is on the table for debate and to insure the presence of all board members for important discussions and avoid ‘surprise’ votes on impromptu resolutions. Furthermore, to ensure the efficient conduct of the meeting, motions, documents forming the basis of decision making, and any material necessary for preparation should be made available to all members prior to the meeting.

**Timing.** The organizational regulations may state an advance notice period for board meetings such as at least 10 days (except in urgent cases or with the consent of all board members). To prevent the convening of board meetings at overly delayed notice, the organizational regulations may provide that the meeting shall be convened within 20 days following a board member’s request for a board meeting.

**Location.** Typically, organizational regulations provide for board meetings to be held at the company’s registered office, but holding them at a different location, even abroad, is permissible provided that the location is not too far, too difficult, or too expensive for the board members to travel to.

### 5.3.1.3 Holding Board Meetings

Since board members have several options for voting on a resolution the organizational regulations should establish applicable rules; for instance, on

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1842 Also for evidentiary reasons, see VISCHER/ENDRASS, p. 406. The same goal is achieved by confirmation of an oral convocation already announced, see MÜLLER/LIPP/PLÜSS, p. 97.
1843 See HOMBURGER, Zürcher Kommentar, CO 713, N 283.
1844 See BAUEN/VENTURI, § 3, N 293; MÜLLER/LIPP/PLÜSS, p. 97.
1845 See BAUEN/VENTURI, § 3, N 293; FORSTMOSER, Organisationsreglement, p. 48.
1846 See VISCHER/ENDRASS, p. 409.
1847 See Section IV.E.5.1.3.
Part Two: Legal Framework and Tools

holding telephone or video conferences and on voting procedures. Furthermore, the possibility of passing resolutions by means of written consent should be specified. To avoid any exploitation of a certain board member’s absence to pass resolutions, the organizational regulations should state that, as a rule, resolutions may only passed on matters that have been listed in advance in the agenda, along with the necessary background information for board members to consider prior to the meeting. However, board members may deviate from such rule if justified by the urgency of a matter or if the directors that are absent have been informed before the meeting about the respective resolution and planned vote. On the stipulation of quorum and majority vote requirements applicable to board resolutions, see Section IV.E.3.3.2.

5.3.2 Board of Directors Chairman

Even though characterized as a *primus inter pares* in a collective decision-making body, the chairman of the board can hold a position of significant power depending on the duties he/she is assigned and the de facto position of power (e.g., based on the chair’s personality, experience, and competences). Therefore, the power to appoint the chairman can be an important means to influence decision making at the board level. From the PEMI’s point of view, two factors are of relevance: (i) how the chairman is appointed: PEMIs want to have a say in the election of the chairman; and (ii) depending on whether PEMIs can have a representative become a chairperson, PEMIs have an interest in broadening (or limiting) the chairman’s powers; that is, if nominating the chairman, PEMIs will want to broaden the chairman’s powers or otherwise keep it restrained.

5.3.2.1 Appointment and Removal

In larger companies with diffuse ownership structures, the board of directors generally appoints its chairman because it is best suited to determine the best-qualified candidate in light of the forthcoming tasks. In closely held companies in which shareholders are acquainted with the

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1848 See KRNETA, CO 713, N 789.
1849 See WERNLI, Basler Kommentar, CO 712, N 10; with further details, BÜHLER, Regulierung, § 8, N 627; on the chairman’s role, see KRNETA, CO 712, N 481 *et seqq.*; and, with further references on the legal literature, N 481 (“Er macht die halbe Miete.”); equally BÖCKLI, Aktienrecht, § 13, N 105.
1850 See KRNETA, CO 712, N 473; with reference to KAMMERER, p. 143, FN 555 (“Es ist deshalb von grösster Wichtigkeit, dass der Verwaltungsrat unter dem Aspekt der Festlegung der geeigneten Mittel zur Zielerreichung unter anderem auch den bestgeeigneten Kandidaten zu seinem Präsidenten kürt.”).
potential candidates, shareholders may choose to transfer the authority to elect the chairman to the general meeting via the articles of association. From the PEMI’s perspective, the latter is advisable if they have greater de facto voice at the general meeting or have entered into contractual voting agreements with fellow shareholders on the position of the chairman providing, for instance, for annually rotating the office among the parties’ respective board representatives.

5.3.2.2 Powers

As Swiss corporate law offers considerable latitude with respect to defining the chairman’s tasks, the powers and responsibilities may be defined as best fits the individual circumstances. One of the most controversial question in the Swiss corporate governance debate is whether it is suitable if the board of directors and the executive management are headed by the same person with joint responsibility (joint leadership, in German Personalunion) or whether both functions should be separated (dual leadership, in German Doppelspitze). For a discussion, see Section IV.E.5.3.5.2.

5.3.3 Board Committees

5.3.3.1 Purpose

Swiss corporate law does not regulate board committees. In line with the principle of self-organization, the board of directors may, but is not obliged to, form one or more board committees or ad-hoc-working groups. The formation of committees can make sense for a number of reasons. By carrying out detailed analyses, preparing background information for board meeting agenda items, submitting proposals to the board, and by implementing board resolutions, board committees increase the efficiency of the board as they enable numerous tasks to be shared among the board members. This allows the board of directors to adequately manage the ever-increasing complexity of board tasks and enhance the quality of information, debate, and decision making. Moreover,
committees allow board members to get more closely involved in different areas of the company in which they can effectively make available their expertise, industry connections, and skills. Board committees also enable the board to more swiftly react to economic or technological changes in a fast-paced highly competitive global business environment. Board committees also help the board to more effectively carry out its supervisory duties. In addition, committees help mitigate potential conflicts of interest by enabling conflicted board members to abstain from discussion and decision making in board committees with regard to issues related to these potential conflicts. On the other hand, setting up committees causes a certain fragmentation of the board of directors’ work and can result in a loss of uniform management, additional and overlapping administrative efforts and a cumbersome hierarchical structure, which requires additional coordination and reporting efforts. The pros and cons must be weighed in each individual case.

5.3.3.2 Types

A huge variety of committee structures are in practice today, in terms of their numbers, tasks, and membership. On the one hand, though somewhat out of fashion, some boards still have a single committee with broad responsibilities (an executive committee serving as a link...
between the executive management and non-executive managers. More common are boards with several committees with concrete tasks (e.g., the audit committee, nomination committee, and compensation committee) where the directors, aside from working on the board at large, are involved in one or more committees. Further committees may be set up on an ad hoc basis or for a longer term to deal with specific issues in the areas of strategic change, corporate governance, risk management, environmental issues, security, or ethical concerns. In private-equity sponsored firms, cooperation committees are sometimes formed consisting of board representatives of the owner family and Pemi board representatives for the purpose of exchanging information and viewpoints, coordinating activities, and resolving conflicts. Moreover, an exit committee may be established to prepare for the Pemi’s exit.

5.3.3.3 Decision-Making Authority

In terms of decision making, two types of committees exist, those without and those with decision-making authority. The former are tasked with preparing and implementing board resolutions and supervising certain important business transactions. Within these scopes, the committees

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1866 See Bauen/Venturi, § 3, N 259; Hofstetter, Corporate Governance Report, p. 44. In detail on the possible powers of executive committees, see Krneta, CO 716b, N 1647.

1867 Audit committees serve to support the directors in fulfilling their responsibilities as supervisors. For details, see Gnoss/Vischer, p. 754; Bauen/Venturi, § 3 N, 266 et seqq.; Böckli, Aktienrecht, § 13, N 414, N 425 et seq.; Roth Pellanda, p. 288 et seqq., N 608 et seqq.; Krneta, CO 716b, N 1652 et seqq.; Ruppen, p. 79 et seqq.

1868 Nomination committees are primarily concerned with the search for new members of the board of directors and executive managers. For details, see Gnoss/Vischer, p. 755; Bauen/Venturi, § 3 N, 276 et seqq.; Böckli, Aktienrecht, § 13, N 413; N 426 et seq.; Roth Pellanda, p. 290 et seq., N 612 et seqq.; Krneta, CO 716b, N 1663 et seqq.; Ruppen, p. 82 et seqq.

1869 Compensation committees deal with the compensation policy of the company. For details, see Gnoss/Vischer, p. 754; Bauen/Venturi, § 3 N, 275 et seqq.; Böckli, Aktienrecht, § 13, N 412; N 426 et seq.; Roth Pellanda, p. 291 et seq., N 616 et seqq.; Krneta, CO 716b, N 1661 et seqq.; Ruppen, p. 81 et seq.

1870 See Meier-Hayoz/Forstmoser, § 16, N 406; Hofstetter, Corporate Governance Report, p. 44.

1871 In detail on ad hoc committees, see Böckli, Aktienrecht, § 13, N 416b; Watter/Roth Pellanda, Basler Kommentar, CO 716a, N 50; Roth Pellanda, p. 297 et seq., N 624; Krneta, CO 716b, N 1667. With respect to the GmbH, see Nater, p. 160.

1872 See, with further references, Gnoss/Vischer, p. 754; Böckli, Aktienrecht, § 13, N 415b et seqq.; Watter/Roth Pellanda, Basler Kommentar, CO 716a, N 50; Roth Pellanda, p. 298, N 625.

1873 See Huber, p. 33.

1874 See Peac/e/Barnes, p. 143 (“provision for exit committees, which deals with the analysis and implementation of exit opportunities such as a sale or IPO”).

1875 CO 716a II. With respect to the GmbH, see Nater, p. 161.
may also deal with matters under the board of directors’ non-delegable and inalienable powers as long as the authority and responsibility for decision making remains with the board of directors in its entirety.\textsuperscript{1876} These committees may be formed by the board of directors as required based on a board resolution or provision in the organizational regulations.\textsuperscript{1877} To provide board committees with decision-making authority and assign responsibilities to independently carry out certain tasks and activities, the statutory rules on delegation\textsuperscript{1878} must be observed.\textsuperscript{1879} In particular, decision-making authority may only be assigned concerning matters outside of the non-delegable and inalienable powers of the board.\textsuperscript{1880}

5.3.4 Advisory Boards

5.3.4.1 Purpose

Advisory boards can be implemented as control bodies and as platforms for exchange of information, ideas, and advice.\textsuperscript{1881} In family firms with PEMIs, the establishment of an advisory board can help the firm tap the professional expertise, experience, ideas, business contacts, and benefit from the reputation of advisory board members who can include selected representatives of the private equity investor and family members, without requiring them to do more than share their experience, expertise, and networks (i.e., not have to carry out responsibilities associated with a board mandate).\textsuperscript{1882} Moreover, a special hand-picked advisory board can also enhance the balance between the company and the family, reduce organizational blindside, and challenge business decisions by forcing directors and managers to justify the rationale behind their decisions.\textsuperscript{1883}

\begin{itemize}
\item \textsuperscript{1876} See BÖCKLI, \textit{Aktienrecht}, § 13, N 405b; FRICK, § 12, N 1450; VON DER CRONE/CARBONARA/HUNZIKER, p. 49; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 29, N 31 \textit{et seq}. With respect to the GmbH, the managing officers decide together, respectively. See NATER, p. 161.
\item \textsuperscript{1877} See BÄUEN/VENTURI, § 3, N 256; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 29, N 32.
\item \textsuperscript{1878} See Section IV.E.5.1.5.1.
\item \textsuperscript{1879} CO 716b I. See BÖCKLI, \textit{Aktienrecht}, § 13, N 417; WATTER/ROTH PELLANDA, \textit{Basler Kommentar}, CO 716a, N 38; MEIER-HAYOZ/FORSTMOSER, § 16, N 408; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 29, N 33 \textit{et seq}. With respect to the GmbH, see NATER, p. 161.
\item \textsuperscript{1880} See BÖCKLI, \textit{Aktienrecht}, § 13, N 417. In detail on the possibilities to delegate tasks to certain committees, see WATTER, \textit{Verwaltungsratsausschüsse}, p. 191 \textit{et seq}. (for audit committees); p. 195 \textit{et seq}. (for nomination committees), p. 196 (for compensation committees). With respect to the GmbH, see NATER, p. 161.
\item \textsuperscript{1881} See KRNETA, CO 707, N 323. In a GmbH context, also see GASSER/EGGENBERGER/STÄUBER, \textit{Orell Füssli Kommentar}, CO 804, N 1; NUSSBAUM/SANWALD/SCHHEIDEGGER, CO 804, N 2; NATER, p. 17, 121.
\item \textsuperscript{1882} See KRNETA, CO 707, N 320. With respect to the GmbH, see NATER, p. 160.
\item \textsuperscript{1883} See ACHLEITNER/SCHRAML/TAPPEINER, \textit{Familienunternehmen}, p. 53, 68.
\end{itemize}
5.3.4.2 Types

Swiss corporate law neither defines the term of so-called advisory boards nor contains any specific regulations thereon. Legal experts have different understandings of advisory boards. According to ROTH PELLANDA, they can be institutionalized and permanent bodies appointed by the general meeting or the board of directors, or temporary bodies of external experts who the board of directors may hire to receive independent expert advice on important business matters. The functions of the advisory board, both in stock corporations and GmbHs, are usually specified in the articles of association or organizational regulations, and flow from board resolutions or contractual agreements. While some authors argue that advisory boards are strictly limited to consultative tasks, others find that they may also be afforded management and supervisory powers provided that the statutory allocation of powers is observed.

5.3.5 Management Organization

PEMIs rarely seek executive management positions, nor do they participate in the firm’s day-to-day management. Yet, the executive management is absolutely critical for turning the shareholders’ vision of the firm into reality and for increasing its corporate value. Inability and management errors can have catastrophic consequences for the company if not discovered and remedied in time. Hence, the following questions are among the most important for PEMIs when deciding on a proposed investment: Who has the de facto power to determine the firm’s
management team? How will the corporate governance model be decided? How will management responsibilities be divided between the board of directors and executive managers?\textsuperscript{1894}

5.3.5.1 Appointment of Management

Having voice in relation to the appointment, remuneration, and removal of executive managers is critical to PEMIs, particularly in family firms, since there may be a tendency to prefer family members as managers over potentially better qualified external managers, which poses a risk for PEMIs. As the appointment of senior management falls into the non-delegable and inalienable powers of the board of directors, PEMIs’ voting power, through their representatives on the board of directors, determines the extent of influence they will have on appointing management. Hence, to increase their voice on management personnel, PEMIs would benefit by using the tools outlined in Section IV.E.3.3 to enhance voting power at the board in general. In other words, all of the tools that can enhance the PEMI’s voice at the board level (greater share of board seats, suitable quorum and majority vote requirements, contractual shareholder control agreements) can also help the PEMI to gain a greater say on management personnel.

5.3.5.2 Corporate Governance Models

As for choosing a suitable management organization, legal experts speak of the side-by-side (pari passu) ranking of the governance models outlined in Section IV.E.5.1.5.3.\textsuperscript{1895} Moreover, neither Swiss law nor the Swiss Code of Best Practice (SCBP) provides clear guidelines on whether to separate the positions of the chairman of the board and CEO.\textsuperscript{1896} The SCBP simply refers to the principle of maintaining a balance between direction and control within the company’s top management.\textsuperscript{1897} Empirical research has not proven the supremacy of any one model over the others in this respect.\textsuperscript{1898}

\textsuperscript{1894} See LEVIN, § 103 (“VC generally cannot be induced to put its money behind a management team in which it does not have confidence, no matter how attractive the portfolio company’s product, concept, or business plan.”).

\textsuperscript{1895} See ROTH PELLANDA, p. 86, N 160.

\textsuperscript{1896} Only banks must have a dual leadership structure (BankV 8 II).

\textsuperscript{1897} SCBP 18. Differently however, the governance guidelines for family firms that recommend avoiding joint leadership. See Governance guidelines for family firms, N 51.

\textsuperscript{1898} Cf. AMSTUTZ, Macht und Ohnmacht, p. 159; SCHMID/ZIMMERMANN, p. 27; DONALDSON, Stewardship, p. 60; VON DER CRONE, strategische Leitung, p. 5 et seq.
From the PEMI’s point of view, it is worthwhile noting that while a corporate governance model similar to the German two-tier system is prone to type I agency problems (see Section II.B.1.1), the governance models similar to the American board system and French Président-Directeur Général are critical in light of type II agency problems, particularly if owner family representatives on the board of directors assume executive management positions and, as the case may be, fill both the position of the chairman of the board and CEO. These circumstances are likely to catch the PEMI’s particular caution given the potential conflicts of interest and, in particular, the risk of family members diverting personal private benefits from the company. Hence, PEMIs pay particular attention to institutionalizing a balance of power at the top. On the other hand, one can understand why the founders of a family-owned business, due to their sizeable shareholdings, oftentimes view the company as their own and desire to keep a single leadership structure to retain full responsibility and decision-making power (or as much as possible).1899 The following describes the practical criteria – with no claim of being exhaustive – for facilitating a decision on whether to combine or separate the role of the board chairman and CEO which must ultimately be take in light of the individual investment situation and needs.

Supervision and control. The concentration of management and supervisory functions inevitably leads to a certain degree of self-regulation1900 that entails the risk that the person holding the reigns of both functions pursues a self-interested agenda.1901 Joint leadership is widely perceived to be less effective regarding the board’s control function1902 since participation in the executive management is likely to impair neutral supervision and objective assessment not only of one’s own executive functioning, but also when it comes to, for example, appointing, evaluating, compensating, and dismissing fellow executive managers.1903 Moreover, the separation of supervision and operational management is recommended because it promotes a clear division of powers and responsibilities for all corporate players’ actions.1904 On the other hand, for the chairman to effectively control management and react in time to important management issues

1899 See BÜHLER, Leitlinien, p. 324; KRNETA, CO 716b, N 1681.
1900 See BÄUEN/BERNET, p. 244 et seq., N 706.
1901 See MÜLLER/LIPP/PLÜSS, p. 611 et seq.
1902 See AMSTUTZ, Macht und Ohnmacht, p. 159; WERNLI, Basler Kommentar, CO 712, N 11; BÄUEN/BERNET, p. 244 et seq., N 706; KRNETA, CO 716b, N 1678; SCHWARZ, p. 21 (“Sich selbst zu beaufsichtigen, ist nicht nur unsinnig, es ist unmöglich”).
1903 See BÜHLER, Regulierung, § 11, N 1339; BÜHLER, Leitlinien, p. 324; SCHMID/ZIMMERMANN, p. 27.
arising, the chair needs to closely follow respective management decisions, which is challenging if not involved in the day-to-day management.\footnote{1905 See VON DER CRONE, Personalunion, p. 29 (“Wer das Geschehen bloss aus der Ferne beobachtet, kann wenn nötig nicht gezielt und effizient eingreifen. Strategische Qualitäts- sicherung muss deshalb in den Informations- und Entscheidungsprozess integriert sein. Dieser Integration ist ein zweistufiges Modell nicht förderlich.”).}

*Flow of information and transparency.* Joint leadership leads not only to a (possibly) unhealthy concentration of power but also of information. Information imbalances between the executive directors and non-executive directors render the latter ignorant of important information about the firm and/or the circumstances influencing it, which can result in the non-executive directors diminished ability to effectively carry out their supervision, control, and ultimate management responsibilities.\footnote{1906 See WATTER/ROTH PELLANDA, Zusammensetzung, p. 71.} On the other hand, the executive chairman’s and other executive directors’ superior (well-informed) insight into corporate matters vis-à-vis other non-executive board members\footnote{1907 See KRNETA, CO 716b, N 1681.} can be of great advantage in that they can share their additional information with the latter. The direct observations and experiences of the executive directors also may help the board of directors as a whole to better evaluate the management skills of the firm’s managers.\footnote{1908 See BOHRER, § 6, N 261.}

*Available expertise.* If leadership positions are separated, non-executive chairmen, due to their independence, can critically scrutinize management decisions and proposals as well as introduce new ideas by calling upon their externally acquired professional expertise, experiences, and business contacts with representatives of other companies and regulatory authorities.\footnote{1909 See SCHMID/ZIMMERMANN, p. 27; BÜHLER, Regulierung, § 11, N 1339.} This in turn increases the probability of preventing or eliminating errors and mismanagement.\footnote{1910 See VON DER CRONE, Personalunion, p. 29; ROTH PELLANDA, p. 157, N 312.} Conversely, with superior access to information, a CEO who also serves as board chairman, along with the other board members engaged with the firm’s executive management, automatically acquires detailed commercial and technical knowledge relating to relevant industries, market trends, competition, products, to name a few, which can enhance the quality of decision making at the board level.\footnote{1911 See ibid.}

*Resources.* Better control and cross-checking that comes with dual-leadership structures may save substantial costs associated with rectifying
potential management errors. In addition, some authors hold that the careful and responsible mastering of both leadership functions by one and the same person is nearly impossible in larger companies, both from a physical and psychological standpoint.\textsuperscript{1912} The division of labor between a CEO focusing on the running of the company and a chairman assuming more representational and networking tasks significantly eases the burden of both persons.\textsuperscript{1913} On the other hand, separating the roles of chairman of the board and CEO requires additional financial resources along with time and energy.\textsuperscript{1914} While paying two salaries might burden companies, particularly small firms, those in distress, and in early development stages,\textsuperscript{1915} combining both leadership positions can save the firm money and shorten the information and decision-making routes, which, in turn facilitates rapid and consistent management action and supports leadership efficiency at the top\textsuperscript{1916} due to strong command and control in one hand, which is particularly advantageous during development and re-organization phases or in distressed situations.\textsuperscript{1917}

\textit{Stability and continuity}: Joint leadership results in a concentration of power in one singular person, which could lead to a leadership vacuum if this individual leaves the firm,\textsuperscript{1918} thus compromising the firm’s stability and continuity.\textsuperscript{1919} Moreover, concentrated leadership in one individual places a risk of perpetuating the status quo, which can prevent the company from adapting to changes in the business environment and can endanger the firm’s competitiveness.\textsuperscript{1920} Conversely, power struggles between the chairman of the board of directors and the CEO resulting from overlapping powers can impede rapid decision making and equally result in competitive disadvantages.\textsuperscript{1921} Proximity to the firm’s operational management can

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\item \textsuperscript{1912} See AMSTUTZ, \textit{Macht und Ohnmacht}, p. 159; ROTH PELLANDA, p. 158, N 312. Cf. also GNOS/VISCHER, p. 756.
\item \textsuperscript{1913} See BOHRER, § 6, N 265.
\item \textsuperscript{1914} See BÖCKLI, \textit{Aktienrecht}, § 13, N 555; ROTH PELLANDA, p. 158, N 312; BOHER, § 5, N 207; SCHMID/ZIMMERMANN, p. 27; BÖCKLI/HUGUENIN/DESSEMONET, p. 82; HUNGERBÜHLER, p. 19 et seq.
\item \textsuperscript{1915} See BOHER, § 5, N 207.
\item \textsuperscript{1916} See GNOS/VISCHER, p. 756; BÜHLER, \textit{Leitlinien}, p. 324.
\item \textsuperscript{1917} See ROTH PELLANDA, p. 156, N 311; BAUEN/BERNET, p. 244 et seq., N 706.
\item \textsuperscript{1918} See GNOS/VISCHER, p. 756; BOHER, § 5, N 207.
\item \textsuperscript{1919} See VON DER CRONE, \textit{Strategische Leitung}, p. 8; ROTH PELLANDA, p. 156, N 311.
\item \textsuperscript{1920} See BOHER, § 5, N 207; VON DER CRONE, \textit{Personalunion}, p. 29.
\item \textsuperscript{1921} See, GNOS/VISCHER, p. 756; with further references, ROTH PELLANDA, p. 157, N 312; MÜLLER/LIPP/PÖSS, p. 614; BÜHLER, \textit{Leitlinien}, p. 324; BOHER, § 5, N 207; HOFSTETTER, \textit{Corporate Governance Report}, p. 43; VON DER CRONE, \textit{Personalunion}, p. 29; HUNGERBÜHLER, p. 19.
\end{itemize}
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promote personal commitment and identification with the company, which in turn can help align management with the PEMI’s interests. While many legal scholars are critical of joint leadership, the appropriate governance model is, ultimately chosen by the parties based on the individual circumstances including strategic, economic, organizational, cultural, social, and interpersonal aspects. In an effort to establish a system of checks and balances when the PEMI is considering investing in a family-owned firm the following corporate governance arrangements could be helpful for the PEMI to consider: (i) the parties may agree to have a family member assume the position of the CEO and possibly also serve on the board of directors as an executive member. As a counterbalance, the board of directors can be headed by a director representing the PEMI or by a mutually agreed independent member. (ii) Conversely, the search for a suitable third-party CEO can be left to the PEMI or carried out by mutual agreement, while the position of the board chairman can be occupied by an owner family representative. (iii) The parties may decide to fill both positions with independent third parties respected by both the family shareholders and the PEMI who are capable of neutralizing potential conflicts of interest. (iv) If the particular circumstances provide good grounds for joint leadership, such as if the company is in its initial stage or in distress, appropriate supervision and a system of checks and balances must be ensured by alternative means of control. One such measure is to appoint an experienced non-executive member of the board as lead director tasked to perform the control function and closely monitor the chairman’s work. Other suitable instruments are to stipulate reserved matters (see next section), high quorum and majority vote requirements for important resolutions, and extend directors’ information rights. A further counterbalance results from structuring the board in a way that allows the owner family to determine both the position of chairman and CEO and allocates the board seats so that the non-executive representatives of the PEMI alone

1922 See ROTH PELLANDA, p. 156, N 311.
1923 See BAUEN/VENTURI, § 1, N 4. Critical are, inter alia, MÜLLER/LIPP/PLÜSS, p. 612 et seq.; AMSTUTZ, Macht und Ohnmacht, p. 161 et seqq., particularly p. 164; AMSTUTZ, Doppelspitze, p. 27; KRNETA, CO 716b, N 1674; HOMBURGER, Zürcher Kommentar, CO 716b, N 757. Differentiating is BÖCKLI, Aktienrecht, § 13, N 551 et seq. Pointing to positive aspects of leadership unity is ROTH PELLANDA, p. 159, N 31; WATTER/ROTH PELLANDA, Zusammensetzung, p. 74; VON DER CRONE, Personalunion, p. 29; VON DER CRONE, Strategische Leitung, p. 4 et seqq.
1924 See WERNLI, Basler Kommentar, CO 707, N 24; ROTH PELLANDA, p. 86, N 161; BOHRER, § 5, N 207; VON DER CRONE, strategische Leitung, p. 8; HOMBURGER, Zürcher Kommentar, CO 707, N 119 (“je nach den konkreten Umständen”).
1925 See BÜHLER, Leitlinien, p. 325; FORSTMOSER, KMU, p. 491.
1926 SCBP 18 II; see BÜHLER, Leitlinien, p. 324 et seq.; similarly VON DER CRONE, Strategische Leitung, p. 9.
or together, with further independent board members form the majority of the board of directors.\textsuperscript{1927} Another measure for institutionalizing checks and balances is to divide the board’s responsibilities among the executive and non-executive members to avoid conflicts of interest as much as possible,\textsuperscript{1928} for example, by appointing only non-executive members to the audit and compensation committees.\textsuperscript{1929} (v) The governance model ultimately could be made dependent upon the company’s situation (see Section II.B.1.2.2.6 on contingent contracting). For example, the parties may agree that joint leadership is generally in the hands of the owner family. However, if certain trigger events arise such as a significant drop in turnover over an extended period, the PEMI can hold a contractually guaranteed right to replace members of the management team if deemed necessary.

5.3.5.3 Division of Management Responsibilities

The executive management powers are not defined by law, but depend on the corporate governance model chosen, that is, the extent to which the board of directors has delegated its duties. From the PEMI’s perspective, who in most cases is only present on the board of directors, but does not participate in the executive management,\textsuperscript{1930} the stipulation of reserved matters – those that require the board of directors’ consent, is an important means for ensuring that the minority investor is fully informed in advance of any critical pending management decisions and can exercise voice in relation to these matters at the board of directors. Typical reserved matters are, according to BÖCKLI, the approval of the annual budgets and financial planning, investment decisions not factored into the budget or exceeding a certain threshold, expansion into new business activities of major importance, appointment and removal of managers below top management, compensation policy (below top management), and the launch of significant legal proceedings.\textsuperscript{1931} In addition, reserved matters can relate to the incurrence of debt, joint ventures, and other forms of cooperation, real estate transactions, license agreements, personnel decisions,\textsuperscript{1932} the awarding of consultancy contracts, representation in industry associations,

\begin{itemize}
\item \textsuperscript{1927} Cf. VON DER CRONE, Strategische Leitung, p. 8.
\item \textsuperscript{1928} WATTER/ROTH PELLANDA, Zusammensetzung, p. 75.
\item \textsuperscript{1929} Cf. in the same direction, SCBP 23 I and 25 I.
\item \textsuperscript{1930} See FN 144.
\item \textsuperscript{1931} BÖCKLI, Aktienrecht, § 13, N 438. Also cf. MÜLLER/LIPP/PLÜSS, p. 146. See Section IV.E.3.3.2.5.
\item \textsuperscript{1932} Comprising, apart from the appointment and dismissal of important personnel, corporate guidelines and specifications, personal policy and planning, decisions on compensation and fringe benefits, training, staff welfare, and pensions, etc. See ZWICKER, p. 62.
\end{itemize}
and important advertising and public relations campaigns, to list a few. Particularly important, from the PEMI’s perspective, are also transactions with shareholders, related parties, and subsidiaries, donations and sponsoring activities, and transactions concerning the company’s own shares, all of which are prone to conflicts of interest.¹⁹³³

¹⁹³³ See MüLLeR/LiPP/PLÜSS, p. 146.; ZWiCKER, p. 62.
V    Access to Information

A    Functions

1    Control Through Monitoring

Access to information\(^{1934}\) is pivotal for the PEMI’s monitoring activities.\(^{1935}\) Monitoring is defined as “routinely and systematically collecting information about the investment in a planned and organized way”\(^{1936}\) and thoroughly analyzing such information. For example, thorough monitoring involves comparing the company’s financial results and key performance indicators (KPIs) with the investment targets defined at the time of investment and with the results of previous years and of competitors, and by analyzing noticeable deviations. Monitoring enables PEMIs to control management actions (control function)\(^{1937}\) and to discover potentially unexpected and unfavorable business developments at an early stage, and to react promptly.\(^{1938}\) Access to information is therefore a prerequisite for a functioning risk management and for establishing an early warning system\(^{1939}\) to mitigate the financial and reputational downside risks inherent in the investment. Moreover, information also serves as an incentive mechanism.\(^{1940}\) By monitoring corporate actions, the PEMI motivates the board of directors and management to ‘stay on their toes,’ – to perform well – because they know their work will be overseen and thus opens the possibility for rewards and penalties.\(^{1941}\) In addition, the controlling shareholder benefits from the PEMI’s monitoring activities. This can be particularly important in family firms in which owners at times rely upon their intuition and not on an institutionalized decision-making process in

\(^{1934}\) For a detailed discussion of the term information, see MAROLDA MARTÍNEZ, p. 7 et seqq.; STÜCKELBERGER, p. 2 et seqq.; DETTWILER, p. 5 et seqq.

\(^{1935}\) See von SALIS-LÜTOLF, Finanzierungsverträge, p. 308, N 1330; MAROLDA MARTÍNEZ, p. 22.

\(^{1936}\) MÜLLER, Private Equity Partnerships, p. 63.

\(^{1937}\) On the control function, see WEBER, Basler Kommentar, CO 696, N 1; MAROLDA MARTÍNEZ, p. 22; HORBER, Informationsrecht, p. 26, N 67; DRUEY, Outsider, p. 72 (describing information as a means for the general meeting to exercise its control rights vis-à-vis the corporate executive as part of the rights of participation); BÜRGI, Zürcher Kommentar, Vorbemerkung zu CO 696 and 697, N 2. Sceptical of the control function is MEIER-SCHATZ, Unternehmenspublizität, p. 228 et seqq.

\(^{1938}\) See FRICK, § 12, N 1325.

\(^{1939}\) See PEARCE/BARNES, p. 44.

\(^{1940}\) See ROTH PELLANDA, p. 308, N 642.

\(^{1941}\) See MÄNTYSAARI, Comparative Corporate Governance, p. 32.
which the pros and cons are systematically analyzed. Private equity investors have particular expertise in and motivation for setting up and expanding efficient institutional governance mechanisms by implementing suitable information and control systems.

2 Assessment and Valuation of the Investment

Typically, private equity investors are not involved in the day-to-day management of the firm. The information obtained as part of their monitoring activities allows them to observe and track the performance of the business, to assess the firm’s current economic and financial status, and future prospects based on the firm’s operations and its ability to generate cash flow. Hence, adequate access to information is prerequisite for PEMIs to make an informed valuation of the firm.

3 Informed Decision Making

According to modern information economics, PEMIs, like all economic agents, exercise their rights under uncertainty. Information reduces uncertainty and is therefore indispensable for the PEMIs’ informed decisions-making. The sounder the PEMIs’ information base, the less uncertainty they face when comparing costs and benefits of various decision alternatives and the better is their position to make a rational choice between such options and to allocate their funds efficiently. Conversely, the lack of, or manipulated information can cause PEMIs to

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1942 See BÜHLER, Regulierung, § 11, N 1348. On relational versus institutional governance mechanisms, see Section II.A.3.2.4.
1943 See FN 157.
1944 See FN 144.
1945 See HORBER, Informationsrecht, p. 25, N 66 et seq.; MAROLDA MARTÍNEZ, p. 91.
1946 See WALTHER, p. 87 (finding that the main purpose of control rights is to allow shareholders to realistically assess their investments); equally GABRIELLI, p. 23; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 40, N 146; MAROLDA MARTÍNEZ, p. 91, FN 504.
1947 For an overview of the history of information economics, see STIGLITZ, Information and the Change in the Paradigm of Economics.
1948 See MÄNTYSAARI, The Law of Corporate Finance, p. 336 (“the set of alternatives from which individuals choose depends on their knowledge about the actions they can choose and the pay-offs that follow from them. Their decisions can only be subjectively rational, because they can only choose the relatively best option within the limits of their subjective knowledge and information”); KUNZ, Minderheitenschutz, § 12, N 4 et seqq. (“Informationsrechte der Gesellschafter stellen unter verschiedenen Aspekten die Basis sämtlicher Aktionärsrechte … dar”). More cautious, MEIER-SCHATZ, Unternehmenspublizität, p. 222 et seqq. (“Dem Grundsatz nach steht ausser Zweifel, dass die Zugänglichmachung von Informationen den Willensbildungsprozess im Kapitaleignerkreis fördern”).
make wrong decisions, which clearly undermines their goal of turning a profit.  

Adequate access to information is necessary both ex ante – to make an informed decision on whether to invest in a company – and ex post – to assess whether staying an investor continues to be profitable or whether to exit the investment. Having access to complete and timely information is crucial to effectively exercise respective shareholder rights. PEMIs rely on information for various needs such as to actively engage in discussions at the general meeting, to propose specific motions, and, most importantly, for casting their votes. Moreover, access to information is necessary to assess whether to exert protection rights and commence liability proceedings against appropriate corporate organs.

4 Reduction of Information Asymmetries

Adequate access to information helps PEMIs to reduce the chances for opportunistic behavior of controlling shareholders and the company organs effectively nominated by them (e.g., by shirking duties or extracting private benefits of control to the PEMI’s detriment). In line with US Supreme Court Justice Brandeis’s famous quote “sunlight is said to be the best of disinfectants,” appropriate access to information and a brisk flow of information between the company and its shareholders, in which the principle of information equality is observed, helps reduce information asymmetries, mitigates associated agency problems and reduces their related agency costs.

1950 See von Greyerz, p. 150 (“Das Kontrollrecht steht dem Aktionär nicht nur zur Willensbildung ... zu, sondern auch zur Beschaffung der Kenntnisse für das Treffen des Grundsatzentscheides: Verbleib oder Verkauf”); Gabielli, p. 16.
1952 See Forstmoser/Meier-Hayoz/Nobel, § 40, N 146; Horber, Informationsrecht, p. 27, N 73, FN 128.
1953 See Forstmoser/Meier-Hayoz/Nobel, § 35, N 2; Forstmoser, Meinungsausserungsrechte, p. 86 et seq.; Roth Pellanda, p. 308, N 642; Marolda Martínez, p. 92; Walther, p. 87.
1954 See Section II.B.1.2.1.3.
1955 Brandeis, p. 92.
1956 See Section V.B.1.4.
1957 See Ruffner, Grundlagen, p. 81 et seq. (describing information rights as a means to reduce information asymmetries), equally Frick, § 12, N 1320; Marolda Martínez, p. 89; Giger, p. 247.
5 Performance of Advisory Role

PEMIs rely on sufficient contact with the firm’s management and timely access to information to gain in-depth understanding of the firm’s issues and concerns, which in turn allows PEMIs to carry out their role as sparring partners and indirectly steer the company (soft control). It follows that access to information is a prerequisite not only for risk management that helps mitigate the downside risks inherent in the minority investment, but also to increase the upside potential.

6 Enhanced Efficiency

Comprehensive information rights can contribute to more efficiently run general meetings of shareholders and board meetings if the PEMI and its representatives are prepared and their questions, general or technical, are answered in advance. Moreover, the unsolicited disclosure of relevant information also reduces the PEMI’s requests for information and saves the firm money, time, and energy associated in answering these requests.

7 Trust

Finally, granting information rights and voluntarily sharing corporate information demonstrates the firm’s (and indirectly the controlling shareholder’s) willingness to cooperate with and involve the PEMI in corporate decision making. In cases of family firms, it also conveys to the PEMI that the controlling owner family has nothing to hide, and reinforces trust in management. Such confidence can prompt PEMIs to feel comfortable with the owner family keeping a strong grip on management, and, as the case may be, appointing both the chairman of the board of directors and the CEO.

1958 See FN 141.
1959 See MÜLLER/LIPP/PLÜSS, p. 88.
1961 See FRICK, § 12, N 1369.
1962 See MEIER-SCHATZ, Unternehmenspublizität, p. 105 et seqg.; MAROLDA MARTÍNEZ, p. 22; also see, with further references, ROTH PELLANDA, p. 308, N 641; BÖCKLI, Unternehmensspitze, p. 31. Critically, DRUEY, Fetichismus, p. 592 (“Die rechtliche Fixierung der Informationspflichten ist dem Zweck der Vertrauensschöpfung abträglich. Ist dafür nämlich die relationale Ebene massgebend, geht es also um die Tatsache, dass, und nicht was offengelegt wird, so ist die Freiwilligkeit des Handels von entscheidender Bedeutung.”).
1963 See WRIGHT/ROBBIE, p. 548.
B Statutory Framework

1 Minority Investor Information Rights at Shareholder Level

Shareholders obtain access to information either passively or actively. In other words, while the company spontaneously makes some information available to the shareholders, such as the annual report and the auditor’s report, other information is divulged to the shareholders upon request only. Moreover, the P slim may be entitled to initiate a special audit. With this three-pronged information system, the law strikes a balance between the shareholders’ need for information and the company’s interest in confidentiality. On the one hand, the statutorily guaranteed information gives PEMIs access to a minimum of information for exercising their participation rights. One the other hand, the shareholder right to information is limited to safeguard the company’s interest in confidentiality because shareholders generally owe no loyalty to the company and could use information (unintentionally or intentionally) to the detriment of the company and freely pass it to third parties.

The members in a GmbH have broader information rights than the shareholders in a stock corporation. Yet, the GmbH laws provide for a two-pronged information system and do not expressly grant members the right to request a special audit. The articles of association of a GmbH may,

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1964 See Weber, Basler Kommentar, CO 696, N 1; Meier-Hayoz/Forstmoser, § 16 N, 190; von Büren/Stoffel/Webber, p. 190, N 907; Kunz, Minderheitenschutz, §12, N 10; Forstmoser/Meier-Hayoz/Nobel, § 40, N 149 et seqq.; Epnerberger, p. 160 et seq. (speaking of a “Schleusensystem”). Apart from this three-pronged information system, there are further special information rights, e.g., listed in Forstmoser/Meier-Hayoz/Nobel, § 40, N 154-160.

1965 See Bauern/Bernet, p. 101, N 305; Forstmoser/Meier-Hayoz/Nobel, § 40, N 149.


1967 The term information rights is not stated in corporate law. Instead, the marginal note of CO 696 uses the term control rights. In the legal literature, the term information rights is not used uniformly. Pursuant to Spillman, it is “eine Frage der Perspektive, ob diejenigen Rechte, welche die Ausübung dieser Kontrollrechte erst ermöglichen, wie etwa die Informationsrechte, auch als Kontrollrechte zu qualifizieren sind” (Spillmann, p. 249 and FN 1390). See Horber, Informationsrecht, p. 18, N 44 et seqq. (finding the term control rights is inappropriate in this context and uses the term information rights as the generic term for the rights stated in CO 696 and 697). Equally, Marolda Martinez, p. 26; Kunz, Minderheitenschutz, § 12, N 12; Kunz, Vorsitz des Aufsichtsratsmitglieds, p. 572. In line with these authors, this dissertation uses the term information rights.


1970 See Meier-Hayoz/Forstmoser, § 16, N 198; Forstmoser/Meier-Hayoz/Nobel, § 35 N 3; Böckli/Bühler, Vorabinformationen, p. 104 et seq.
however, optionally provide for such a right, thereby installing a three-pronged information system as well.\textsuperscript{1971}

1.1 Unsolicited Access to Information\textsuperscript{1972}

Based on Swiss corporate law, PEMIs are entitled to be informed by the company on a regular basis and spontaneously\textsuperscript{1973} — without their request.\textsuperscript{1974} No later than 20 days prior to the ordinary general meeting, the annual report and the auditor’s report must be made available for inspection at the company’s registered office.\textsuperscript{1975} In addition, PEMIs may request to be sent copies of these documents,\textsuperscript{1976} immediately and free of charge,\textsuperscript{1977} and they maintain this right for one year following the general meeting.\textsuperscript{1978, 1979} In the GmbH, the annual report and the auditor’s report are automatically sent to all members, at least 20 days prior to the starting day of the meeting of members.\textsuperscript{1980}

\textsuperscript{1971} See Gasser/eggenger/stäuber, Orell Füssli Kommentar, CO 802, N 1; weber, Basler Kommentar, CO 802, N 3; meyer-hayoz/forstmoser, § 18, N 88; handschin/truniger, § 13, N 30 et seqq. and § 14, N 144.

\textsuperscript{1972} Also called right to periodic information, right to receive the annual report and the auditor’s report, passive information right, right to spontaneous information.

\textsuperscript{1973} Providing information spontaneously means merely without the shareholder’s specific request; it does neither mean providing it in a timely fashion nor voluntarily. In case of reactive information, information is divulged only on the shareholder’s (active) request. See with further references, marolda martínez, p. 104; weber, Basler Kommentar, CO 697, N 1; von büren/stoffel/weber, p. 190, N 908 (“institutionelles Informationsrecht”); bauen/bernet, p. 102, N 306 et seq.; dettwiler, p. 56 et seq.; forstmoser, Meinungsäußerungsrechte, p. 89, 92 (speaking of “aktive Informationsvermittlung durch die Gesellschaft” and “reaktive Information aufgrund von Aktionärsbegehren”); horber, Informationsrecht, p. 10, N 25; epenberger, 64 et seqq.

\textsuperscript{1974} See horber, Informationsrecht, p. 30, N 84; garbielli, p. 11.

\textsuperscript{1975} CO 696 i.

\textsuperscript{1976} CO 696 i.

\textsuperscript{1977} See weber, Basler Kommentar, CO 696, N 8; marolda martínez, p. 125; forstmoser/meier-hayoz/nobel, § 40, N 165, FN 34. Of another opinion, böckli, Aktienrecht, § 12, N 218 (“Unser Gesetz … erlaubt der Gesellschaft, dem informationsdurstigen Aktionär oder Dritten die Kosten der Ausfertigung und des Versands in Rechnung zu stellen.”). The Draft Legislation expressly provides that the delivery is free of charge (D-CO 969 III). With respect to the GmbH, see weber, Basler Kommentar, CO 801a, N 5; nussbaum/sanwald/scheidegger, CO 801a, N 7, 13.

\textsuperscript{1978} CO 969 III.

\textsuperscript{1979} So-called duty to procure information (in German, Holschuld). Only shareholders listed in the share register must be informed by the company’s written notice that the documents as required by law are available for inspection and that a prompt delivery of such reports may be requested (so-called notification duty). See böckli, Aktienrecht, § 12, N 80; weber, Basler Kommentar, CO 696, N 8; forstmoser/meier-hayoz/nobel, § 40, N 164; horber, Informationsrecht, p. 39 et seqq., N 110 et seqq.; gabrielli, p. 13.

\textsuperscript{1980} CO 801a I, 805 III. In addition, the members may request the delivery of the version of the annual report approved by the meeting after the meeting of members (CO 801a II).
The ordinary general meeting is held each year within six months after the close of the financial year.\textsuperscript{1981} Swiss law does not require the publication of semi-annual or quarterly reports. The annual report is prepared by the board of directors and comprises the annual financial statements and the management report.\textsuperscript{1982} The annual financial statements include the profit and loss statement,\textsuperscript{1983} the balance sheet,\textsuperscript{1984} and the notes to the financial statements.\textsuperscript{1985} The management report provides information on the course of the business, as well as the firm’s economic and financial situation.\textsuperscript{1987} It reports any capital increases that occurred during the financial year and includes the confirmation of the auditor’s examination.\textsuperscript{1988} The auditor’s report includes findings on the financial reporting, the internal control system,\textsuperscript{1989} and the performance and result of the audit.\textsuperscript{1990}

\subsection*{1.2 Access to Information Upon Request\textsuperscript{1991}}

\subsubsection*{1.2.1 Overview}

In addition to PEMIs’ right to receive the annual report and the auditor’s report, they are entitled to further information on their own initiative by exercising their right to information and inspection of company records.\textsuperscript{1992} At the general meeting, PEMIs may ask the board of directors for information concerning corporate affairs, and ask auditors for information concerning the conduct and the results of their audit.\textsuperscript{1993} Moreover, PEMIs have a right to inspect the company’s books and files upon the general meeting’s explicit authorization or based on a board of directors’ resolution, but subject to safeguarding the company’s business secrets or other interests.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1981} CO 699 II. With respect to the GmbH, CO 805 II.
\item \textsuperscript{1982} It also comprises the consolidated financial statements if such statements are required by law (CO 662 I). In a GmbH, the stock corporation laws regarding the annual report, the reserves, and the disclosure of the annual financial statements apply analogously (CO 801 i.c.w. CO 662-674, 697h).
\item \textsuperscript{1983} CO 663.
\item \textsuperscript{1984} CO 663a.
\item \textsuperscript{1985} CO 663b (for the notes to the financial statements); CO 663g II (for the notes to the consolidated financial statement).
\item \textsuperscript{1986} CO 662 II.
\item \textsuperscript{1987} CO 663d I.
\item \textsuperscript{1988} CO 663d II.
\item \textsuperscript{1989} In detail, see MÜLLER/LIPP/PLÜSS, p. 191 \textit{et seqq.}
\item \textsuperscript{1990} CO 728b. In case of a limited audit, \textit{cf.} CO 729b.
\item \textsuperscript{1991} Also called \textit{right to information and inspection, active information right.}
\item \textsuperscript{1992} CO 697.
\item \textsuperscript{1993} CO 697 I.
\end{itemize}
\end{footnotesize}
worth being protected. These information rights are considered one-sided mandatory in that they may be extended in the Pemi’s favor via the articles of association, but they must not be limited to the Pemi’s disadvantage.

In a GmBH, members’ rights to information and inspection are broader than those of shareholders in a stock corporation and may be exercised not only in the meeting of members, but at any time. In fact, they are oriented toward the information rights of the board members in a stock corporation. The broader information rights of GmBH members reflect the typically closer relationships among the members and between the members and the company, the greater possibilities for members to participate in corporate decision making, and their duty of loyalty. Hence, the information rights of GmBH members are portrayed together with those of the board of directors in Section V.B.2.

1.2.2 Timing of Information Requests

Swiss corporate law states that the shareholders’ requests for information must be submitted at the general meeting. Prevailing opinion holds that shareholders may also submit their requests for information or inspection of company records in writing ahead of the general meeting. companies

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1994 CO 697 III. For practical purposes, the request for inspection should be directed to the chairman of the board of directors, see Horber, Informationsrecht, p. 188, N 595; Gabrielli, p. 20.

1995 See Weber, Basler Kommentar, CO 696, N 1; Bürgi, Zürcher Kommentar, OR 696; Kunz, Informationsrecht, p. 884; Forstmoser, Meinungsausserungsrechte, p. 99 (deeming a restriction of the right to information and inspection unlawful. In contrast, an extension of such rights via the articles of association is legally possible concerning the simplification of the procedure or level of detail of the information to be provided. The board of directors must, however, maintain its duty to deny requests that violate business secrets due to the principle of parity (see Section IV.D.2.1) and the duty of loyalty, see Section IV.E.4.1.2).


1997 CO 803.

1998 See Federal Council report, BBI (2001), p. 3202; Weber, Basler Kommentar, CO 802, N 2; Siffert/Fischer/Petrin, CO 802, N 2; Nater, p. 70.

1999 CO 697 I. See Horber, Informationsrecht, p. 169, N 536 with respect to the right to information and p. 199, N 632 et seq. with regard to the right of inspection; Gabrielli, p. 41 and 43. Also cf. Böckli, Aktienrecht, § 12, N 149 (pointing to the exception stipulated in CO 716b I Sentence 2, whereby the shareholders are entitled, at any time, to request information on the organization of the management from the board of directors). With respect to the right of inspection, the law does not clearly state a time for respective requests. It is assumed that, in principle, the same temporal limitations apply as in case of the right to information; see Marolda Martínez, p. 204.

generally even welcome advance requests as it gives managers time to adequately prepare an answer prior to the general meeting.\textsuperscript{2001} Companies have no obligation to continuously provide information and are allowed, but not obliged, to provide information or allow inspection outside the general meeting and the preceding 20-day period.\textsuperscript{2002} If the company decides to do so the principle of equal treatment must be observed, that is, the requested information must be provided and inspection allowed for all shareholders.\textsuperscript{2003} The information must be included in the meeting minutes to grant all shareholders equal access to information.\textsuperscript{2004} If the request is submitted only at the general meeting, the requested information may also be provided or the inspection granted after the general meeting if reasonable and necessary to procure the relevant documents.\textsuperscript{2005}
1.2.3 Information Objects

When exercising active information rights, PEMIs must either name a certain subject matter on which they seek information or name the specific document(s) that they desire to inspect. The request for information must pertain to objective matters concerning corporate affairs. Two lines of argument have emerged with regard to the information that can be requested from the board of directors. Some authors argue that the right to information has an explanatory function – the information objects must be limited to issues covered in the annual report and the auditor’s report, or relate to agenda items or the financial year as presented at the general meeting. Prevailing opinion and legal precedent, however, interpret

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2006 See GABRIELLI, p. 21 et seq. (pointing out that the question of the possible information objects relates to the framework within which the shareholder’s request for information may be exercised. It is to be distinguished from the question of the scope of information to be actually made accessible which is determined on a case-by-case basis taking into account the shareholder’s subjective perspective); HORBER, Informationsrecht, p. 150, N 467 et seq. (holding that the assessment of the information objects is aimed at defining the maximum range of the right to information).

2007 See NÄNNI/VON DER CRONE, p. 155.

2008 CO 697 I.

2009 So-called Spiegelbildtheorie supported by EPPENBERGER, p. 142 et seqq. (“Wenn das Auskunftsrecht als Erläuterungsrecht verstanden wird, kann vom Aktionär nur gefragt werden, was zur Erläuterung einer konkreten in den Bekanntgaben schon enthaltenen Information notwendig ist.”). See also NOBEL/GRÖNER, p. 461 et seq. (“das, was in der Bilanz nicht aufscheinen muss, durch das Auskunftsrecht nicht hervorgeholt werden kann”).

2010 See BÖCKLI, Aktienrecht, § 12, N 152; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 40, N 170 et seqq. (“Verlangt ist also ein Sachzusammenhang mit der Tätigkeit der Gesellschaft und den zur Debatte stehenden Traktanden”).

2011 See KRNETA, CO 712, N 580.

2012 In favor of a broad interpretation of the right to information, BÖCKLI, Aktienrecht, § 12, N 152 (“Der Aktionär ist aber nicht an die Traktandenliste gebunden, solange die erfragte Tatsache einen erheblichen Einfluss auf die wirtschaftliche und die finanzielle Lage der Gesellschaft haben kann oder sich auf die Einhaltung des Gesetzes und anderer anwendbarer Regeln bezieht”); WEBER, Basler Kommentar, CO 697, N 7 (“auf alle Tatsachen, die einen Einfluss auf die wirtschaftliche und finanzielle Lage der Gesellschaft auszuüben vermögen”); VON BÜREN/STOFFEL/WEBER, p. 192, N 917 (“Vielmehr ist Auskunft zu erteilen über alles, was Gegenstand des Geschäftsbereiches sein kann, z.B. Forschung und Entwicklung, Personalpolitik, Unternehmensstrategie”); KUNZ, Minderheitsschutz, § 12, N 19 et seq.; KUNZ, Informationsrecht, p. 888 (“sachlich unbeschränktes Auskunftsrecht des Aktionärs,” where a “Sachzusammenhang zwischen dem Auskunftsbegehren und der in Frage stehenden Tätigkeit der AG bestehen muss,” determined “erstes positives Element”); MAROLDA MARTÍNEZ, p. 133 and 137 et seq; HÖRBER, Informationsrecht, p. 157, N 490 et seq.; GABRIELLI, p. 22 et seqq; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 40, N 169 (“Gegenstand eines Auskunftsbegehrens kann grundsätzlich alles sein, was im Zusammenhang mit der Ausübung von Aktionärsrechten steht und für die Beurteilung der Lage der Gesellschaft erheblich ist.”); with further references CEREGLHEITI, p. 122.

2013 See BGE 4C.234/2002 (E. 4.1.1: “[Die Beklagte] wendet jedoch ein, dass aufgrund des Auskunftsrechts nur Aufschlüsse zusammenfassender Natur verlangt werden können, nicht aber Einzelheiten der Geschäftsführung ... Dem Gesetz lässt sich keine solche Einschrän-
information objects broadly and include in principle all information that relates to corporate affairs such as information on all aspects of business that can influence the firm’s economic and financial situation. Gabrielli interprets corporate affairs as everything that can support the formation of well-grounded judgments on the company’s financial standing and business activities (e.g., strategy, research and development, investment plans, and personnel policy).2014 As a result, while a limitation may arise when determining the actual scope of the information to be provided, the information right as such (i.e., regarding potential information objects) is principally unlimited as long as a connection with the corporate affairs prevails.

The right of inspection relates to company financial books and files. Pursuant to contemporary understanding, inspection not only relates to the annual report, the auditor’s report, or the company books, but also to other written documents needed for an appraisal of the company, including, among others, the order backlog, customer lists, payroll details, budgets, letters, emails, faxes, memoranda. Such documents must, however, directly relate to the company and its business. Moreover, this right is

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2014 Gabrielli, p. 23; also see Böckli, Aktienrecht, § 12, N 151b; Marolda Martínez, p. 137.
2015 CO 957.
limited to existing documents since, by law, the company is not obliged to specially prepare requested documents.  

1.2.4 Scope of Information Rights

The scope of information which PEMIs are entitled to request or inspect, given the plethora of possible information objects, is determined according to the criterion of necessity, though the precise meaning of this term is contentious. According to one view, the criterion of necessity represents a stand-alone qualifying condition that requires the requested information to be necessary for exercising shareholder rights. Other authors see the criterion of necessity merely as the prohibition of pursuing unjustified purposes. Both views, however, concur that the requirements for such a criterion should not be too high so as to block shareholders’ access to information. The Swiss Federal Supreme Court has adopted the first line of argumentation and requires substantial proof indicating the necessity of

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2018 See Frick, § 12, N 1361.
2019 See Kunz, Minderheitenschutz, § 12, N 20 (“zweites positives Element”).
2020 For a detailed overview of expert opinions, see Horber, Informationsrecht, p. 250 et seqq., N 795 et seqq.
2021 In particular, the right to vote, to initiate a special audit, to raise an action against a decision of the general meeting or an action of accountability. See Nänni/von der Crone, p. 157 (differentiating between the right to information and inspection: “Während die Erfordernis für das Einsichtsrecht u.E. nicht Anspruchsvoraussetzung bildet, stellt sie für den Anspruch auf Auskunft eine materielle Voraussetzung dar.”). Equally asking for a clearly identifiable connection between the request for information and exercising shareholder rights is Gabrielli, p. 25 et seqq. Also see Druey, Geheimnissphäre, p. 208 (stating that information cannot be requested as an end to itself, quas as food for thought); von GREYERZ, p. 152 (no information requests to merely satisfy curiosity). With further references see also Marolda Martínez, p. 142 et seqq. (pointing out that necessity must not be equated with a legitimate interest in taking action); Böckli, Aktienrecht, § 12, N 152 (calling necessity a functional limitation: “Die in der Generalversammlung zu erteilende Auskunft geht so weit und nur so weit, als die verlangte Information für die Ausübung der Aktionärsrechte erforderlich ist – insbesondere für die Meinungsbildung im Hinblick auf das Stimmrecht”). Similarly, Horber, Informationsrecht, p. 249 et seqq., N 790 et seqq. (viewing the criterion of necessity as a limitation of the right to information).
2022 See Forstmoser, Meinungsausserungsrechte, p. 94 (stating, e.g., purposes that serve only the interest of a competitor for such non-intended purposes. He adds, however, that a misuse is not yet given if the right to request information is not based on a demonstrated legitimate interest since the proof of such interest is principally not required); Forstmoser/Meyer-Hayoz/Nobel, § 40, N 172 et seq. (clarifying that an abusive request for information is one that is submitted with the intention to harm the company, e.g., requests that only serve a competitor’s interests; it is up to the board of directors to provide evidence for the abuse); Kunz, Minderheitenschutz, § 12, N 20; Kunz, Informationsrecht, p. 888 (finding that, in case of doubt, necessity must be assumed to exist).
2023 See Nänni/von der Crone, p. 159; Forstmoser, Meinungsausserungsrechte, p. 94; Gabrielli, p. 26; Kunz, Minderheitenschutz, § 12, N 20; Weber, Basler Kommentar, CO 697, N 7; Forstmoser/Meyer-Hayoz/Nobel, § 40, N 173; Marolda Martínez, p. 146 et seq.

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the information requested for shareholders to exercise their information rights.\textsuperscript{2024} It held that \textit{prima facie} evidence is not sufficient.\textsuperscript{2025} Yet, the right to information must be commonly assumed if required by reasonable, average shareholders to exercise their shareholder rights.\textsuperscript{2026} In case of a PEMI with substantial personal and financial commitments to the firm, the request for further information appears usually justified, so that the company must have good cause to withhold information, particularly if the shareholder contractually agrees to maintain confidentiality.\textsuperscript{2027}

Whether the criterion of necessity also applies to the right of inspection and if such a requirement is of stand-alone nature is debated in legal circles. While some authors advocate for this, others reject it arguing that the criterion of necessity is already sufficiently safeguarded by the formal requirement of authorization of the general meeting or the board of directors, the latter being obliged to preserve the company’s interests.\textsuperscript{2028}

\begin{itemize}
\item \textsuperscript{2024} See BGE 132 III 71, 76 (E. 1.3.1: “Im Streitfall hat der Aktionär zu beweisen, dass die Einsicht im Hinblick auf die Ausübung seiner Rechte erforderlich ist.”); BGE 4C.234/2002.
\item \textsuperscript{2025} See BGE 4C.234/2002 (E. 4.2.2: “reicht ein blosse Glaubhaftmachen nicht aus.”).
\item \textsuperscript{2026} See BGE 4C.234/2002 (E. 4.2.1: “Ob die verlangte Auskunft zur Meinungsbildung hinsichtlich der Ausübung der Aktionärsrechte erforderlich ist, bestimmt sich nach dem Massstab eines vernünftigen Durchschnittsaktionärs.”).
\item \textsuperscript{2027} See HORBER, Informationsrecht, p. 270, N 850. Debated among legal scholars is whether, in light of the scope of the shareholder right to information, the size and nature of the company should be taken into account. In favor, FORSTMOSER, Meinungsausserungsrechte, p. 106 (“dem allenfalls vermehrten Engagement des Minderheitsaktionärs in einer kleinen Gesellschaft und dem trotz durch die Aktienrechtsreform gelockerter Vinkulierung erschwerten Ausscheiden aus solchen Gesellschaften Rechnung zu tragen”). Also see WEBER, Basler Kommentar, CO 697, N 9; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 40, N 171. In contrast, GABRIELLI, p. 28 (only deeming the shareholder rights relevant when determining the scope of the information right. However, he takes the nature of the company into consideration when assessing the limitations of the right to information). In contrast to this view, it should be acknowledged that in extraordinary circumstances, the shareholder, from a subjective point of view, is likely to need further information in order to exercise his/her shareholder rights and hence, the scope should be a function of the company’s circumstances. See WIDMER, Auskunftserteilung, p. 23 (taking the particular circumstances into account, and pointing out that in case of an unfavorable business situation in which disclosure can be harmful, a more restrictive disclosure practice is justified).
\item \textsuperscript{2028} In favor, see HORBER, Informationsrecht, p. 255, N 813 (“dass die Erforderlichkeit (resp. Erheblichkeit) nicht nur eine spezifische Schranke des Auskunftsrechts, sondern auch eine spezifische Schranke des Einsichtsrechts darstellt.”); MAROLDA MARTÍNEZ, p. 205 (“Dennoch ist auch beim Recht auf Einsicht davon auszugehen, dass die funktionale Schranke der Erforderlichkeit Anwendung findet”). Of different opinion are NÄNNI/VON DER CRONE, p. 154 (“Da eine Einsichtnahme also im Ermessen der zuständigen Organe liegt, besteht im Gegensatz zum Auskunftsrecht kein Anspruch auf Einsichtnahme bzw. positive Beschlussfähigung. Wenn aber ohnehin kein Anspruch besteht, ist es systematisch schwierig zu begründen, weshalb die Einsicht zusätzlich vom Nachweis materieller Voraussetzungen abhängig sein soll.”).
1.2.5 Limitations of Information Sharing

To strike a balance between the shareholders’ need for information and the company’s interest in safeguarding confidentiality, shareholder information rights are subject to certain formal and material limitations.

The *right to information* is not subject to any formal limitations. In a material regard, exercising the right to information must not amount to an abuse of the law (a subjective limitation). Secondly, the information requested must not jeopardize business secrets or any other legitimate company interests that need protection (an objective limitation). According to the Swiss Federal Supreme Court, the company cannot merely render the risk plausible. Rather, the company must demonstrate specifically that its interests are at realistic and probable risk.

Certain legal scholars argue that a company’s denial of information should be an exception and if it does so, it must state the reasons at least briefly. The firm’s decision not to disclose should be based on a rational balancing of the company’s confidentiality interests and the shareholder’s interest in exercising shareholder rights and this must be performed on a case-by-case basis.

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2029 CC 2 II. See GABRIELLI, p. 31 et seq. ("Rechtsmissbräuchlich ist ein Aufschlussbegehren, wenn der Aktionär ausschliesslich oder vorwiegend andere Zwecke als die sachliche Aufklärung, insbesondere nur Konkurrenzinteressen, schikanöse Zwecke, Geschäftsspionageabsichten oder überhaupt Schädigungabsichten verfolgen will.").

2030 See FN 1685.

2031 See MAROLDA MARTÍNEZ, p. 160 (subsuming under the term all facts of equal importance as business secrets). Also for the term, see HORBER, *Informationsrecht*, p. 241 et seqq., N 771 et seqq.

2032 CO 697 II.


2034 Debated among legal scholars. For an overview of legal expert opinion, see MAROLDA MARTÍNEZ, p. 163. In favor of equality of the shareholder’s interest in information and the company’s interest in secrecy is HORBER, *Informationsrecht*, p. 266, N 839.

2035 See, inter alia, with further references BÖCKLI, *Aktienrecht*, § 12, N 156.

2036 In detail on the balancing of interests and the views held by different legal experts, see MAROLDA MARTÍNEZ, p. 165 et seqq.; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 40, N 177 et seq.; HORBER, *Informationsrecht*, p. 260 et seqq., N 825 et seqq. For arguments in favor of disclosure to private equity investors, in particular, see FRICK, § 12, N 1369 (”Beider Interessenabwägung hat der Verwaltungsrat dem Charakter der Gesellschaft, d.h. ihrer
case basis. General guidelines can hardly be formulated.\textsuperscript{2037} Pursuant to the Swiss Federal Council Report, the term \textit{overriding interests of the company} clearly indicates that denying a request for information or inspection solely with reference to the company’s confidentiality interests is not sufficient. Instead, the firm must carefully weigh the involved interests and a denial is justified only if the company’s interests are regarded a higher priority than those of the requesting shareholder.\textsuperscript{2038} In weighing whether to grant a shareholder’s request for information, according to WEBER, the company must consider the range of circumstances such as the timing of the request, the PEMI’s reasons for it, and the financial situation of the firm.\textsuperscript{2039} The Draft Legislation\textsuperscript{2040} explicitly provides that the withholding of requested information must be substantiated in writing.\textsuperscript{2041}

The \textit{right of inspection} is subject to both a formal and a material limitation, the latter of which is debated by legal scholars. Formally, the right of inspection is subject to an express authorization by the general meeting or\textsuperscript{2042} the board of directors.\textsuperscript{2043} The respective body decides based on its own weighing of facts and discretion.\textsuperscript{2044} Apart from the general duty of

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\textsuperscript{2037} See WEBER, Basler Kommentar, CO 697, N 9; MAROLDA MARTÍNEZ, p. 166 et seq. (“Es ist zwar äusserst schwierig, Leitsätze aufzustellen, doch sollten zur Steigerung der Rechtssicherheit die entgegengesetzten Interessen konkreter umschrieben werden, damit klarer wird, wie im Einzelfall zu entscheiden ist”); KUNZ, Minderheitenschutz, § 12, N 48 (“Klar dürfte in diesem Zusammenhang immerhin sein, dass sich generelle Richtlinien kaum formulieren lassen”); KUNZ, Informationsrecht, p. 886 et seq. (“Im Bereich der aktienrechtlichen Informationsrechte gibt es aber keine eindeutigen Vorgaben des Gesetzgebers zu den Interessenabwägungen, d.h. es braucht bei der Auslegung der Normen eine Abwägung im Einzelfall”); GABRIELLI, p. 38 (“bleibt die Informationsvermittlung durch das Recht auf Auskunftserteilung immer eine Frage des Einzelfalls. Nach wie vor mangelt es an einem abgeschlossenen System bei der Informationsvermittlung.”).

\textsuperscript{2038} See Federal Council report 2007, p. 1671 et seq.

\textsuperscript{2039} See WEBER, Basler Kommentar, CO 697, N 9.

\textsuperscript{2040} See FN 463.

\textsuperscript{2041} D-CO 697 III and 697bis II.

\textsuperscript{2042} Meaning alternatively. See WEBER, Basler Kommentar, CO 697, N 18; GABRIELLI, p. 44; KUNZ, Minderheitenschutz, § 12, N 28.

\textsuperscript{2043} CO 697 III. See KUNZ, Informationsrecht, p. 892 (stating that neither the decision by the general meeting nor that of the board of directors must be notified with reasons); HORBÉR, Informationsrecht, p. 202, N 646 et seq. (holding that, different from the right to information, a request for inspection may be denied without giving reasons); see also WEBER, Basler Kommentar, CO 697, N 18 (speaking of a “zweifelhafte Mehrheitsmeinung”). Of another opinion, MAROLDA MARTÍNEZ, p. 181; HORBÉR, Informationsrecht, N 648; GABRIELLI, p. 45 et seq. (stating that the decline for the request must be provided with reasons). Differentiating, BÖCKLI, Aktienrecht, § 12, N 150 (finding that only the board of directors must substantiate its decision).

\textsuperscript{2044} With further references to legal scholars, see BGE 132 III 71 (E. 1.1: “Die Erteilung oder Verweigerung der Einsicht steht im freien Ermessen der Generalversammlung bzw. des

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objectivity, including the principle of exercising rights with consideration and the prohibition of arbitrary decision making, the company’s organs are bound by the principle of equal treatment and the prohibition of abusing the law.\textsuperscript{2045} If the general meeting grants a request for inspection and if this decision could jeopardize the company’s legitimate interests, the board of directors is entitled and, obliged, to decline the inspection based on its duties of loyalty and care.\textsuperscript{2046} In deciding on whether to grant the authorization for inspection, the shareholders’ need for the requested inspection for exercising shareholder rights and the firm’s time and effort necessary to provide the requested documents may be considered.\textsuperscript{2047} The requested inspection must not constitute an abuse of the law or jeopardize business secrets. Prevailing expert opinion assumes that the limitation of other legitimate interests of the company also applies to the right of inspection.\textsuperscript{2048}

<table>
<thead>
<tr>
<th>Information</th>
<th>Inspection</th>
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<tbody>
<tr>
<td>Obligor</td>
<td>Authorization of GM or BoD resolution</td>
</tr>
<tr>
<td>Information object</td>
<td>Company books &amp; files</td>
</tr>
<tr>
<td></td>
<td>All written company documents suitable for appraisal</td>
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<td></td>
<td>Factual connectivity with company affaires</td>
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<td>Factual connectivity with company affaires</td>
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Verwaltungsrates … Damit hat das … Gericht lediglich zu entscheiden, ob der ablehnende Entscheid sachlich vertretbar ist, was einer auf Willkür beschränkten Prüfung entspricht.”). BGE 4C.234/2002 (E. 6.3). Within the scope of discretion, the principle of equal treatment, the principle of objectivity, and the principle of exercising rights with consideration as well as the prohibition of abusing the law must be considered. See NÄNNI/VON DER CRONE, p. 154. \textit{Ibid.}

\textit{See}, among others, WEBER, \textit{Basler Kommentar}, CO 697, N 19; LAMBERT/SCHLEIFFER, p. 100; MAROLDA MARTÍNEZ, p. 203; STÜCKELBERGER, p. 30; KUNZ, \textit{Minderheitsschutz}, § 12, N 21 (re information) and N 30 (re inspection); equally, FORSTMOSE, \textit{Meinungsausserungsrechte}; p. 98; GABRIELLI, p. 45.

With further references, see NÄNNI/VON DER CRONE, p. 154.

For further references, see MAROLDA MARTÍNEZ, p. 160 and 205 (“Allerdings ist nach herrschender Lehre davon auszugehen, dass auch schutzwürdige Interessen der Gesellschaft als materielle Schranke des Einsichtsrechtes analog Abs. 2 zu gelten haben.”); WEBER, \textit{Basler Kommentar}, CO 697, N 19; equally KUNZ, \textit{Minderheitsschutz}, § 12, N 29 (considering the lack of explicit reference of the company’s legitimate interests a lapse by the lawmakers and calling for an analogous application of such a limitation; KUNZ, \textit{Informationsrecht}, p. 891; GABRIELLI, p. 29 (“Sowohl beim Auskunfts- als auch beim Einsichtsrecht sind die Belange der Gesellschaft gleichermassen zu behandeln”); also cf. HORBER, \textit{Informationsrecht}, p. 236 \textit{et seq.}, N 761.
### Table 6: Overview of shareholder rights to information and inspection

<table>
<thead>
<tr>
<th>Scope</th>
<th>Limitation</th>
</tr>
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</table>
| • Necessary for exercising shareholder rights | • No formal limitations  
• Material limitations:  
  - Company’s business secrets  
  - Legitimate interests  
  - Abuse of rights  
• Required is a weighing of interests on a case-by-case basis | • Formal: GM or BoD approval; decision subject to discretion  
• Material limitations as in case of right to information, but disputed if necessary |

1.3 Additional Shareholder Information Rights

In addition to the core information rights outlined above, Swiss corporate law provides PEMIs with further access to information by conferring a right to ask the board of directors at any time²⁰⁴⁹ for information in writing on the organization of the management.²⁰⁵⁰ The information is to be provided in writing and must cover both the content of the organizational regulations as well as the organization actually “lived”.²⁰⁵¹ PEMIs are also entitled to inspect the minutes of the general meeting which include the motions and

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²⁰⁴⁹ See BAUEN/BERNET, p. 103, N 309; VON BÜREN/STOFFEL/WEBER, p. 196, N 931; EHRAT, Protection of Minority Shareholders, p. 229.
²⁰⁵⁰ CO 716b II. Whether the shareholder must substantiate his/her request is debated. Some authors assume that the shareholder’s interest is always legitimate, except in case of an obvious abuse of right. See for further references to prevailing expert opinion, ROTH PELLANDA, p. 315 et seqq., N 657 et seqq.; KUNZ, Minderheitsschutz, § 12, N 54 et seq.; HORBER, Informationsrecht, p. 109, N 337 et seqq. (“da das Interesse einer beteiligten Person immer als schutzwürdig zu taxieren ist”). Other authors require the shareholder to substantiate his/her legitimate interest because of the lack of any duty of loyalty. See VON BÜREN/STOFFEL/WEBER, N 616 (“ein schutzwürdige Interesse glaubhaft zu machen”); BERTSCHINGER, Arbeitsteilung, § 4 N, 129; to a lesser extent, KRNETA, CO 716b, N 1761 et seq. (requiring the shareholder to provide prima facie evidence for his/her legitimate interest, yet without setting high demands for such evidence). With respect to the GmbH, CO 716b II applies analogously, see NUSSBAUM/SANWALD/SCHEIDEgger, CO 810, N 8.
²⁰⁵¹ With reference to further legal experts, see ROTH PELLANDA, p. 31, N 658; BÖCKLI, Aktienrecht, § 13, N 333 (emphasizing that the right relates only to orientation, not to presenting particular documents or excerpts thereof); MEIER-SCHATZ, Zusammenarbeit, p. 828 (finding the disclosure of the organizational chart already sufficient). Much broader, BERTSCHINGER, Organisationsreglement, p. 188.
Part Two: Legal Framework and Tools

results of the votes and elections. Moreover, they have unrestricted access to the company’s *articles of association* which is a public document. As members of a GmbH, PEMIs also have a right to *inspect the share register*, while as shareholders they may only access the share register with respect to their own entry. In a closely held firm context, however, access to the share register is less relevant because the shareholders generally know each other.

To investigate specific events, circumstances, or behaviors – information that may be necessary to exercise shareholder rights – PEMIs may move at the general meeting for certain facts be subject to a *special audit*. As indicated above, the right to request a special audit is part of the three-pronged information system. In contrast, GmbH members are not explicitly granted a right to request a special audit by law, but this right can be granted via the articles of association. PERAKIS characterizes such right a “powerful weapon in the hands of the minority.” However, it is subordinate to the right to information and inspection and it is predominantly of practical relevance in connection with the preparation of liability claims against the board of directors or management and when challenging a resolution of the general meeting. Moreover, the complicated and time-consuming procedure as well as the rather stringent jurisprudence requiring strong prima facie evidence showing that corporate organs have breached the law or articles of association and thereby have harmed the company or its shareholders have contributed to

2052 CO 702 III. D-CO 702 III provides that the meeting minutes must be accessible to the shareholders electronically within 20 days after the general meeting or a copy must be sent to each shareholder upon request free of charge.

2053 CO 790 III.

2054 See BAUEN/VENTURI, § 2, N 128.

2055 The special audit is intended to investigate facts rather than to provide a legal opinion, a review of expediency or adequacy of certain decisions, or an assessment of certain judgements made by corporate organs, see VON BÜREN/STOFFEL/WEBER, p. 193 N 922; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 35, N 26.

2056 CO 697a et seq. In detail, inter alia, KUNZ, Minderheitenschutz, § 12, N 59 et seq.; GABRIELLI, p. 70 et seq.; HORBÉR, Informationsrecht, p. 337 et seq.

2057 See FN 1964.

2058 See FN 1971.

2059 PERAKIS, p. 71.

2060 See BÖCKLI, Aktienrecht, § 16, N 30; WEBER, Basler Kommentar, CO 697a, N 2; MAROLDA MARTÍNEZ, p. 254 et seq.; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 35, N 31; HORBÉR, Informationsrecht, p. 343 et seq., N 1072.


2062 See EHRAT, Protection of Minority Shareholders, p. 231.

2063 See WEBER, Basler Kommentar, CO 697a, N 13.
the limited role of this instrument in practice. For these reasons, the special audit is not a tool to satisfy PEMIs’ ongoing need for information. Hence, the right to request a special audit is not further addressed in this dissertation.

![Diagram](image)

**Figure 21**: Information provided upon request

### 1.4 Shareholders’ Equal Access to Information

The principle of equal treatment of shareholders (or members in a GmbH), applied to the firm’s disclosure practice, requires in principle that the information that one shareholder obtains must be accessible to all

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shareholders. Thus, the question arises as to whether and to what extent selective contacts and the uneven dissemination of information (i.e., providing more or more detailed information to certain shareholders, particularly the controlling owner family) is permissible by qualifying the status of majority/minority shareholder as the different circumstances the law requires to justify uneven sharing of information. Some authors advocate absolute equal treatment concerning shareholders’ indivisible rights, such as the right to information. They argue that the board of directors is strictly forbidden from giving some shareholders more information because it provides certain benefits or confers a greater degree of power to those who received privileged information. Other legal scholars find differential degrees of disclosure permissible provided that certain conditions are met, particularly for shareholders with sizeable equity investments and limited exit opportunities. For example, Böckli asserts

2065 The remarks apply both to the right to information and inspection. With regard to the right of inspection, the documents made available to the requesting shareholder must also be made available to the other shareholders; see Gabrielli, p. 19 et seq. Huguenin Jacobs, p. 192 et seq. (assuming that the mandatory provisions relating to the right to information apply analogously to the right of inspection: “Wissen, welches sich ein Aktionär durch Ausübung der Kontrollrechte verschafft, ist allen Gesellschaftern zugänglich zu machen. Dies regelt das Gesetz zwingend für das Sonderprüfungs- und das Auskunftsrecht, für das Einsichtsrecht muss es analog gelten. … Ist einem Aktionär Einsicht gewährt worden, darf die vermittelte Information somit auch den anderen Aktionären nicht vorenthalten werden.”). With respect to equal access to information in a GmbH, see Weber, Basler Kommentar, CO 802, N 6; Siffert/Fischer/Petrin, CO 802, N 5; Nußbaum/Sanwald/Scheidegger, CO 802, N 4; Küng/Camp, CO 802, N 2; Nater, p. 71.

2066 On the problem, see Section II.B.1.2.1.1.

2067 In favor of absolute equal information disclosure and rejecting a privileged information status of major shareholders is Huguenin Jacobs, p. 191 et seq. and 244. Also see Kunz, Minderheitschutz, § 8, N 77 et seqq.; Kunz, Informationsrecht, p. 898 (rejecting the privileged information status of major shareholders due to the lack of any duty of loyalty of these shareholders vis-à-vis the company and fellow shareholders, due to significant practical problems and legal uncertainties, and due to a potential loss of trust. However, he accepts a gray area and finds it conceivable that “eine privatautonome Geheimhaltungspflicht die Informationsvermittlung ‘erleichtern’ kann, u.U. sogar bis zu einer Privilegierung hin, womit das (absolute) Gleichbehandlungsprinzip doch wieder etwas relativiert wird”). Against a privileged information status of major shareholders with reference to Kunz is also Burkhalter, Einheitsaktien, p. 33 (acknowledging the practical need for information privileges, but demanding a legal basis de lege ferenda for this purpose); Gigler, p. 254 (finding that confidential information which cannot be made accessible to all shareholders must be held confidential vis-à-vis all shareholders). Similarly, Marolda Martínez, p. 100 et seq. (“Wissensvorsprünge innerhalb des Aktionariats – wie beispielsweise die bevorzugte Informationsvermittlung an Grossaktionäre – sind demnach unerwünscht und widersprechen der ratio legis der Informationsrechte … Eine Privilegierung eines Aktionärs ist deshalb in jeder Konstellation als unzulässig zu betrachten.”).

2068 See Huguenin Jacobs, p. 244.

2069 Principally critical Forstmoser/Meier-Hayoz/Nobel, § 39, N 68; § 39, N 73; FN 25a (“Im Licht des Gleichbehandlungsprinzips sind aber solche Privilegien [der Information an Grossaktionäre] problematisch”). They find differential disclosure admissible by way of
that a true privileged information status for major shareholders is incompatible with the principle of relative equal treatment,\textsuperscript{2070} but he views an uneven disclosure of information to major shareholders admissible if the information pertains to an explanation, or thematic deepening of information to which prices of publicly listed shares are insensitive, if it is additional information concerning public facts, or the uncovering or clarifying of misunderstandings, and if the privileged information does not constitute a substantial preference of a particular shareholder.\textsuperscript{2071} With respect to closely held companies, BÖCKLI argues that equal treatment is even more important since the potential for differential treatment is even greater.\textsuperscript{2072} According to KRNETA, the financial commitment of major shareholders can justify differential treatment between major and small or majority and minority shareholders, respectively. Yet, he concurs with

\textsuperscript{2070} BÖCKL, Aktienrecht, §13, N 703.

\textsuperscript{2071} Ibid, § 13, N 701 et seqq. ("Wer sich besonders interessiert, darf auch aus aktienrechtlicher Sicht vom Verwaltungsrat mit gewissen zusätzlichen Informationen bedient werden" (N 701). However, there is a limit when the advance information is critical and substantially favors the receiver vis-à-vis the anonymous shareholders, i.e., true privileged information status). In agreement, with further references BÖCKL/BÜHLER, Vorabinformationen, p. 110 et seq. and BÜHLER, Regulierung, § 5, N 487 et seq.

\textsuperscript{2072} BÖCKL, Aktienrecht, § 1 N 40.
BÖCKLI that a substantial preferential treatment is not permissible.\textsuperscript{2073} RUFFNER deems justifiable a privileged information status for active, major shareholders in publicly listed corporations as a type of reward for functioning as control and information intermediaries.\textsuperscript{2074} Moreover, he approves of the preferential treatment of institutional investors who are willing to hold substantial long-term stakes in the firm. With respect to publicly listed companies, HOFSTETTER argues that major shareholders can help to increase corporate value by ensuring a stable shareholder structure, by enabling the company to pursue its long-term business strategy, and by allowing long-term soft investments.\textsuperscript{2075} He accepts differential treatment if (i) such measures could plausibly increase the value of the firm and (ii) a similar result cannot be achieved by treating all shareholders equally.\textsuperscript{2076} However, HOFSTETTER makes his argument in view of major institutional investors in publicly listed companies with a broad shareholder base. He acknowledges that the shareholders’ situation in publicly listed firms is not comparable with that of smaller, unlisted companies due to the diminished liquidity of investments;\textsuperscript{2077} he thus acknowledges that the argument for differential treatment may be different in this context.

The author of this dissertation endorses the view, with focus on closely held firms, that selective disclosure is unjustifiable if the Pemi holds a sizeable equity stake\textsuperscript{2078} in the company for an extended investment horizon, which is typically true for private equity investors. In this case, both the controlling shareholder and the Pemi qualify as major shareholders. Both invest substantial funds and other resources in the company, both are typically active shareholders equally dependent on sound information to exercise their participation rights and protect and grow their investments.\textsuperscript{2079} Thus, a distinction based solely on the criterion of holding a majority/minority of the equity cannot justify differential treatment of shareholders.\textsuperscript{2080} In taking serious their advisory role, private equity

\begin{thebibliography}{9}
\bibitem{2073} KRNETA, CO 717, N 1927.
\bibitem{2074} RUFFNER, \textit{Aktive Grossaktionäre}, p. 236; RUFFNER, \textit{Grundlagen}, p. 263 \textit{et seqq.} (“Grossaktionäre, die privilegierte Informationen erhalten, müssen sich ... glaublich verpflichten, zumindest während den kritischen Phasen, in denen sie mehr als die übrigen Marktteilnehmer wissen, keine Transaktionen mit den Titeln des fraglichen Unternehmens zu tätigen.”).
\bibitem{2075} HOFSTETTER, \textit{Gleichbehandlung}, p. 230.
\bibitem{2076} \textit{Ibid}, p. 223.
\bibitem{2077} \textit{Ibid}, p. 223.
\bibitem{2078} As a guideline, see to the legal definition in CO 663c II where important shareholders are deemed shareholders and groups of shareholders whose participation exceeds 5% of all votes, see BÖCKLI/BÜHLER, \textit{Vorabinformationen}, p. 106.
\bibitem{2079} Cf. DETTWILER, p. 100.
\bibitem{2080} Equally, DETTWILER, p. 121 (pointing out, however, that a privileged status of information is justified if the respective shareholder is a legal or \textit{de facto} corporate organ).
\end{thebibliography}
investors provide added value by contributing professional expertise, experience, ideas, and access to their professional network. Like owner families, they support a stable shareholder structure (patient capital\textsuperscript{2081}), and they tend to monitor corporate organs as closely as majority shareholders. Particularly in closely held companies, a privileged information status intensifies the already existing information asymmetries which the controlling shareholder may use to gain certain private benefits of control.\textsuperscript{2082} Also, in light of the PEMI’s lack of ready exit in closely held firms and the resulting importance of voice strategies, objective justifications for a privileged information status for majority shareholders are lacking. As a result, the principle of equal treatment prohibits selective contacts and disclosure of information to family shareholders holding the majority of the equity. If material information is disclosed to the controlling shareholder outside the general meeting (e.g., in casual conversations during a golf game or at a social event), the PEMI is entitled to the same information at the same time in cases of planned disclosure and promptly if disclosure was unplanned. That said the company may make the extended disclosure of company information to shareholders subject to confidentiality agreements.\textsuperscript{2083} Besides, the PEMI may voluntarily consent to family shareholders receiving additional information concerning certain matters that need to be passed on to them.\textsuperscript{2084}

2 \hspace{1em} \textbf{Minority Investor Information Rights at Board of Directors Level}

To properly perform their managerial and supervisory duties,\textsuperscript{2085} to justify the board members’ liability, and given that the board members’ duty of loyalty encompasses the obligation not to disclose confidential business information,\textsuperscript{2086} the members of the board of directors enjoy much broader information rights than shareholders.\textsuperscript{2087} Similarly, GmbH members enjoy much broader information rights than shareholders due to their typically closer relationships among members and between the members and the

\textsuperscript{2081} See AYRES/CRAMTON, p. 3, 16 ("relational investors create value because they are more patient").
\textsuperscript{2082} See Section II.B.1.1.2 and II.B.1.2.1.1.
\textsuperscript{2083} See Section V.D.3.2.
\textsuperscript{2084} See FN 1703.
\textsuperscript{2085} See BÖCKLI, Aktienrecht, § 13, N 167 (holding that only an informed board member is in a position to act responsibly); with further references WERNLI, Basler Kommentar, CO 715a, N 3; HANDSCHIN, Swiss Company Law, p. 67; ROTH PELLANDA, p. 322 et seq., N 671 et seq.; similarly KRNETA, CO 715a, N 907; HOMBURGER, Zürcher Kommentar, CO 715a, N 444.
\textsuperscript{2086} See Section IV.E.4.1.2.
\textsuperscript{2087} See VON SALIS-LÜTOLF, Finanzierungsverträge, § 11, N 1318; KUNZ, Minderheitenschutz, § 12, N 35.
company, their greater participation in corporate decision making, and their duty of loyalty.\textsuperscript{2088} Their information rights mirror those of the board members in a stock corporation. As for the managing officers of a GmbH, Swiss corporate law does not provide for specific rights to information and inspection. Yet, they must be entitled to the same information rights as the board members in a stock corporation to adequately perform their management functions.\textsuperscript{2089}

As a result of the board members’ broader information rights, PEMIs’ representation on boards substantially expands their access to information. However, the information to which the PEMIs’ board representatives have access is not to be equated with the information PEMIs hold in the shareholder capacity. The board members’ duty to maintain confidentiality requires PEMI representatives on the board of directors not to disseminate information to the PEMI or any other employees,\textsuperscript{2090} nor to use information acquired as director when exerting PEMI shareholder rights if it could jeopardize the company’s interests.\textsuperscript{2091} It follows that the PEMI’s right to representation on the board of directors is not a direct enhancement of its right to information in the shareholder capacity, but only indirectly enhances access to information since the PEMI’s board representative has comprehensive access to information and can use it to guard PEMI interests when compatible with those of the company.\textsuperscript{2092} In a GmbH, where the members enjoy much broader information rights de jure than stock corporation shareholders, PEMIs do not necessarily need to participate in the executive organ of the company to gain stronger rights to access information.

In the following section, the information rights and duties of board members are explained in greater detail. As the information rights of members and managing officers in a GmbH mirror those of the directors in a stock corporation, this section also briefly examines the GmbH for reasons of comparison.\textsuperscript{2093}

\textsuperscript{2088} See FN 1998.
\textsuperscript{2089} See also NATER, p. 15.
\textsuperscript{2090} On the duty to maintain confidentiality, see Section IV.E.4.1.2.2.
\textsuperscript{2091} Cf. PEARCE/BARNES, p. 144 (“in the absence of specific contractual rights … the information flows that the VC fund will be receiving indirectly through the medium of its nominated board director (board papers, etc) may not be utilised freely by the VC fund or the VC firm without risking breach of duties by the director.”).
\textsuperscript{2092} See FRICK, § 12, N 1373; MÜNCH, p. 24.
\textsuperscript{2093} See Federal Council report, BBI (2001), p. 3202; WEBER, Basler Kommentar, CO 802, N 2; SIFFERT/FISCHER/PETRIN, CO 802, N 2; NATER, p. 70.
2.1 Unsolicited Access to Information

Primarily, it is the board chairman’s responsibility as guarantor of information\textsuperscript{2094} to ensure that board members receive all relevant information in a timely fashion and in an appropriate form and quality.\textsuperscript{2095} An efficient flow of information relies upon an efficient and effective board communication system. The term communication\textsuperscript{2096} involves a bilateral, two-way information channel characterized by a sharing of questions and answers, along with comments, feedback, and insights.\textsuperscript{2097} Particularly, if the board of directors delegates management tasks to individual board members or to third-party managers, it must adopt appropriate organizational regulations that provide for an effective reporting system with appropriate and workable reporting structures and policies that ensure a timely, comprehensive, concentrated, and continuous flow of information between the board and persons entrusted with management duties.\textsuperscript{2098}

2.2 Access to Information Upon Request

2.2.1 Overview

Corporate law grants each member of the board of directors a comprehensive, individual, and inalienable\textsuperscript{2099} right to information\textsuperscript{2100} concerning all matters of the company along with a right to inspect

\begin{footnotes}
\footnote{2094}{See BÖCKLI, Aktienrecht, § 13, N 187; KRNETA, CO 715a, N 986.}
\footnote{2095}{See BAUEN/VENTURI, p. 37, N 96. With respect to the chair of the management in a GmbH, CO 810 III Sec. 2; see NATER, p. 115.}
\footnote{2096}{See DRUEY, Informationsversorgung, p. 14 ("Es muss nicht nur Information, sondern für Kommunikation gesorgt werden. Das heisst, dass es eingefahrene, zeitlich kurzfristige Kontakte geben muss, in welchen das Spiel von Frage und Antwort, Meldung und Reaktion natürlich fliessen kann"); see also DRUEY, Informationsrecht, p. 120.}
\footnote{2097}{See DRUEY, Outsider, p. 77.}
\footnote{2098}{CO 716a II, 716b II. If management is delegated, the establishment of an appropriate reporting system constitutes a statutory minimum to be delineated in the organizational regulations. For more information as to the information to be provided, see FRICK, § 12 N 1393; WERNLI, Basler Kommentar, CO 715a, N 8 ("Der VR hat daher im Rahmen seiner Organisationsbefugnifs … für ein angemessenes Berichtwesen zu sorgen"). On the internal information system in particular, see BÖCKLI, Aktienrecht, § 13, N 189 et seqq. As such, the articles CO 715a I-V are mandatory and represent the minimal information rights which each member of the board must be granted. See BÖCKLI, Aktienrecht, § 13, N 197a; WERNLI, Basler Kommentar, CO 715a, N 14; FRICK, § 12, N 1397; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 28, N 104; BÄCHTOLD, p. 120.}
\footnote{2099}{See BAUEN/VENTURI, p. 41, N 123; WEBER, Basler Kommentar, CO 696, N 1 and CO 697, N 1; with further references, KRNETA, CO 715a, N 920; KUNZ, Minderheitsschutz, § 12, N 34; HOMBURGER, CO 715a, N 445; BÄCHTOLD, p. 61.}
\footnote{2100}{See BÄCHTOLD, p. 56 et seq. (arguing that the term information stated in CO 715a I is to be understood as a generic term and relates to both the right to information and inspection).}
\end{footnotes}
company books and files to the extent necessary for the performance of his/her duties.\textsuperscript{2101} During board meetings, both the members of the board of directors and the persons entrusted with management duties\textsuperscript{2102} are, in principle, obliged to provide information to directors.\textsuperscript{2103} Since the latter are not legally obliged to attend board meetings, it is the chairman’s responsibility to procure the relevant information by obtaining respective written documents and ensuring the soundness of such information, by directing questions to persons with adequate knowledge, and by inviting such persons to discuss the matter of concern at the board of directors.\textsuperscript{2104}

Outside board meetings, members of the board of directors may ask the persons entrusted with management duties and, though not expressly stated in the law, fellow board members,\textsuperscript{2105} for information concerning the general course of business and, upon authorization of the chairman, on particular affairs.\textsuperscript{2106} The directors have a right to directly access executive managers for information, but not to exert influence on the management.\textsuperscript{2107}

The directors’ right to request information is complemented by a right to request the chairman of the board for inspection of the firm’s books and files, and, in case of his/her denial, the director can bring the request to the CO 715a.

\textsuperscript{2101} These include members of the board of directors, delegates, directors, authorized signatories, authorized representatives, and employees who perform management duties, whether under the supervision of the executive management or within the scope of their own responsibilities, see WERNLI, Basler Kommentar, CO 715a, N 7; BÖCKLI, Aktienrecht, § 13, N 177 et seq. (stating that the individual board member only has a right to access the executives of the firm, not all employees); also cf. in detail, KRNETA, CO 715a, N 959 et seq.; HOMBURGER, Zürcher Kommentar, CO 715a, N 449; BÄCHTOLD, p. 107 et seq.

\textsuperscript{2102} Cf. SCBP 15. See BÖCKLI, Aktienrecht, § 13, N 186; BAUEN/VENTURI, p. 39, N 113; DREUY, Informationsversorgung, p. 13 et seq. (specifying that the chairman functions as a central hub for the individual information processes; however, the supply of information as such is determined by the board of directors in its entirety). See BÄCHTOLD, p. 109 et seq. (holding that each member of the board can demand the attendance of particular persons, i.e., each member has an invitation right which is irrevocable and must not be restricted); equally for an invitation right is KRNETA, CO 715a, N 989; of another opinion is DREUY, Verwaltungsratsmitglied, p. 52 (“Es besteht deshalb m.E. kein Anspruch … für das Aufmarschierenlassen von Personen, die an der Sitzung nicht teilnehmen … Dafür wäre der Entscheid des Sitzungskreises, in der Regel also des Präsidenten, erforderlich”).

\textsuperscript{2103} See BÖCKLI, Aktienrecht, § 13, N 206a (“[kann] jedes Verwaltungsratsmitglied von allen seinen Kollegen – auch und insbesondere den in anderen Ausschüssen tätigen Kollegen – jederzeit ausserhalb der Sitzungen Auskünfte über deren Arbeit und Erkenntnisse verlangen”); WERNLI, Basler Kommentar, CO 715a, N 9b (holding that the circle of persons obliged to provide information is the same, both in and outside meetings); KRNETA, CO 715a, N 958; BÄCHTOLD, p. 104 et seq.

\textsuperscript{2104} See KRNETA, CO 715a, N 996 et seq. (holding that the procurement of information must not include any commentary on the course of business); in agreement, BÖCKLI, Aktienrecht, § 13, N 205 (maintaining that it is not allowed to exert “political influence”).
entire board of directors. As a corollary to the board members’ broad access to information, each board member has a duty to obtain information that provides sufficient knowledge and understanding of the company’s status so as to adequately perform directors’ duties.

In a GmbH, each member and managing officer has a comprehensive, individual, and inalienable right to request from the (other) officers information on all matters concerning the company; each member and managing officer can also request to inspect all books and files without restriction, but – in the case of members – only if the company has no auditors. Otherwise, the right of inspection exists only if a legitimate interest can credibly be shown.

2.2.2 Timing of Information Requests

The board members’ right to information and inspection of company records may be exercised at any time. However, the law differentiates between obligors and the scope of information that board of directors can access during board meetings and outside as described above.

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2108 CO 715 IV and V.
2109 See BÖCKLI, Aktienrecht, § 13, N 163 et seqq. (“jeder Verwaltungsrat ist] aufgrund eines Wissens verantwortlich, das er hatte oder sich hätte verschaffen sollen,” “dass dem Recht auf Information notwendigerweise auch die Pflicht, sich im eigenen Aufgabenbereich aktiv zu erkundigen, entspricht”); BAUEN/VENTURI, p. 34, N 85; p. 35, N 88 (“Ignorance or lack of knowledge does not therefore automatically absolve him from responsibility”); WERNLI, Basler Kommentar, CO 715a, N 3 (“Dem Recht auf Auskunft entspricht auf der anderen Seite die Pflicht des VR-Mitgliedes … die erforderlichen Informationen auch aktiv zu verlangen”); with further references KRNETA, CO 715a, N 930 et seq. (“dass das … Auskunftsrechts des VR-Mitgliedes auch eine Handlungspflicht beinhaltet, sich zumindest über wichtige Vorgänge in der Gesellschaft informiert zu halten”); and N 940 (“Bring-und-hol-Prinzip”); STÜCKELBERGER, p. 20 (“Holschuld”); DRUEY, Informationsversorgung, p. 23 (“Dem Wissen ist das Wissen-Müssen gleichzusetzen. Das heisst, dass die dem Verantwortlichen greifbaren, aber nicht ergriffene Information ihm zugerechnet wird”); KUNZ, Minderheitenschutz, § 12, N 36 (“Pflicht, sich zu informieren”); also see HOMBURGER, Zürcher Kommentar, CO 715a, N 446. With respect to the managing officers in a GmbH, see HANDSCHIN, Gesellschaftsanteile, p. 110 et seq.; NATER, p. 116.
2110 See WEBER, Basler Kommentar, CO 802, N 4; KÜNG/CAMP, CO 802, N 3; NATER, p. 71.
2111 CO 802 I and II. With respect to the managing officers, see NATER, p. 116.
2112 CO 802 II.
2113 With respect to the GmbH, see Federal Council report, BBI (2001), p. 320; WEBER, Basler Kommentar, CO 802, N 5; SIFFERT/FISCHER/PETRIN, CO 802, N 5; MEYER-HAYOZ/ FORSTMOSER, § 18, N 87; NUSSBAUM/SANWALD/SCHEIDEgger, CO 802, N 3; HANDSCHIN/ TRUNIGER, § 13, N 61; KÜNG/CAMP, CO 802, N 3.
2.2.3 Information Objects

*During board meetings*, the directors have a right to information, in principle, with respect to all matters concerning the company.\(^{2114}\) This includes not only the general course of business, but also singular business transactions.\(^{2115}\) *Outside board meetings*, the right to request information relates to the general course of business, while the receipt of information on particular matters\(^{2116}\) requires the chairman’s approval.\(^{2117}\) According to prevailing expert opinion, information on the general course of business should be interpreted broadly and relates to everything except a single, precisely defined business transaction.\(^{2118}\) According to BÄCHTOLD and VENTURI, information on the general course of business comprises records on the company’s turnover, order book changes and stock levels, market developments, financial position, and human resources, and for purposes of comparison, comparative data for the previous year and the budget.\(^{2119}\) Not included, however, and thus requiring the chairman’s approval, is information on particular transactions, databases, and the personnel files of top managers, or on particular events or meetings in the distant past.\(^{2120}\)

The right of inspection relates to *books and files*, which should be interpreted broadly, as well.\(^{2121}\) Included are written and otherwise recorded internal corporate information on sound, video, electronic, and data.

\(^{2114}\) CO 715a I and II.

\(^{2115}\) For further references, see ROTH PELLANDA, p. 329, N 689, FN 2206.

\(^{2116}\) In detail on the differentiation between *general course of business* and *singular business transactions*, see BÄCHTOLD, p. 120 et seq.; KRNETA, CO 715a, N 1005 (holding that *singular business transactions* are narrowly confined and detailed facts). Of another opinion, KUNZ, *Minderheitenschutz*, § 12, N 40 (understanding the term more broadly and subsumes any singular incidence related to the company).

\(^{2117}\) CO 715a III.

\(^{2118}\) See WERNLI, *Basler Kommentar*, CO 715a, N 9; BAUEN/VENTURI, p. 40, N 119; KRNETA, CO 715a, N 998; also with further references, ROTH PELLANDA, p. 330 N 690 (“alles verstanden, was nicht ein konkret umschriebenes Sachgeschäft betrifft.”). More restrictive, DRUEY, *Verwaltungsratsmitglied*, p. 52 (“alle allgemeinen Aussagen über die Entwicklung des Unternehmens”). Also more restrictive, BÖCKL, *Aktienrecht*, § 13, N 204a (finding that the *course of business* is to be understood dynamically and only relates to the business activity of the previous business period). Cf. also HOMBURGER, *Zürcher Kommentar*, CO 715a, N 471a (maintaining that the term *course of business* cannot be abstractly defined; instead he points to the criterion of necessity).

\(^{2119}\) See BAUEN/VENTURI, p. 40, N 119.

\(^{2120}\) See *ibid*; also see KRNETA, CO 715a, N 1007 (“Nicht unter das Auskunftsrecht fällt das Begehren eines VR-Mitgliedes, einem Betriebszweig, einer Fabrik oder einer Tochtergesellschaft einen privaten Besuch abzustatten, um sich dort über den Geschäftsgang zu erkunden.”).

\(^{2121}\) For further references, see KRNETA, CO 715a, N 1017 (“eher extensiv auszulegen”). With respect to the GmbH, see GARSEL/EGGENBERGER/STÄUBER, *Orell Füssli Kommentar*, CO 802, N 9; WEBER, *Basler Kommentar*, CO 802, N 11; SIFFERT/FISCHER/PETRIN, CO 802, N 7; NUSSBAUM/SANWALD/SCHEIDEGGER, CO 802, N 8; NATER, p. 72.
media. The right to information and inspection does not include a right to request, make, or keep copies of documents.

2.2.4 Scope of Information Rights

The requested information must have a functional relationship with the board mandate. The request of inspection must be plausibly substantiated, that is, the requesting board member must explain why

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2122 See STÜCKELBERGER, p. 22; for the terms in detail, BÄCHTOLD, p. 123 et seq.; also see ROTH PELLANDA, p. 331, N 691, FN 2220 et seq. (“Unter den Bergiff Bücher fallen alle mit der Führung der Buchhaltung und dem gesamten Rechnungswesen zusammenhängende Dokumente;” “Akten sind sämtliche Schriftstücke im Besitz der Gesellschaft.”); KRNETA, CO 715a, N 1019 (also includes “elektronische Datenträger”).

2123 With reference to other legal experts, see BAUEN/VENTURI, p. 42, N 127; WERNLI, Basler Kommentar, CO 715a, N 11; ROTH PELLANDA, p. 331, N 691; KRNETA, CO 715a, N 1034; BÄCHTOLD, p. 125.

2124 See BÖCKLI, Aktienrecht, § 13 N 170 (requiring that the information must permit and enable the board of directors to fulfill their statutory duties in the interest of the firm. He characterizes this requirement a functional hurdle); more strictly, KRNETA, CO 715a, N 975 (requiring that the request for information “mit einem bestimmten Sachgeschäft der Gesellschaft einen Zusammenhang haben und gleichzeitig einen wesentlichen Zielereichungsbeitrag leisten [muss]”). Also requiring a functional connexion between the information and the board of directors’ duties is FRICK, § 12 N 1398; KUNZ, Minderheitschutz, § 12, N 429 (stating, however, that the requirements as to the duty to state reasons should be low); WERNLI, Basler Kommentar, CO 715a, N 4 (excluding information on the private affairs of employees or information to satisfy private interests); BÄCHTOLD, p. 142 et seq. (finding it unjustified to differentiate between the right to information and the right of inspection with regard to functionality. He also acknowledges that in practice, functionality is seldom a hurdle for the request for information. Much less demanding are FORSTMOSER/MEIER-HAYOZ/NOBEL, § 28, N 97 (stating that rather than being driven by necessity, the scope of information to which the board members are entitled is determined in light of its usefulness for decision making. In their view, the criterion of necessity only applies to requests for inspection, but not for information where usefulness for decision making suffices).

2125 See BÄCHTOLD, p. 142 et seq. and 156 (arguing that the functional requirement applies to both the right to information and inspection in a material regard. However, formally only the request for inspection necessitates a plausibly substantiation). In agreement, HUNGERBUHLER, p. 77 et seq. (justifying the additional formal requirement of substantiation in case of the right of inspection with the argument that information is disclosed unfiltered); BÖCKLI, Aktienrecht, § 13 N 218 (justifying the requirement for substantiation in case of inspection by arguing that, in practice, there is a substantial difference between the right of inspection outside meetings and the right to information in meetings; “Das Einsichtsrecht ist in der Praxis vor allem auch ein Werkzeug aggressiver Kritik”); WERNLI, Basler Kommentar, CO 715a, N 11 (arguing in favor of a wide interpretation of the right of inspection; finding that providing prima facie evidence is sufficient, due to the board of directors’ liability, i.e., a request for inspection may only be denied if a lacking connection with the directors’ duties is obvious); in agreement, ROTH PELLANDA, p. 221, N 691. Cf. KRNETA, CO 715a, N 1047 (requiring the board members to substantiate both their request for information and for inspection).
he/she needs to inspect the requested documents in order to fulfil a duty.\textsuperscript{2126} Yet, the substantiation requirement must not be unduly rigid.\textsuperscript{2127} In a GmbH, the right to request information equally requires a functional relationship with the tasks as a member of the GmbH.\textsuperscript{2128} A comprehensive right to inspect the company books and files exists only if the company has no auditors.\textsuperscript{2129} In this case, the members must not substantiate their request with a legitimate interest.\textsuperscript{2130} Otherwise, the right of inspection is limited to a legitimate interest that credibly can be shown.\textsuperscript{2131} A legitimate interest is assumed if the member can demonstrate that the requested information is required by reasonable, average members to exercise their members’ rights.\textsuperscript{2132} Requests for information by managing officers in a GmbH must be supported by the need to fulfill their statutory duties.\textsuperscript{2133}

2.2.5 Limitations of Information Sharing

While the right to information is formally subject to express authorization by the chairman of the board of directors only if the request is made outside of board meetings and relates to particular corporate affairs, the right of inspection is subject to authorization in any event, whether a request is made in meetings and outside and with regard to any matter. If the chairman declines a request for information or inspection, the entire board of directors then decides on the request.\textsuperscript{2134} While it is not possible to

\textsuperscript{2126} On the problem that relevancies lead to infinity, see DRUEY, Outsider, p. 75 (“Wichtig für uns ist vor allem festzustellen, dass es aus der Natur der Sache her keinen Kompromiss gibt; verfolgt man die Relevanzen nur ein Stück weit, dann verpasst man vielleicht gerade das wichtigste Element.”).

\textsuperscript{2127} See BAUEN/VENTURI, p. 42, N 127; WERNLI, Basler Kommentar, CO 715a, N 11; KUNZ, Minderheitschutz, § 12, N 42 (“Das die Einsicht wünschende VR-Mitglied hat eine Begründungspflicht für sein Begehren, wobei die Anforderungen tief sein dürften”); HORBER, Informationsrecht, p. 578 et seq. (“Im Normalfall dürfen die Anforderungen an die Begründung des Gesuches gering sein, weil zumindest das Verwaltungsratsmitglied ... in aller Regel auf dieses Recht angewiesen ist, um seine Überwachungspflicht überhaupt nachkommen zu können”). Stricter, BÖCKLI, Aktienrecht, § 13, N 218 (“Das um Einsicht ersuchende Verwaltungsratsmitglied hat stets dem Präsidenten anzugeben, inwiefern die Aktien- bzw. Büchereinsicht für seine Aufgabenerfüllung relevant ist ... Auch wenn die Glaubhaftmachung genügt, bringt doch diese Obliegenheit des Verwaltungsratsmitglieds eine gewisse ‘Kanalisierung’ von Einsichtsbegehren mit sich.”).

\textsuperscript{2128} See TRÜEB, CO 802, N 3.

\textsuperscript{2129} CO 802 II.

\textsuperscript{2130} See WEBER, Basler Kommentar, CO 802, N 8; SIFFERT/FISCHER/PETRIN, CO 802, N 7; NATER, p. 72.

\textsuperscript{2131} CO 802 II.

\textsuperscript{2132} See NUSSEBAUM/SANWALD/SCHIEDEGGER, CO 802, N 10; with further details, NATER, p. 73.

\textsuperscript{2133} See HANDSCHIN, Gesellschaftsanteile, p. 111; HANDSCHIN/TRUNIGER, § 14, N 68.

\textsuperscript{2134} CO 715a V.
appeal to the general meeting,\textsuperscript{2135} it is unclear whether the board member requesting information may apply for a court decision.\textsuperscript{2136} In any case, the requesting director may ask for the convening of a board meeting at which the extended right to information applies.\textsuperscript{2137} HOMBURGER emphasizes that the directors’ requests for information should generally be assumed valid, in accordance with dutiful conduct.\textsuperscript{2138} Hence, a denial of an information request requires an objective justification where the board chairman or the entire board must substantiate why the request is rejected.\textsuperscript{2139} Such proof must relate to any of the material limitations (discussed below) and is subject to rigid requirements.\textsuperscript{2140} Apart from the requirement of the chairman’s express authorization of the request for information or inspection as discussed above, there are no further formal requirements. In

\textsuperscript{2135} See BÖCKLI, Aktenrecht, § 13, N 221a; ROTH PELLANDA, p. 333, N 697; FORSTMOSE/MEIER-HAYOZ/NOBEL, § 28, N 106.

\textsuperscript{2136} In favor of an actionable right to information of the board of directors is ROTH PELLANDA, p. 335 et seq., N 699 et seqq. with detailed arguments and references to other legal experts; BÄCHTOLD, p. 178 et seqq. Also see WERNLI, Basler Kommentar, CO 715a, N 13; DRUEY-GUHL, § 71, N 45; DRUEY, Verwaltungsratsmitglied, p. 53 (but against on p. 51); DRUEY, Informationsversorgung, p. 5 et seqq.; WICKI, p. 29. Against actionability is BÖCKLI, Aktenrecht, § 13, N 221a et seqq. (referring instead to the option of having the board’s negative resolution declared null and void by the court (CO 714 i.e.w. 706b II), because it is not based on objective reasons or due to a gross violation of the principle of equal treatment. Furthermore, he mentions the option to declare protest in the minutes, to make a personal statement, to request a special audit, to appoint an expert to review particular aspects of management, to apply for a denial of release, withdraw from re-election and, as the case may be, request the dismissal of board members at the next general meeting. Against an actionable right to information also BAUEN/VENTURI, § 2, N 121, 129; VON BÜREN/STOFFEL/WEBER, p. 131, N 624; KUNZ, Verwaltungsratsmitglied, p. 578; HOMBURGER, Zürcher Kommentar, CO 715a, N 447 and N 470. Undecided is KRNETA, CO 717a, N 1054.

\textsuperscript{2137} CO 715 i.e.w. 715a II. See BAUEN/BERNET, p. 163, N 474, FN 65.

\textsuperscript{2138} HOMBURGER, Zürcher Kommentar, CO 715a, N 473. See also ROTH PELLANDA, p. 333, N 696 (pointing out that “diese Bestimmung [CO 715a V] zumindest im Fall des Auskunftsbegehrens auf einer legislatorischen Fehlerüberlegung beruht und ins Leere führt, da im Fall des Weiterzugs an den Gesamtverwaltungsrat, eo ipso ein Fall von Art. 715a Abs. 2 OR und damit nämlich ein Auskunftsbegehren innerhalb einer Sitzung vorliegt, was zur Folge hat, dass die Informationen zu gewähren sind”). Another opinion is DRUEY, Information, p. 433 (deriving from this article that the provision of information may also be limited within meetings: “Die Meinung kann nicht sein, dass an den Sitzungen unbeschränkt Information angefordert werden kann, die ausserhalb nicht erhältlich ist. … Die Information ist in dem Sinn beschränkt auf das, was an einer Verwaltungsratssitzung an verfügbarem Wissen erreicht werden kann.”).

\textsuperscript{2139} See HOMBURGER, Zürcher Kommentar, CO 715a, N 473; KRNETA, CO 715a, N 1048; WERNLI, Basler Kommentar, CO 715a, N 12 (with respect to the board of directors at large); ROTH PELLANDA, p. 332, N 692 (with respect to the chairman); BÄCHTOLD, p. 162 (with respect to requests for inspection or for information on specific items). Of another opinion, DRUEY, Information, p. 434 (not demanding a justified decision).

\textsuperscript{2140} See HOMBURGER, Zürcher Kommentar, CO 715a, N 473.
particular, the organizational regulations cannot stipulate that such requests must be made in writing.\textsuperscript{2141}

In a material regard, legal theorists debate if and what limitations apply to the board members’ right to information and inspection subject to authorization.\textsuperscript{2142} Uncontested in the legal literature is that requests for information must not represent an abuse of the law.\textsuperscript{2143} As such, the information right must not be exercised by a member of the board to allow a competitor an insight into the business or to satisfy curiosity.\textsuperscript{2144} Secondly, the principle of proportionality rules out any ill-timed or excessive requests for information or inspection that could cause a disorder or financial burden to the company.\textsuperscript{2145} Thirdly, the principle of equal treatment must be observed.\textsuperscript{2146} Fourthly, debated in the literature is whether a board member’s request for information can be declined with reference to the company’s legitimate and overriding interests in confidentiality. Some legal scholars endorse the view that the company’s interest in confidentiality on its own does not justify non-disclosure of information because the board of directors’ duty of loyalty requires the board members to keep sensitive information confidential.\textsuperscript{2147} Some legal

\textsuperscript{2141} See Roth PellanDa, p. 331, N 692; Kunz, Verwaltungsratsmitglied, p. 579 et seq.; BächHold, p. 159.

\textsuperscript{2142} See Kunz, Minderheitsschutz, § 12, N 40; for an overview of the discussion see Homburger, Zürcher Kommentar, CO 715a, N 464 et seqq.; BächHold, p. 133 et seqq.

\textsuperscript{2143} CC 2 II. See Böckli, Aktienrecht, § 13, N 171; Frick, § 12, N 1398; Wernli, Basler Kommentar, CO 715a, N 4 et seqq.; Roth PellanDa, p. 332, N 693; Forstmoser/Meier-Hayoz/Nobel, § 28, N 97, particularly FN 51 (“Missbräuchlich wäre es, wenn ein Verwaltungsratsmitglied Informationen verlangen würde, die es nicht für die Erfüllung seiner Aufgabe benötigt, sondern zu anderen Zwecken verwenden will”). With respect to members in a GmbH, see Weber, Basler Kommentar, CO 802, N 6; Siffert/Fischer/Petrin, CO 802, N 5; Nater, p. 71, 74. With respect to the managing officers in a GmbH, see Handschin/Truniger, § 14, N 68; Handschin, Gesellschaftsanteile, p. 111; Nater, p. 116.

\textsuperscript{2144} See Böckli, Aktienrecht, § 13, N 171; Frick, § 12, N 1398; Wernli, Basler Kommentar, CO 715a, N 5; Roth PellanDa, p. 332, N 692 (“wobei eine Abweisung nach der Lehre insbesondere im Falle der Unschuldigkeit sowie einer übermässigen Störung des Betriebes möglich ist”); Käch, p. 151; Forstmoser/Meier-Hayoz/Nobel, § 28, N 101 (“übermässige Störung des Betriebs”). With respect to the GmbH, see Handschin, Gesellschaftsanteile, p. 111; Nater, p. 116.

\textsuperscript{2145} See Sections IV.E.4.1.3 and V.B.1.4. With respect to members in a GmbH, see Federal Council report, BBI (2001), p. 3202; Weber, Basler Kommentar, CO 802, N 6; Siffert/Fischer/Petrin, CO 802, N 5; Nater, p. 71, 74; Nussbaum/Sanwald/Scheidegger, CO 802, N 4. With respect to the managing officers, see Handschin/Truniger, § 14, N 68.

\textsuperscript{2146} With respect to the GmbH, CO 802 III. It is argued by legal scholars that, in this context, the managing officers have significant room for discretion. Therefore, CO 802 III should be interpreted narrowly. See Gasser/Éggenberger/Stäuber, Orell Füssli Kommentar, CO
scholars accept that there are exceptional situations in which an overriding interest of the company justifies withholding certain information (even from board members) for the sake of confidentiality.\textsuperscript{2148} Böckli explains that only the board in its entirety, not individual board members, is the custodian of business secrets.\textsuperscript{2149} He argues that the board members’ access to information is unlimited, but withholding information with reference to the company’s interest in confidentiality is lawful, at least in cases in which the information contains the essence of a business secret and is requested by only one board member; that is, disclosure does not target the entire board of directors, just individual members.\textsuperscript{2150} Eigenmann maintains that absolute business secrets\textsuperscript{2151} are also applicable to board members if third parties explicitly make this a condition for disclosing information to the company. Relative business secrets may be kept confidential if a disclosure could with certainty cause harm to the company.\textsuperscript{2152} This author holds that the question as to whether a board member should be granted access to highly sensitive information does not depend on the degree of sensitivity of the information in question, but rather whether the knowledge of such information is relevant for exercising the board mandate and whether substantiated risk exists that such information is used for non-board mandated reasons or against the company’s interest, with the risk of causing substantial damage to the company. Since this criterion refers to the question of scope and the prohibition of abusing the law, no separate limitation is seen in the company’s interests in confidentiality, except in the case of absolute business secrets of which non-disclosure is expressly indicated. Of course, in cases in which the requested board member faces a conflict of interest obliging him/her to abstain from decision making (so-
called recusal hurdle), disclosure with regard to hot or highly sensitive information may be denied. In such cases, however, the request for information must be deemed an abuse of the law, which is again subject to the first hurdle discussed. The GmbH laws expressly provide that if a risk exists that the member will use the information requested to the company’s detriment or for purposes unrelated to the company, the request for information or inspection should be denied.

### 2.3 Board Members’ Equal Access to Information

In principle, the board members of a stock corporation are entitled to equal access to information. They are principally on equal footing in terms of the disclosure of information. Nonetheless, differential treatment is justifiable if there is a risk that a director will use the information to the detriment of the company or for purposes of self-gain unrelated to the company. Moreover, the principle of equal treatment does not require that each board member has access to the same amount of information at all times. BÖCKLI advocates a relative equal treatment where the amount of information received is a reflection of the circumstances and functions of the individual board members. A possible information advantage of members of certain board committees is compensated by the committee members’ reporting duties to the board of directors at large and by the non-committee directors’ right to request information. However, granting an information privilege solely based upon the fact that certain members of the board represent major shareholders is not a legitimate justification, at least in the absence of severe conflicts of interest of a board member excluded from disclosure, as each board member has the same rights and owes the same duties to the company.

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2153 See BAUEN/VENTURI, § 2, N 92; BÖCKLI, Aktienrecht, § 13, N 172; WERNLI, Basler Kommentar, CO 715a, N 5; KACH, p. 149 et seq.; BÄCHTOLD, p. 137 et seqq. (“darf eine Auskunft verweigert werden, wenn sie in einem Bereiche liegt, in dem das Mitglied wegen einer Interessenkonkordanz ohnehin zum Ausstand verpflichtet ist.”).  
2154 See BÖCKLI, Kernkompetenzen, p. 85; BÄCHTOLD, p. 79.  
2155 See HORBER, Informationsrecht, p. 120, N 368; DRUEY, Verwaltungsratsmitglied, p. 51.  
2156 Explicitly stated by the rules governing the GmbH in CO 802 III.  
2157 E.g., BÖCKLI, Aktienrecht, § 13, N 176 (finding it justifiable if the members of the audit committee receive more detailed information and financial data than the other board members); equally, BAUEN/VENTURI, § 2, N 95; KRNETA, CO 715a, N 952 (pointing out that the chairman of the board or the delegate constantly have an information advantage associated with their particular position in the company).  
2158 See HOMBURGER, Zürcher Kommentar, CO 715a, N 490.
C Assessment of Legal Status and Further Need for Protection

1 Equal Access to Information

To mitigate the agency problem between the PEMI and the controlling owner family, it is important for PEMIs to ensure that they are treated equally, whether as shareholders or members of the board directors (or their board representatives). Although differential disclosure practices based solely on the characteristics of controlling/minority or family/non-family shareholder is deemed unlawful by this author, it is nevertheless advisable to clearly state, at a corporate and at a contractual level, the principle that controlling owner family members and the PEMI must be treated equally concerning the company’s disclosure of information, both at shareholders’ and at the board of directors’ level, that is, the PEMI (or its representatives) must be given the opportunity to access the same information as provided to family members in the same function.

2 Ongoing Access to Information

The company’s statutory obligation to inform its shareholders is tied to the general meeting. The annual report and the auditor’s report must be made available for inspection at least 20 days prior to each ordinary general meeting. Likewise, the duty of corporate organs to provide the shareholders with information or allow for inspection upon request relates to the general meeting. Given that the ordinary general meeting takes place once a year, PEMIs, by law, have access to corporate information on an annual basis only. Between the end of an ordinary general meeting and the publication of the annual report and the auditor’s report at least 20 days prior to the following one, the PEMIs, in the shareholder capacity, are not entitled to receive information on the course of business. The law neither establishes a duty to publish semi-annual reports, nor to communicate extraordinary developments or events of significant importance.

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2159 See Section V.B.1.4.
2160 See Section V.B.1.2.2.
2161 CO 699 II.
2162 An exception is stated in CO 716b II Sentence 2, whereby the shareholders are entitled at any time to request the board of directors for information on the organization of the management. Moreover, it is possible to access information at an extraordinary general meeting, see HORBER, Informationsrecht, p. 44, N 125.
2163 See BÖCKLI/HUGUENIN/DESSEMONTET, p. 55.
2164 There is no ad-hoc reporting requirement for unlisted companies, see BÖCKLI, Aktienrecht, § 12, N 226; MAROLDA MARTÍNEZ, p. 126.
Part Two: Legal Framework and Tools

Similarly, in a GmbH, the annual report and the auditor’s report are also delivered only once per year and, by law, there is no interim reporting. In contrast though, GmbH members enjoy information rights year round and may request information or inspection principally at any time during the year.

The statutory access to information that stock corporation shareholders have is in stark contrast to the information needs of private equity investors. The PEMI’s need for information clearly does not arise just once a year, but is ongoing because the PEMI needs to be up-to-date with the company’s operations, finances, strategies, in order to protect its investment. In particular, the private equity investor will typically want to be involved in important decisions with regard to strategy, organization, or human and financial resources at all times, but particularly in turbulent times, for example, when expanding the business through important acquisitions or when in financial distress. To assess whether and how to support such undertakings or whether and/or when to exit the investment the PEMI relies on ongoing access to information.

As part of the revision of corporate law, the Swiss Federal Council suggests broadening shareholders’ information rights in privately held companies by granting them a right to demand information on corporate affairs in writing from the board of directors (but not the auditors) at any time. The board of directors must provide such information in writing within 90 days and make it available for inspection at the next general meeting or alternatively publish it immediately by electronic means. Such an ongoing right to information and inspection is subject to the same requirements as the existing right to information. The Swiss Council of States in 2009 rejected this extension of the shareholders’ information rights. From the PEMI’s perspective, such a revision is welcome; however, in light of the Council of State’s previous rejection of this, it is questionable whether it will become law.

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2166 See FN 463.
2167 D-CO 697 II. See BÖCKLI, Aktienrecht, § 12, N 157 et seq. (pointing, however, to significant potential for abuse of such newly proposed right: “Andererseits besteht die Gefahr, dass die Minderheitsaktionäre das Recht … gezielt als Waffe einsetzen.”).
2168 I.e., it must relate to the company’s affairs, be necessary for exercising shareholder rights, and it must not jeopardize the company’s business secrets or any other legitimate interests of the company. See GLANZMANN, Aktienrechtsrevisions, p. 673 et seq.
2169 Council of State resolution as of 11 June 2009.
Turning to the board of directors, the law, in principle, provides each board member with ongoing access to information concerning any matter relating to the company. Board members can request information during board meetings and outside board meetings, where the information requested can be on the general course of business, and, with the chairman’s authorization, on particular affairs.\textsuperscript{2170} The law assumes a continuous ability of board members to contact the chairman of the board of directors. However, in case he/she is not reachable, the right to information and inspection is in question. Therefore, PEMIs may want to expand the more restrained right to information outside board meetings.

3 Timely Access to Information

Closely related to the need for ongoing access to information is the need for \textit{timely} access to information. This aspect relates to the time period between an event or change in the firm’s functioning or other relevant matters, and the time of the company’s reporting on such issue. Timely access is paramount for PEMIs to obtain information on unexpected business developments at an early stage and leave enough time to take advantage of opportunities or react to adverse situations. Yet, by law, PEMIs, in the shareholder capacity, have no right to timely information. As previously stated, the PEMI’s information rights revolve around the general meeting, which as noted earlier, occurs annually within six months after the close of each fiscal year.\textsuperscript{2171} Given that the annual report and the auditor’s report must be made available by the company at least 20 days prior to the general meeting, company information can be delayed up to almost 1½ years!\textsuperscript{2172} This is clearly incompatible with an active PEMI’s need for timely information.

From the PEMI’s perspective, the Swiss Federal Council’s recently proposed right, which allows shareholders of privately held companies to demand information on corporate affairs in writing \textit{at any time} from the board of directors is certainly welcome. However, the 90-day period within which the request must be answered may still be too long for PEMIs and others to receive time-critical business information. Moreover, additional

\textsuperscript{2170} \textit{See FN 2106.}
\textsuperscript{2171} CO 699 II.
\textsuperscript{2172} This time frame refers to the beginning to end of the financial year (12 months) plus the maximum time until the ordinary general meeting takes place (6 months) minus the 20-day period stipulated for the advance publication. \textit{See} HORBER, \textit{Informationsrecht}, p. 44, N 124 and p. 66, N 195; HUSE, p. 124 ("Möglichkeit des Unternehmens, den Geschäftabschluss erst 5 Monate und 10 Tage nach dem Bilanzstichtag bekanntzugeben, ist bei Publikumsgesellschaften nicht mehr tragbar.").
Part Two: Legal Framework and Tools

information is only provided upon the PEMI’s request. As will be explained shortly, the PEMI must already possess some knowledge of the critical corporate developments on which to seek further information. Thus, the Draft Legislation, the passage of which is highly uncertain, addresses shareholders’ need for continuous access to information. It does not, however, ensure that information is provided in a timely manner.

Members of the board of directors, even more so than active shareholders, have a need for timely access to information. Of particular importance is the provision of ad hoc information in case of extraordinary events with material effect on the firm’s operative performance or financial position. Like the need for ongoing information, the need for timely information depends, in practice, on the establishment of a well functioning board of directors’ communication system that ensures the efficient flow of information.

4 Unsolicited Provision of Information

The statutory information rights entitle PEMIs to actively procure information. This applies to the annual report and the auditor’s report in that the shareholder must either physically go to the company’s registered office where such reports are made available or actively request a copy of these documents to be sent. So, the right to request information and inspection requires the PEMI become active. This need to actively procure standard information on a regular basis is cumbersome, inefficient and a drain on resources of both the investor and the company. Apart from these organizational inefficiencies, a second problem lies in the fact that the information gap between the PEMI and the controlling shareholder/management is usually not caused by the denial of the PEMI’s request for information or answers to questions posed. Rather, it exists because, due to the PEMI’s lack of knowledge of internal matters, it fails to pose the right questions. Hence, there is a need to establish a communication system that routinely provides PEMIs with a defined, systematically organized, and standardized set of basic information unsolicited. Secondly, critical

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2173 See FN 463.
2174 See FRICK, § 12, N 1393.
2175 See FN 1979.
2177 See DRUEY, Informationsversorgung, p. 11 et seq.
2178 See SALIS-LÜTOLF, Finanzierungsverträge, § 11, N 1331.
information should be provided unsolicited in exceptional situations\textsuperscript{2179} including those with material effects on the valuation of the minority investment or where the PEMI’s legitimate interest can reasonably be assumed for other reasons.

What applies at the shareholder level applies at the board level even more so – an information gap between the PEMIs’ and the controlling shareholders’ board representatives is usually not caused by the denial of the former’s requests for information. Rather, it exists because, due to their lack of knowledge of internal matters and relational information channels, they fail to pose the right questions.\textsuperscript{2180} This emphasizes the need for a board communication system that provides board members with critical information on the course of business automatically and routinely, based on stringent adherence to the principle of equal treatment.\textsuperscript{2181}

5 Extended Scope and Quality of Information

5.1 Defining Content in General

Not only is it important to clarify that information must be disclosed in a certain manner, but also to define what type of information must be provided. In obliging the company to prepare the annual report and the auditor’s report, the law specifies the means of disclosure by which shareholders must be informed. The minimum information to be provided can be inferred from the statutory rules on proper financial accounting\textsuperscript{2182} and relating to commercial accounting,\textsuperscript{2183} and from the statutory requirements on the profit and loss statement, the balance sheet, and the notes to the financial statements.\textsuperscript{2184} However, a precise definition of the content to be provided in these documents is not given.\textsuperscript{2185} Hence, as Horber rightly points out, the company enjoys plenty of rope with respect to content.\textsuperscript{2186} Even in light of the trend to provide information beyond the

\textsuperscript{2179} Described as important singular facts, i.e., data of importance which is not determined in advance; see Druey, Informationsversorgung, p. 11 et seq.

\textsuperscript{2180} See Section V.C.4 and FN 2176.

\textsuperscript{2181} See Druey, Verwaltungsratsmitglied, p. 51.

\textsuperscript{2182} CO 662a.

\textsuperscript{2183} CO 662a IV in connection with CO 957 et seqq.

\textsuperscript{2184} CO 663, 663a and 663b. In a GmbH, the laws applicable to stock corporations regarding auditors apply analogously (CO 818 I).

\textsuperscript{2185} See Horber, Informationsrecht, p. 34 et seqq., N 94 et seqq. and p. 66 et seq, N 196; Gabrielli, p. 13; Marolda Martínez, p. 126, FN 691.

\textsuperscript{2186} See Horber, Informationsrecht, p. 35, N 98 (finding that CO 663d I on the annual report is “derart rudimentär ausgefallen, dass sich daraus für die Gesellschaft keine konkreten
statutory minimum requirements, the absence of precise statutory provisions on the content of the information to be provided necessitates a definition of such content in order to manage expectations as to what information should be delivered, from the company’s perspective, and what information to expect, from the PEMI’s perspective.

With regard to the unsolicited routine provision of information, it is equally important for the board of directors to precisely define in the organizational regulations the documents and content of the information to be provided unsolicited by management. Since directors enjoy much broader access to information to adequately perform their duties, such list may contain only a standard set of commonly transmitted information without being exhaustive. In light of the huge scope of potentially relevant information, defining the content explicitly is inefficient, if not impossible. Hence, the parties should rather focus on agreeing on the principles of communication and to manage expectations with regard to what information is to be delivered and what information is to be expected routinely in the course of ordinary business.

5.2 Specific Content and Documents

Due to the lack of precise provisions for closely held companies regarding the content of the reports by law to be provided unsolicited and due to the rather restrictive right to information and inspection, Swiss corporate law allows minority shareholders to obtain only a rudimentary overview of the firm’s financial situation. Moreover, the annual report is highly concentrated on financial aspects. The minority shareholder obtains little information on singular products and their markets, on business principles, on human resources, on remuneration and other benefits of managers, as well as loans provided the controlling shareholder. Even though PEMIs may receive information on the organization of the management, they are not entitled to a direct inspection of the organizational regulations, which are highly important for establishing a balanced relationship between

inhaltlichen Informationsverpflichtungen ableiten lassen. In der materiellen Ausgestaltung des Jahresberichtes hat die Verwaltung praktisch freie Hand”).

2187 See MEIER-HAYOZ/FORSTMOSER, § 16, N 198 et seq.
2188 See GABRIELLI, p. 13 (noting, however, that most shareholders are pleased to receive only a rudimentary and summary overview of the corporate situation). For a general discussion on the limits of financial accounting as a means of information, see MEIER-HAYOZ/FORSTMOSER, § 16, N 197 et seq.; HÖRBER, Informationsrecht, p. 45 et seqq., N 129 et seqq.; MEIER-SCHATZ, Unternehmenspublizität, p. 182 et seqq.
2189 See DREY-GUHL, § 68, N 10
2190 Ibid; in detail also see BÖCKLI/HUGUENIN/DESSEMONTET, p. 55 et seq.
2191 CO 716b II.
corporate leadership and control.\textsuperscript{2192} With respect to the information objects under the shareholder right to information, some legal scholars hold that questions may relate only to matters included in the annual report or the auditor’s report.\textsuperscript{2193} In such a case, the active information right does not open up broader access to information either. Also, for privately held companies, corporate law has no provisions requiring the disclosure of current developments and future business prospects.\textsuperscript{2194} Yet, it is precisely this information that is critical to PEMIs for valuing their minority investments in that valuations typically rely on the projected future cash flows. According to the Draft Legislation,\textsuperscript{2195} the annual report of companies subject to an ordinary audit must contain a \textit{status report} in which, among other things, the future prospects shall be discussed together with further aspects relevant for assessing the firm’s potential.\textsuperscript{2196} Moreover, the Swiss Federal Council has proposed that shareholders of privately held companies shall have a right to request from the board of directors information on compensation, loans, and credits granted to that members of the board and management just as publicly listed companies must disclose in their notes to the financial statements.\textsuperscript{2197} From the PEMI’s perspective, the improved access to information with regard to these particular matters would be advantageous. However, the Swiss Council of States has dismissed the extended information rights with respect to compensation, loans and credits in privately held companies,\textsuperscript{2198} so it is unclear if and what type of extended information rights will come into force. With respect to specific documents, the right of inspection is currently limited to existing documents, so that PEMIs who need the company to prepare specific information must privately negotiate for such information.\textsuperscript{2199}

With regard to the documents provided to board members, the law does not stipulate any rules regarding the handling of electronic or paper files, data, and documents made available to board members. Generally, board members are allowed to keep the documents obtained during board meeting

\textsuperscript{2192} See BÖCKLI/HUGUENIN/DESSEMONTET, p. 56.
\textsuperscript{2193} See FN 2009.
\textsuperscript{2194} See BÖCKLI/HUGUENIN/DESSEMONTET, p. 55; ROTH PELLANDA, p. 309, N 645.
\textsuperscript{2195} See FN 463.
\textsuperscript{2196} For example, the risk assessment procedure, the order situation, and the research and development activities (D-CO 961 Sec. 3 i.c.w. D-CO 961c II).
\textsuperscript{2197} D-CO 697\textsuperscript{quinquies} 1 i.c.w. D-CO 697\textsuperscript{quarter}. Such information must be provided within 45 days (D-CO 697\textsuperscript{quinties} II) in the form deemed appropriate.
\textsuperscript{2198} Council of State resolution as of 11 June 2009.
\textsuperscript{2199} See FN 2018.
in their private records.\textsuperscript{2200} However, in specific situations and based on good grounds such as with reference to particularly sensitive content, the chairman may withdraw this right, ask the members to return the documents provided earlier, and prohibit the copying of any documents.\textsuperscript{2201} In such a case, the documents must, however, be available for the board members to inspect at the company’s registered office.\textsuperscript{2202} In any case, it is advisable to establish specific rules on the handling of documents in the organizational regulations.

5.3 Quality of Information

Not only is it important to define information content, but also to ensure that such content meets the PEMI’s standards of quality. Prevailing opinion holds that the annual report prepared by the board of directors should cover all relevant aspects that impact the company’s business operations and outcomes.\textsuperscript{2203} However, not only does the law minimally specify the content of the documents to be provided, but it also prescribes only minimum standards regarding the quality of information to be provided (mentioning the quality standards of completeness, clarity and materiality, prudence, going-concern assumption, consistency of presentation and valuation, and non-offsetting of assets and liabilities or income and expenses).\textsuperscript{2204} No reference is made to the accuracy and generic usefulness of information.\textsuperscript{2205} As a result, particularly in private closely held companies, the annual report is often merely “a routine document with only little meaningful information contained therein”\textsuperscript{2206}. Against this backdrop,

\textsuperscript{2200} See BÖCKLI, Aktienrecht, § 13, N 214 (arguing that keeping the files is necessary to enable to board members to later justify the decisions made at the board, to potentially continue the discussion at a later stage, to supervise management, and in light of any liability proceedings or a special audit).

\textsuperscript{2201} See BAUN/VENTURI, § 2, N 125; BÖCKLI, Aktienrecht, § 13, N 214. Much stricter, HOMBURGER, Zürcher Kommentar, CO 715a, N 499 (holding on the contrary that board members who receive books and files must not make copies unless they clearly and explicitly explain why it is necessary to do so). Of another opinion, KRNÉTA, CO 715a, N 1041 et seq. (finding that board members have no right to take documents home and prohibiting copying generally except where approved by the chairman of the board).

\textsuperscript{2202} See BÖCKLI, Aktienrecht, § 13, N 214.

\textsuperscript{2203} See EHRAI, Protection of Minority Shareholders, p. 228.

\textsuperscript{2204} See FN 2182 and 2183.

\textsuperscript{2205} CO 662a II e contrario.

\textsuperscript{2206} See EHRAI, Protection of Minority Shareholders, p. 228; DRIEY, Dualismus, p. 113 (referring to an ‘hemiplegia’ of the requirement for truth because the data presented must not be too favorable, but there are no limits concerning poor performance); HÖRBER, Informationsrecht, p. 47 et seq., N 135 et seq. (“Die zitierten Grundsätze der Bilanzklarheit und der formellen Bilanzwahrheit vermochten daher nicht zu verhindern, dass in der Bilanz Posten beliebig saldiert oder summiert wurden und damit dem Aktionär Abschlüsse offenbart wurden, die wichtige Kennziffern wie bspw. Umsatz, Abschreibungsaufwand, Konzern-
PEMIs may want to establish with the company (the board of directors and/or top management) a set of minimum quality standards which information provided to PEMIs (as shareholders) or to their board representatives must fulfil so that PEMIs can rely on the information provided.

6  

**Broader Circle of Information Providers**

The shareholder right to request information obliges both the board of directors to provide information concerning corporate affairs and the auditors to relay information concerning the details and results of their audits. In the shareholder capacity, PEMIs have no direct access to management. Yet, because management is in the driver’s seat, PEMIs require regular, up-to-date information directly from management on the status and future prospects of the business – conveyed as purely as possible, that is, not whitewashed or watered down from traveling through various levels of management and investor relations channels.

7  

**Conclusion**

The preceding assessment of the legal framework in light of the PEMI’s need for timely, detailed, and relevant information shows that the respective rights that corporate law provides do not sufficiently mitigate potential agency problems associated with minority investments and barely satisfy the information needs of actively engaged PEMIs in their quest to monitor and grow their investments, to effectively exercise shareholder rights and, particularly, to carry out their role as sparring partners. The information rights that PEMIs enjoy in the shareholder capacity are subject to stringent limitations which represent, as DRUEY concludes, a colossal dam that allows just a trickle of information to flow through. After all, how can even the most brilliant and properly motivated PEMI provide competent management advice if it lacks clear, concise, accurate, and timely information.

PEMIs represented on the board of directors substantially enhance access to information compared to PEMIs who are not. In effect, board representation

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2207 See FN 1993.

2208 Of equal opinion, see FRICK, § 12, N 1360; SALIS-LÜTOLF, *Finanzierungsverträge*, § 11, N 1324; PEARCE/BARNES, p. 144 et seq.; MAROLDA MARTÍNEZ, p. 267.

is the most efficient tool to gain continuous, accurate, and updated access to information. Yet, it must be kept in mind that the duties of loyalty and care owed to the firm may prevent directors from using such information when exercising shareholder rights.\textsuperscript{2210} Moreover, as shown in this section, there remains room to improve board of directors’ access to information.\textsuperscript{2211} In practice, substantial access to information relies to a great extent on the firm’s willingness to provide the PEMI with information.\textsuperscript{2212} Some support of the PEMI’s statutory access to information may come with the Draft Legislation.\textsuperscript{2213} However, in light of the uncertainty as to when and in what form it comes into effect, PEMIs should use privately negotiated measures to ensure access to adequate information rather than be at the company’s and the controlling shareholder’s mercy when they need to realistically assess the company’s economic and financial situation during their investments.

By comparison, in a GmbH, the members’ information rights are much broader.\textsuperscript{2214} Solely for the purpose of ensuring adequate de jure access to information, the PEMI does not necessarily need to assume a management role in a GmbH.

D Legal Structuring Options

To provide PEMIs with the information necessary for effective monitoring, to appraise the company’s performance, economic and financial status, and business prospects, to value the minority investment, to prepare decision making, and to render advice, the PEMI relies on a functioning investor information system. The investor information system is designed to ensure that the PEMI obtains critical information at the right time, in the right form, and automatically (unsolicited). It sets out general principles, responsibilities, channels, timing, form, content, and quality of information to be made available. Conversely, the PEMI’s duty of confidentiality and duty to return files, documents, and other sensitive materials are typically agreed upon. In the following section, the individual aspects of the investor information system are examined in more detail.

\textsuperscript{2210} See FN 2091.
\textsuperscript{2211} See WYSS, Aktionärbindungsvertrag, p. 514 (“Die aktienrechtlichen Informationsrechte werden dem Investor kaum genügen, selbst wenn er im Verwaltungsrat vertreten ist.”).
\textsuperscript{2212} See HORBER, Informationsrecht, p. 340, N 1265 (concluding that the shareholder’s state of information depends, from a practical standpoint, on the willingness of the company to provide information).
\textsuperscript{2213} See FN 463.
\textsuperscript{2214} See FN 1998.
1  Key Legal Documents

In principle, the statutory rights to information and inspection of shareholders and board members represent a minimum standard.\textsuperscript{2215} Due to its one-sided mandatory nature,\textsuperscript{2216} the respective rights can be amended only for the PEMI’s benefit.\textsuperscript{2217} Shareholders’ information rights can be broadened via the articles of association. At all times, however, the board of directors, due to the principle of parity and the directors’ personal liability,\textsuperscript{2218} must maintain its authority to reject requests that could breach business secrets or where the information requested could be used to the detriment of the company.\textsuperscript{2219} The later withdrawal of enhanced information rights requires an amendment of the articles of association, which is, by default, approved by the absolute majority of the votes allocated to the shares represented at the general meeting.\textsuperscript{2220}

Pursuant to prevailing expert opinion,\textsuperscript{2221} board members’ information rights are broadened via the organizational resolutions or board resolutions, but not via the articles of association due to the principles of parity\textsuperscript{2222} and of the board’s self-organization\textsuperscript{2223}. Such a view is also reflected in corporate law, which mentions only “regulations and resolutions”\textsuperscript{2224} of the board of directors and not the articles of association as a means of

\textsuperscript{2215} With respect to shareholders, see KUNZ, Minderheitenschutz, § 12, N 13, FN 44; FORSTMOSER, Meinungsäußerungsrechte, p. 99; MEIER-SCHATZ, Zusammenarbeit, p. 829. With respect to members of the board of directors, see VON SALIS-LÜTOLF, Finanzierungsverträge, §11, N 1338; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 28, N 104; BÄCHTOLD, p. 67; HORBER, Informationsrecht, p. 119, N 366 and p. 122, N 371; DREU, Verwaltungsratsmitglied, p. 49. With respect to the GmbH, see NATER, p. 117.

\textsuperscript{2216} CO 697. See FN 1992. With respect to the GmbH, see NATER, p. 75.

\textsuperscript{2217} See KUNZ, Minderheitenschutz, § 12, N 13, FN 44; FORSTMOSER, Meinungsäußerungsrechte, p. 99; WATTER, Minderheitenschutz, p. 125.

\textsuperscript{2218} For principle of parity, see Section IV.D.2.1, FN 557, for duty of loyalty, see Section IV.E.4.1.2.

\textsuperscript{2219} See WEBER, Basler Kommentar, CO 697, N 3; FORSTMOSER, Meinungsäußerungsrechte, p. 98 et seq. With respect to the GMBH, see NATER, p. 75 et seq.

\textsuperscript{2220} CO 703.

\textsuperscript{2221} See WERNLI, Basler Kommentar, CO 715a, N 14; ROTH PELLANDA, p. 329, N 687; KRNETA, CO 715a, N 1062; KUNZ, Verwaltungsratsmitglied, p. 579 (stating that in order to abolish the required authorization of the chairman regarding a request for information or inspection, an amendment of the organizational regulations – not the articles of association – or a passing of a board resolution is necessary); BÄCHTOLD, p. 67, 95 et seq.; DREU, Verwaltungsratsmitglied, p. 51 (finding that the establishment and management of an adequate board information system is part of the board’s organizational autonomy); NOBEL, Klare Aufgaben, p. 532 (“dürfte es ratsam sein, das gesamte Auskunftsrecht reglementarisch zu ordnen”); FORSTMOSER/MEIER-HAYOZ/NOBEL, § 28, N 104.

\textsuperscript{2222} See Section IV.D.2.1 and FN 557.

\textsuperscript{2223} See Section IV.E.5.1.1.

\textsuperscript{2224} CO 715a VI. The provision applies analogously with respect to the information rights of the managing officers in a GmbH, see NATER, p. 117.
expanding the directors’ information rights. The organizational regulations are the principal means for regulating the exchange of information between management and the board of directors, establish the cornerstones of the board information system, and refine the board members’ information rights.\textsuperscript{2225}

To protect themselves against unfavorable amendments of the articles of association or organizational regulations, PEMIs should request such amendments be subject to a high quorum and/or majority vote requirement to obtain veto power against any unfavorable ex post changes by the controlling shareholder and its board representatives, respectively. Critical provisions can additionally be secured by contractual agreements.\textsuperscript{2226} However, in case of board of directors’ agreements, certain limitations must be observed. Firstly, board members must not provide information that could jeopardize the company’s interest. While absolute business secrets must not be disclosed, the board of directors has room for discretion regarding relative business secrets, which must also be protected because they can result in a competitive advantage for the company if they fall into the hands of competitors.\textsuperscript{2227} Secondly, the principle of equal treatment\textsuperscript{2228} provides another limitation to granting the PEMI additional information rights.\textsuperscript{2229}

\textsuperscript{2225} See Böckli, Aktienrecht, § 13, N 188. If the board has delegated the management to individual members or to third parties it must establish an appropriate reporting system in the organizational regulations. See FN 1809. It is questionable if the organizational regulations establishing a board information system require a basis in the articles of association pursuant to CO 716b I. Arguing in favor Druey, Verwaltungsratsmitglied, p. 51, FN 6 (“Obwohl kein Delegationsfall, sollte dann aber wohl erst recht die statutarische Basis bestehen, wenn z.B. dem einzelnen Verwaltungsrat überhaupt unbeschränkter Aktenzugang gewährt werden soll. Dagegen ist das spontane Informationssystem m.E. kein notwendiger Gegenstand des Organisationsreglements im Sinne von Art. 716b, da es ein Stück Organisation allgemein darstellt, die, trotz der Berichterstattung, nicht als Gegenstand von Art. 716b ist.”). In contrast, Böckli, Aktienrecht, § 13, N 188 (arguing that the spontaneous information system must be regulated in the organizational regulations).

\textsuperscript{2226} See Bühler, Regulierung, § 11, N 1349; Wyss, Aktionärbindungsvertrag, p. 514; Bühler, Leitlinien, p. 323; Forstmoser, KMU, p. 499; Forstmoser/Meier-Hayoz/Noël, § 39, N 43 et seqq.; Schenker, Familiengesellschaften, p. 25.

\textsuperscript{2227} See FN 2030.

\textsuperscript{2228} See Section V.B.1.4.

\textsuperscript{2229} See Frick, § 12, N 1370; Forstmoser, KMU, p. 499 (“Durch Aktionärbindungsverträge können die Informationsrechte erweitert werden, wobei aber auch diesbezüglich das Gleichbehandlungsgebot zu wahren ist.”).
Chapter V: Access to Information

2 Aspects of an Investor Information System

2.1 Obligors

First and foremost, the investor information system must define the roles and responsibilities of individuals subject to reporting and information obligations. The persons particularly suitable are the board of directors’ chairman, the chairpersons of board committees, committee members, executive and regular board members, third-party managers, and controllers. In addition to depending mainly on the board of directors and senior managers as the primary source of information, PEMIs may also want to establish direct access to the officers and employees – the level below top management. Theoretically, any employee and/or representative of the firm can be useful to supply information.\textsuperscript{2230} Yet, to prevent an unnecessary disruption of the ordinary course of business, granting such access to particular information providers with regard to particular information, and only in the event of defined circumstances or events, or only at set recurrent dates, could be a good approach.

The PEMI’s board representatives’ statutory rights to information outside board meetings may be expanded in that it not only relates to the general course of business, but to all or a defined set of information objects related to corporate affairs without the chairman’s prior authorization.\textsuperscript{2231} The chairman’s authorization can also be waived for inspection requests.\textsuperscript{2232} In the broadest sense, board members may be granted a comprehensive right to procure information, both during and outside board meetings, from both executive managers and subordinate employees.\textsuperscript{2233} The practical question that arises in such a case is how the requests for information outside meetings are to be handled. Inquiries not automatically brought to the attention of the chairman of the board or CEO are difficult to coordinate and to integrate into the official circulation of information and, as a result, may hinder attaining the objective of simultaneous and equal disclosure to board members. It is therefore advisable to stipulate that any requests for information or inspection to be addressed to the chairman of the board who, in case he/she does not provide the information directly then functions as a point of coordination.\textsuperscript{2234} Even if the requirement of an express authorization of the chairman is waived or dispensed with, providing

\textsuperscript{2230} See KUNZ, Verwaltungsratsmitglied, p. 579; BÄCHTOLD, p. 67.
\textsuperscript{2231} See HORBER, Informationsrecht, p. 122, N 371; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 28, N 104; KRNETA, CO 715a, N 1063; BÄCHTOLD, p. 67.
\textsuperscript{2232} See KRNETA, CO 715a, N 1063; BÄCHTOLD, p. 67.
\textsuperscript{2233} See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 28, N 104.
\textsuperscript{2234} See HORBER, Informationsrecht, p. 122 et seq., N 372.
information or granting inspection should be reported to the chairman in advance.2235

2.2 Informational Level Playing Field

It is imperative to clarify that companies must comply with the principle of equal treatment of shareholders and disseminate information in a way that ensures equal treatment of all shareholders to the greatest extent possible to maintain an informational level playing field.2236 If the company provides certain shareholders with additional information it must ensure that such data is also provided to their peers. Unequal disclosure by corporate organs should be deemed unacceptable, and open and fair behavior of all interested parties should be granted to the extent possible. Yet, it is common to make additional access to information subject to a shareholders’ confidentiality agreement.2237 As has been argued,2238 the author of this dissertation endorses the view that such a practice does not constitute an illicit differential treatment of shareholders if all shareholders are given the opportunity to access the same additional information provided they agree to a reasonable confidentiality agreement.

2.3 Timing of Information

In addressing the need for ongoing and timely information, a number of different temporal aspects are commonly addressed when designing investor information systems. A difference is typically made between information that the firm delivers unsolicited to the Pemi and information that is disclosed only upon request. Firstly, with regard to the information provided unsolicited, the intervals of disclosure should be clearly stated, for example, reporting on a yearly, semi-annual, quarterly, monthly, and weekly basis and ad hoc following certain important events that can have a material impact on the firm’s performance or financial situation. Frequently, PEMIs seek to obtain extensive information on an annual basis, detailed information on a quarterly basis, and key statistics on a monthly basis. In particular situations that require intensive monitoring, for instance, in case of financial distress, the investor may request to be updated on a

2235 See MÜLLER/LIPP/PLÜSS, p. 88.
2237 For example, assessments of future trends, plans, and strategies of the management are the company’s proprietary information and may only be disclosed in justified cases, e.g., if the shareholder commits to maintain confidentiality with regard to those matters.
2238 See Section V.B.1.4.
weekly basis, in writing (hardcopy and/or electronically), and/or orally.\textsuperscript{2239} Secondly, the information must be dispatched in a timely fashion, typically no later than between 15 and 90 days after the end of the respective reporting interval. While some agreements stipulate a single disclosure period for all reporting intervals, other agreements set out varying intervals, for example, 15 days for the disclosure of the minutes of the general meeting and monthly summary statistics, 30 days for unaudited quarterly and semi-annual reports, and 90 days for annual reports. With regard to the information to be provided upon request, PEMIs have an interest in receiving the requested information as quickly as possible. On the other hand, it would be cumbersome if companies were required to continually provide information upon request from shareholders. A reasonable period for replying to requests for information, inspection, or site visits could be 20-30 days. Thirdly, aside from the disclosure period, a second period is regularly agreed as part of the investor communication system, namely the preparation period – the period between the time of the actual reporting and the next meeting. On the one hand, the preparation period must be long enough to reasonably allow PEMIs a proper study of the materials and formation of an opinion. On the other hand, the period should not be too long in the interest of quick decision making. The definition of a suitable preparation period depends on the individual decision to be made. While at the shareholders’ level, the period is stipulated in the law (at least 20 days\textsuperscript{2240}), at the board level, insofar as general recommendations are possible, a preparation period of one to two weeks seems appropriate.

2.4 Form of Information

Information is typically provided from the company to the shareholders or board members in writing (hardcopy and/or electronically) or orally.\textsuperscript{2241} Written information is at the center of the reporting, and includes monthly reports, quarterly statements, the business plan and budget, auditor’s reports, etc., sent by post or email, published on internal or external electronic platforms, (e.g., the company’s intranet or website), or made available for study ahead of meetings in conference rooms or nearby. In addition to determining what information shall be provided in writing, the appropriate handling of such information should also be clearly delineated,

\textsuperscript{2239} With respect to the frequency of unsolicited disclosure by private equity-owned firms, see RUPPEN, p. 162 (finding based on his survey that 70% of firms report on a monthly basis, 26% quarterly and 4% on an as-need basis).

\textsuperscript{2240} CO 696 I.

\textsuperscript{2241} See VON SALIS-LÜTOLF, Finanzierungsverträge, § 11, N 1319; DIETRICH, Brevier, p. 36 et seq.
including, for instance, which documents are for inspection only, which are to be kept in one’s private files, which can be taken home and copied, etc. *Oral information* is equally important, particularly for maintaining or building the relationships and trust, etc. Oral information is commonly exchanged throughout the course of business; for instance, during telephone conferences, during presentations of divisional directors, at strategy seminars, technical site visits, and during informal conversations at business luncheons and other corporate events. These points of information exchange should be considered important building blocks of the investor information system.

The perceived usefulness of information can be enhanced by disclosing information in a form easy to understand and analyze. Hence, the parties may agree to use certain reporting standards with which the recipients are familiar. PEMIs occasionally ask their portfolio companies to disclose information in a particular form that is compatible with their internal reporting format.

### 2.5 Information Content

#### 2.5.1 General Approaches to Regulation

In determining the information content to be provided automatically or upon a shareholder’s request, two approaches may be followed: the principles-based approach and the rules-based approach. Following a *principles-based approach*, a simple set of key objectives and general principles set the scope of information to which the PEMI (and the other shareholders) shall have access. As shareholders, PEMIs ideally negotiate for access to a range of information as close as possible to that to which their board representatives have access, in order to freely exchange information with their board representatives and to use the information obtained by their representatives when exercising their shareholder rights. Such extensive access to information is, in principle, possible, but because shareholders are not subject to a duty of loyalty and because board members are obliged to prevent the disclosure of information if it could

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2242 *See* SALIS-LÜTOLF, *Finanzierungsverträge*, § 11, N 1319 (rightly pointing out that the information disclosed in such circumstances is, however, seldom based on contractual agreements). Also *see* RUPPEN, p. 164.

2243 *See* DIETRICH, Brevier, p. 12.


2245 *See* PEARCE/BARNES, p. 145; FRICK, § 12, N 1365.

2246 *See* ibid, N 1364.

2247 *See* Section IV.D.4.1.
jeopardize the company’s interests.\textsuperscript{2248} Appropriate control barriers must be established. Among the most effective tools is a confidentiality agreement between the company and the PEMI.\textsuperscript{2249} Following a rules-based approach, a comprehensive catalogue of data to be provided unsolicited and/or upon request is agreed upon. Both approaches have advantages and disadvantages. The benefits of a principles-based approach is that it is flexible\textsuperscript{2250} as it allows the parties to quickly and effectively adapt the reporting to new business developments and associated changing needs for information. It also avoids highly legalistic and rigid language making the legal documents simpler and easier to understand and work with.\textsuperscript{2251} On the other hand, a rules-based approach has the advantage of setting clear responsibilities and managing expectations with regard to what data and information to deliver and what to expect as a shareholder. However, in light of the breadth of possible data points, agreeing on a compact list of key data is easier in theory than in practice. Moreover, this approach entails the risk that, as DRUEY’s writes, “many … big fish may slip through the net.”\textsuperscript{2252} A too detailed list may also lead to an information overkill in which case the PEMI is overwhelmed with processing the data delivered and, as a result, may overlook critical data or forget to ask for important information not included on the list or outside the reporting period.\textsuperscript{2253} To ensure that all relevant information is disclosed to the PEMI, the content to be provided should not be defined too strictly. DRUEY rightly concludes that in stipulating the content to be delivered, the word important or similar wording will be hard to avoid.\textsuperscript{2254} The company always has and should have some leeway in deciding on what information to disclose.\textsuperscript{2255} There is neither a simple nor a safe solution available\textsuperscript{2256} and the decision about which approach to follow can ultimately only be made in light of the particular investment on a case-by-case basis. As a compromise between both approaches, a general clause can be agreed upon in which the aim and the core principles of the investor information system are set. Such a general clause can then be complemented with a clear-cut set of core data to be provided.

\textsuperscript{2248} See Section IV.E.4.1.2.
\textsuperscript{2249} On confidentiality agreements, see Section V.D.3.2.
\textsuperscript{2250} See MÄNTYSAARI, The Law of Corporate Finance, p. 429 (“a principles-based approach can cater for the almost infinite variations in individual circumstances that arise in practice”).
\textsuperscript{2251} Ibid.
\textsuperscript{2252} See DRUEY, Informationsversorgung, p. 13.
\textsuperscript{2253} Ibid, p. 22; DRUEY, Informationsrecht, p. 124.
\textsuperscript{2254} See DRUEY, Informationsversorgung, p. 13.
\textsuperscript{2255} Ibid, p. 13 et seq.
\textsuperscript{2256} Ibid.
2.5.2 Specific Content

If a list of key data is specifically agreed upon, whether as part of the main agreement or in the appendix, such a list should include information on management performance, the firm’s financial status, its business outlook, and other aspects as detailed in a model, in Table 7.

<table>
<thead>
<tr>
<th>Category</th>
<th>Item</th>
<th>Examples</th>
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<tbody>
<tr>
<td>Management</td>
<td>Business environment</td>
<td>• State of the industry &amp; geographic markets</td>
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<td></td>
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<td>• Competition &amp; respective market shares</td>
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<td>• SWOT analysis</td>
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<td>• Market trends</td>
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<tr>
<td>Course of business</td>
<td></td>
<td>• Report on the course of business by product/service &amp; geography</td>
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<td>• Industry-specific KPIs</td>
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<td>• New products/services, product pipeline, store openings</td>
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<td>• Explanation of price/mix effects</td>
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<td>• Customer lists</td>
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<td>• Order books</td>
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<td>• Stock levels</td>
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<td>• Marketing plans</td>
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<td></td>
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<td>• Update on research &amp; development</td>
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<tr>
<td>Structural changes</td>
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<td>• Mergers &amp; joint ventures</td>
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<td>• Substantial investments, acquisitions &amp; disposals</td>
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<td>• Geographic expansions</td>
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<td></td>
<td></td>
<td>• Far-reaching company reorganizations</td>
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<tr>
<td>Risk assessment</td>
<td></td>
<td>• Analysis of commercial, operational, counterparty, legal, political &amp; reputational risks and mitigants</td>
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<td>Human resources</td>
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<td>• Number of employees, turnover rate</td>
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<td></td>
<td>• Information on compensation, average cost per employee</td>
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<td></td>
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<td>• Replacements of board members, senior managers, and auditors</td>
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<td>• Human resources policy</td>
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<td>• Promotion of talent</td>
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<td>• Replacement planning</td>
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<td>• Representation</td>
</tr>
</tbody>
</table>

2257 Analysis of strengths, weaknesses, opportunities, and threats (SWOT), see MEFFERT, p. 68.
### Financials

| Financial accounts | • Audited annual financial statements & unaudited semi-annual, quarterly & monthly financial statements including the balance sheet, profit & loss statement & cash flow statement |
|                   | • Breakdown by geography & product, division, profit centers, subsidiaries, etc. |
|                   | • Cost analysis |
|                   | • Working capital analysis |
|                   | • Breakdown of capital expenditure |

| Financial status | • Debt breakdown, including maturity dates, interest rates, covenant levels |
|                 | • Financial ratios |
|                 | • Liquidity status & forecast |
|                 | • Availability of credit lines |
|                 | • Leasing |
|                 | • Hedges & forward contracts |
|                 | • Changes in the capital structure, e.g., debt & capital increases or reductions, share buybacks |
|                 | • Realization of hidden reserves |

### Business Outlook

| Business plan | • Five-year business plan, including a projected balance sheet, profit & loss and cash flow statement |
|              | • Discussion of business prospects & strategy |
|              | • Order trend & stock levels |
|              | • Development of human resources |

| Budget financial accounts | • Initial & rolling budget |
|                          | • Analysis of deviations |

| Liquidity planning | • See metrics above (e.g., debt maturities, available credit lines, liquidity forecast) |

### Other

|                      | • Information on related-party transactions |
|                      | • Exceptional events or measures taken during the period |
|                      | • Meeting agenda |
|                      | • Minutes of meetings, e.g., general meeting, board meetings, committees meetings, management meetings |
|                      | • Committee reports |
|                      | • Press releases of the company and its competitors |

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2258 For a detailed catalogue of suitable control instruments, see HELBLING, p. 221 *et seqq.*; BOEHMLE/LUTZ, p. 141 *et seqq.*
Other

- Research reports
- Surveys, consultants’ reports
- Real estate, rental, and lease agreements
- Industrial property rights, protection of inventions, industrial design, and trade marks
- Pending judicial, arbitration, and other proceedings including potential damages
- Ongoing sales processes and negotiations with potential investors
- Ongoing (re)negotiations of contracts

<table>
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<tr>
<th>Table 7: Information typically requested by private equity investors&lt;sup&gt;2259&lt;/sup&gt;</th>
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<tr>
<td>Where applicable and reasonable, the above-listed data points are disclosed for the reporting period and for the financial year-to-date. The firm’s actual performance is then compared to the like-for-like&lt;sup&gt;2260&lt;/sup&gt; results of the corresponding period in the preceding financial year, the preceding year-to-date figures and the projected performance for that period set out in the business plan and rolling budget. Comparisons with industry peers and over a longer time period (e.g., five-year comparison) may also prove insightful. A deviation analysis can help the PEMI assess the company’s strengths and weaknesses vis-à-vis competitors and long-term business trends. Management should comment on significant deviations of results compared to business plan figures and past performance in a quarterly report on the development of the company’s activities. As part of the reporting system, management should also discuss future business prospects and strategic goals. Negative developments, with causes that occurred prior to the balance-sheet date, but whose effects are expected only later on, shall also be communicated and discussed. Finally, of particular importance are related-party transactions, because they are a special risk to PEMIs. &lt;sup&gt;2261&lt;/sup&gt; The PEMI should keep a close eye on such dealings and require full disclosure of material transactions with top managers, board members, the controlling shareholder, and other related parties.</td>
</tr>
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</table>

<sup>2259</sup> For similar lists, see BAUEN/VENTURI, § 2, N 99 et seqq.; BÖCKLI, Aktienrecht, § 13, N 192 et seqq.; VON SALIS-LÜHOLF, Finanzierungsverträge, § 11 N 1325 et seqq.

<sup>2260</sup> Like-for-like comparisons relate to data prepared on the same basis, i.e., adjusted for major events, acquisitions, disposals, etc. Any change in the accounting principles, the accounting practices, reference periods, or the assumptions must be explained.

<sup>2261</sup> On related-party transactions, see Section IV.E.4.3.2.
2.6 Quality of Information

Superior information is not only a function of the breadth of information, but also its quality. Therefore, the information disclosed must meet certain standards of quality in order for the sophisticated investor to utilize it. The principles of proper financial accounting, as stipulated in Swiss corporate law, include completeness, clarity and materiality, prudence, going-concern assumptions, consistency of presentation and valuation, and no offsetting of assets and liabilities or income and expenses.\textsuperscript{2262} The parties may choose to specify and complement these suggested standards (see Figure 22).

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Fig22}
\caption{Qualitative characteristics following the International Accounting Standards Board (IASB) Framework\textsuperscript{2263}}
\end{figure}

The overriding principle is that information should be useful.\textsuperscript{2264} Moreover, shareholders expect corporate information to be a fair representation of the company’s financial position and performance. Information that is difficult to understand, murky or incomplete can result in ill-based economic decisions and worse, can give rise to accusations of intentional deceit. More than delivering useful and accurate information, an effective and efficient

\textsuperscript{2262} CO 662a II. The list of principles of proper financial accounting in CO 662 II is not comprehensive, see MÜLLER/LIPP/PLÜSS, p. 176. On the principles in detail, see MÜLLER/LIPP/PLÜSS, p. 175 \textit{et seq}. Also see Swiss GAAP FER 3.


\textsuperscript{2264} \textit{Cf.} IASB Framework, paragraph 24.
investor information system presents information in a reader friendly format (i.e., no data mines or graveyards) so that the PEMI can clearly discern the state of the company and do not have to invest inordinate time and resources in analyzing and decoding the information. In addition to being readily understandable, information must be relevant, that is, it should contain key, updated data and numbers that will help the PEMI’s decision making by facilitating the evaluation of the firm’s past, present, and future performance. Relevance, in turn, is affected by materiality, the critical nature of information. Purely increasing the amount of information disclosed does not necessarily lead to enhanced transparency if the information is not material. Disclosure of too much or meaningless information, for instance, in standardized text that provides no new or material information, is counterproductive as it distracts attention from the firm’s truly important core information. In contrast, the omission or misstatement of material information can also negatively influence the user’s decision making. Hence, the requirement of materiality functions as a threshold or cut-off point for information to be useful. Reliability is fostered by information that is accurate, precise, objective, complete, and a faithful and prudent representation of the facts and the firm. Consistency in structure and preparation, for example, by presenting like-for-like analyses and by standardization of the form and content of the information disclosed enables comparisons of the company’s financial performance. The principle of reliability is, to a certain extent, constrained by the requirement of timeliness. Timely information allows the PEMI to obtain knowledge of unexpected business developments at the earliest stage and to take advantage of opportunities or react to adverse situations. Oftentimes, timeliness involves a trade-off of qualitative characteristics. Moreover, the qualitative requirements are constrained by procurement costs. If information is prepared in accordance with the standards of quality and the PEMI perceives it as useful, this translates into a higher level of certainty and a lower level of perceived risk, and provides

2267 Cf. IASB Framework, paragraph 29.
2269 Cf. IASB Framework, paragraph 29.
2270 Cf. IASB Framework, paragraph 30.
2271 Cf. IASB Framework, paragraph 33-38.
2272 However, standardization for the sake of complying with disclosure rules rather than to fulfil the user’s information needs reduces the usefulness of information. See MÄNTYSAARI, The Law of Corporate Finance, p. 366 et seq.
2273 Cf. IASB Framework, paragraph 39; see VON SALIS-LÜTOLF, Finanzierungsverträge, § 11, N 1332.
2274 Cf. IASB Framework, paragraph 45.
a better basis for the PEMI to make informed decisions, which also benefits the company. In terms of implementing such standards in the corporate documents, it is worthwhile to state singular principles explicitly and agree on the application of particular accounting standards.

3 Mitigating Reservations against Disclosure

The extent to which PEMIs can negotiate for extended information rights in the run-up to the investment is subject to bargaining power effects. As the demands of active, significantly invested minority investors for enhanced access to information is generally objectively justified (the contractual information rights are generally material to PEMIs) and because controlling shareholders also attain certain benefits from the PEMI’s access to comprehensive information (e.g., shared monitoring), granting the PEMI enhanced access to information is commonly accepted and is probably one of the easier items for PEMIs to negotiate before investing. When the PEMI’s information rights are disputed, the first logical step for the PEMI is to analyze the grounds for the controlling shareholder (or corporate organs) to refuse to grant such rights. PEMIs should be suspicious if the reservations are not objectively substantiated as the opposition could be to conceal certain actions of the controlling shareholders (or those of the corporate organs effectively nominated by them) that promote their own interests, at the expense of PEMIs. There are, however, some circumstances in which the reservations are clearly justified. In such cases, the parties need to find a suitable balance of interests. Potential objections can relate to the company’s interests in confidentiality, attempts to maintain a culture of discretion, the costs of preparing and providing the information, and the

2276 I.e., the investment is conditional to an agreement on these points. See FRICK, § 12, N 1367; GAUCH/SCHLUEP, N 342 (“Ohne Einigung über die subjektiv wesentlichen Punkte kommt der Vertrag deshalb nicht zustande, weil damit eine erkennbare Voraussetzung für den Verpflichtungswillen mindestens einer Partei aussteht.”).
2277 See HORBER, Informationsrecht, p. 42, N 117 (“Generell darf festgestellt werden, dass die vom Gesetzgeber vorgezeichnete zurückhaltende Informationspolitik im Wirtschaftsalltag nur mehr selten praktiziert wird.”).
2278 This notion is reinforced when comparing the respective term sheets and shareholders’ agreement of the deals examined as part of the document analysis (see Section I.E). Here, the private equity investor’s enhanced information rights are in many cases not defined in the term sheets or defined only rudimentarily or in vague terms. Yet, shareholders’ agreements contain extensive and detailed provisions on shareholders’ information rights. This observation can mean that the investor’s information rights are generally not subject to intensive discussions during the negotiation process leading up to the investment and therefore are only rudimentarily outlined in the term sheets. Only later when concluding the partnership are they formally regulated in detail in shareholders’ agreements.
potential for abuse. These four reasons are examined in the following section.

3.1 Safeguarding Corporate Interests

Naturally, not every piece of information in the firm’s possession is confidential. However, regarding sensitive information, the confidential treatment of such must be ensured in the company’s interest.\(^\text{2279}\) By law, shareholders are under no obligation to maintain confidentiality about any of the corporate information they attain.\(^\text{2280}\) They are free to use information disclosed and, in principle, can do so even to the company’s detriment, thereby potentially weakening its competitive positioning\(^\text{2281}\) or undermining its private property rights. In contrast, in a GmbH, members are subject to a duty of loyalty, and expressly obliged to safeguard business secrets.\(^\text{2282}\) In both the stock corporation and the GmbH, corporate organs have a duty to ensure that all proprietary information is kept confidential if the disclosure thereof could prejudice the company’s legitimate interest and/or would likely harm the company.\(^\text{2283}\)

The statutory right to information of PEMI board representatives is limited to information that has a functional relationship with their duties as directors.\(^\text{2284}\) Due to the board members’ extensive statutory right to information, the company’s interests justify non-disclosure only in exceptional cases, namely if severe conflicts of interest exist (e.g., if the board member has business dealings with a competing business).\(^\text{2285}\) For the sake of clarity, the legal documents in which the PEMI’s access to information is laid out should make clear that the company’s legitimate and overriding interests in non-disclosure take precedence, so that if the company’s disclosure of certain facts could prejudice the legitimate corporate interests, such facts must remain confidential.

3.2 Maintaining a Culture of Discretion

The controlling shareholder’s and corporate organs’ opposition to disclose corporate matters may not only stem from the concern that the information, if disclosed, could be subsequently used to the company’s detriment, but

\(^{2279}\) See von Salis-Lütolf, *Finanzierungsverträge*, § 11, N 1341.
\(^{2280}\) See Section IV.D.4.1.
\(^{2281}\) See Bauen/Bernet, p. 101, N 305.
\(^{2282}\) CO 803 I.
\(^{2283}\) See FN 1666.
\(^{2284}\) See FN 2124.
\(^{2285}\) See Section V.B.2.2.5.
also stem from a sincere interest in maintaining a culture of discretion. To strike a balance between the PEMI’s need for information and the company’s interest in safeguarding confidential matters and in maintaining a culture of discretion, the PEMI regularly signs a confidentiality agreement.\footnote{See HORBER, Informationsrecht, p. 271, N 851, FN 1398; FRICK, § 12, N 1366 (“sollte er vertrauliche Informationen nur dann erhalten, wenn er vorab eine Vertraulichkeitserklärung abgibt, die ihn verpflichtet, die Information nicht für andere Zwecke als zur Überwachung seiner Investition zu verwenden”); WALTHER, p. 93 (“Da nach Aktienrecht keine Geheimhaltungspflicht für den Auskunft verlangenden Aktionär besteht, könnte sich doch dieser … zur freiwilligen Geheimhaltung gegenüber der AG verpflichten”).} From the PEMI’s perspective, entering into such an agreement is largely unproblematic since it is also in the PEMI’s best interest that corporate information does not fall into the wrong hands. Confidentiality agreements typically define the owner of the relevant information (typically the company) and the recipient\footnote{E.g., the shareholder, its officers, employees, agents, external legal advisers, accountants, consultants, and financial advisers.} (who is subject to confidentiality), state the purpose of making the information available to the recipient,\footnote{E.g., information required to be disclosed for exercising shareholder rights, for the purpose of assessing the shareholder’s investment in the company, or for a purpose reasonably incidental to the shareholders’ agreement.} describe the information to be protected,\footnote{E.g., information that relates to the company, any member of the company’s group or any of their customers, businesses, assets, accounts, finance or contractual arrangements, or other dealings, transactions or affairs that is not in the public domain, was not independently developed by the recipient, and is confidential in its nature or which in its disclosure to the recipient has been designated as confidential. Such information may not only include written information, but also information transferred or obtained orally, visually, electronically, or by any other means.} and contain a general prohibition to use such information for other than the agreed-upon purposes, and to employ all reasonable effort to keep it secret. As exceptions to the general rule, the agreement usually defines an exclusive set of situations and circumstances in which disclosure is allowed, for example, by allowing the recipient to pass information to specific people\footnote{E.g., disclosure of information may be admissible to a party’s or its group companies’ officers, directors, employees, partners, affiliates, agents, and professional advisors; to the PEMI’s limited partners; to any persons on behalf of whom it holds, or is entitled to exercise voting rights; to lenders or prospective lenders; or to any other shareholder in the company.} or to use it for specific purposes\footnote{E.g., disclosure that may be required by law, any competent judicial or regulatory authority or by any recognized stock exchange; disclosure that may be required for tax or accounting purposes; disclosure that may be required for reporting obligations by the PEMI to its direct or indirect investors; the use of the company’s name and logo in marketing or similar materials that may be used by the PEMI for the purposes of raising affiliated investment funds; disclosure of information to any third party in contemplation of a permitted exit (e.g., information which a reasonably prudent purchaser of shares might reasonably require to be disclosed).} . Such a permitted disclosure may be granted subject to certain conditions, for instance, if the secondary
recipients have also entered into appropriate legally binding confidentiality agreements with the firm or the party disclosing information.\textsuperscript{2292} In addition, confidentiality agreements address further aspects, such as the duration of the contract, and the consequences of non-compliance (e.g., a contractual penalty).

### 3.3 Considering the Cost-Benefit Ratio

#### 3.3.1 Cost of Information

Disclosure is not priceless,\textsuperscript{2293} but entails costs in the form of time, energy, and money, so-called information procurement costs.\textsuperscript{2294} Oftentimes, the lion’s share of the costs for searching for, gathering of, producing, copying, and transferring information are not borne by those who receive such information, but by the company. Thus, it is not surprising that the company will oppose certain requests for cost reasons. In granting enhanced access to information, the PEMI’s benefits of the requested information must be proportionate to the company’s procurement costs. A compromise could be that the PEMI agrees to bear the costs for information that is particularly prepared and of no use to any other shareholder or the company, for example, information needed for the PEMI’s tax return or other administrative purposes.

The costs of information also comprise the costs directly borne by the PEMI associated with procuring, processing, verifying, evaluating, and deliberating the information received. The PEMI’s human resources and capabilities for information processing are constrained. Disclosure of too much or meaningless information is not only useless, but counter-productive if it leads to information overkill which could cause the PEMI to overlook critical data. To increase its usefulness, information must be selected, processed, and – from the PEMI’s perspective – presented in a format that is compatible with the PEMI’s internal reporting system.

\textsuperscript{2292} In addition, it may be agreed that the disclosure of information will be examined in good faith by the parties, and will be mutually agreed upon; or that the board of directors must give prior written consent to such disclosure or at least be kept informed of such disclosure.

\textsuperscript{2293} In detail on the costs of information, see STIGLER, Economics of Information; MÄNTYSAARI, The Law of Corporate Finance, p. 336; MAROLDA MARTÍNEZ, p. 14; MEIER-SCHATZ, Unternehmenspublizität, p. 100 et seqq. ("Gleichzeitig ist Information selber ein wirtschaftliches Gut, dessen Erzeugung und Verwendung mit Kosten … verbunden ist.").

\textsuperscript{2294} See EISENBERG, p. 1781; GABRIELLI, p. 27; DRUEY, Outsider, p. 77 ("Information bedeutet \textit{Aufwand}, bedeutet … Kosten, des Sammelns, des Auswähens, des Übermitteln und des Verarbeitens.").
3.3.2 Optimal Information

Complete information is neither reasonable nor necessary.\footnote{See DRUEY, *Informationsversorgung*, p. 21 ("Ganz allgemein ist in Sachen Information das Maximum nicht gleich dem Optimum."); BÜHLER, *Regulierung*, § 11, N 1348 ("[Keinen] aufgeblähten Kontrollapparat, sondern ein paar wenige, dafür umso effizientere Kontrollinstrumente").} In line with the concept of optimal information, the PEMI’s search for information is reasonable if its marginal benefits of additional insights from the information outweigh the firm’s marginal costs.\footnote{See STIGLER, p. 216 ("the optimum amount of search will be such that the marginal cost of search equals the expected increase in receipts.").} Some degree of ignorance in terms of company information is therefore rational. The adequate extent of disclosure is a function of circumstances, (e.g., the company’s stage of development and commercial success) and the reasons for the request, and must be determined on a case-by-case basis employing a cost-benefit analysis.\footnote{See MÄNTYSAAARI, *The Law of Corporate Finance*, p. 368.} If the company is going through a fundamental structural transformation or a critical phase of expansion, or is experiencing a considerable deterioration in its business or financial status, the PEMI’s need for information is likely to be more pronounced.\footnote{See HORBER, *Informationsrecht*, p. 285, N 897 ("dass bei außerordentlichen Verhältnissen die Aktionäre – verglichen mit den normalen Verhältnissen – tendenziell einen erweiterten Informationsanspruch haben"); see also SCHLUEP, *Rechte*, p. 185.} While extensive disclosure is necessary in extraordinary times, it may be considered unreasonable under normal circumstances. Of course, it is impossible to define the adequate extent of disclosure for every conceivable situation in advance. Nevertheless, the parties (the PEMI together with the controlling shareholder and company organs) may choose to define a number of situations in which they need certain additional information in any event.\footnote{Swiss lawmakers, for example, take the corporate situation into account by requiring the board of directors to convene a general meeting in case that half of the share capital and the statutory reserves are no longer covered (CO 725 I). At the extraordinary general meeting, the shareholders must be informed about the extent to which the financial situation of the company has deteriorated. See HORBER, *Informationsrecht*, p. 286, N 899 (pointing out that in case of other extraordinary events, such as a reduction in the share capital, an amendment of the corporate purpose, a corporate restructuring, etc. the interests of the company may not easily justify non-disclosure vis-à-vis the shareholders. However, he also acknowledges in FN 1484: “Allerdings darf der Begriff der außerordentlichen Verhältnisse nicht zu weit gespannt werden. Schlechte Geschäftsergebnisse haben als solche bspw. noch keinen außerordentlichen Charakter.”).} For example, in case of a sustained deterioration in the business or financial situation, expressed in terms of critical KPIs or financial ratios, the scope of information to be provided is automatically extended vis-à-vis the extent of disclosure under normal circumstances.
3.4 Preventing Abuse

Finally, the controlling shareholder’s reservation about the Pemi’s request for extended access to information could stem from the fear that the Pemi could misuse such rights as a means to attain extraneous goals. For example, the controlling shareholder could fear that the Pemi may besiege the firm’s management with pressing requests for much information and thereby, whether by intent or not, unnecessarily harass or overburden corporate management. Moreover, the fear could be that the investor may use information rights to pressure the company to fulfill certain other claims, thereby paralyzing the company. Underlying these reservations could also be concerns that the Pemi could misuse the confidential information, for instance, by transferring it to competitors, suppliers, or customers within the Pemi’s portfolio. If these or similar arguments are brought up during the negotiations leading to a minority investment, it signals distrust for the potential business partner, which is addressed most efficiently by informal means other than by legal tools. In any case, full regulation of all possible information needs is not possible and PEMIs need to trust that their business partners will comply with the agreements made. Ultimately, the extent of information finally agreed to is the result of a delicate balancing of well-founded confidence and legal measures to protect against potential misuse, for example, via confidentiality agreements, non-compete clauses, and/or contingent information rights.

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2300 See LAMBERT/SCHLEIFFER, p. 98.
2301 On the lack of complete contracts, see Section II.A.4.2.2.
VI Exit

Although this dissertation focuses on voice and voice-related aspects in structuring private equity minority investments, voice and exit rights are both fundamental in protecting the PEMI’s interests. This section provides an overview of exit rights and analyzes the relationship between voice and exit.

A Overview of Exit Rights

Private equity investments are held for a limited time (usually three to seven years) at the end of which the investor will exit. The reason for this limited investment horizon is that private equity funds generate returns primarily from a successful sale of the investment after having realized a value increase strategy agreed upon by the majority shareholder and the PEMI at the outset of the investment. When negotiating the investment terms, PEMIs generally have exit strategies planned, and bargain for respective exit rights. Exit rights are legal rights that allow private equity investors to control their exit strategy and, hence, are vital to realizing the PEMI’s upside potential. In addition, exit rights are an important downside protection in that they allow the PEMI to abandon an unsatisfactory investment by selling part or all of its shares and thereby prevent being locked into an unsatisfactory investment. Structuring conditions, mechanisms, and consequences of exit rights is therefore an important cornerstone of the PEMI’s deal negotiation strategy. The following provides an overview of exit rights and related arrangements. When structuring exit arrangements, a fundamental difference is made among share transfer restrictions, exit mechanisms and options, and dissolution rights.

1 Share Transfer Restrictions

In the absence of valid restrictions on the transferability of shares in the articles of association, PEMIs investing in Swiss stock corporations are free to sell their fully paid-up shares; and neither the company nor fellow shareholders may refuse to accept a purchaser as a shareholder. In

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2302 See FN 53.
2303 See RÖTHELI/GROTZER, p. 41. For exit strategies, see Section II.A.1.1.
2304 Cf. HESS, p. 80.
2305 See PEARCE/BARNES, p. 45.
closely held companies, however, both PEMIs and controlling shareholders usually do not want shares to be freely transferable, but seek to control the shareholder circle, that is, prevent unwanted third parties from acquiring shares or existing shareholders from drastically expanding their stake.\footnote{See FRICK, § 11, N 1073; VON SALIS-LÜTOLF, Finanzierungsverträge, § 9, N 1060.} Controlling owner families most often want to secure a stable shareholder base. PEMI’s, as well, have an interest in assuring stability over their targeted investment horizon as the controlling shareholder’s sudden divestment can seriously destabilize companies and negatively impact the PEMI’s investment value. Moreover, PEMIs naturally want to ensure that the controlling shareholder’s shares are only transferred to individuals who are or become parties to the shareholders’ agreement or they risk losing the rights granted therein as the purchasers are not automatically bound by the sellers’ contractual agreements in relation to the shares being sold.\footnote{See O’NEAL/THOMPSON, § 7.2; FRICK, § 11, N 1293.} The legal tool to serve these purposes are share transfer restrictions. In the context of private equity investments, share transfer restrictions also function as a reassurance of the PEMI’s commitment to the controlling shareholder that it will remain invested for a defined investment horizon (e.g., at least three years). Moreover, they signal the PEMI’s belief in the valuation of the firm and further enhancement potential.\footnote{See FRICK, § 11, N 1079; TREZZINI, p. 218.}

Share transfer restrictions fit into four categories: (i) an \textit{absolute prohibition} of any transfer for a pre-determined period of time\footnote{Absolute share transfer restrictions should be limited (e.g., in terms of time) failing which they risk being struck down by a Swiss court as excessive commitments infringing on a shareholder’s personal rights (CC 27 II). See VON SALIS-LÜTOLF, Finanzierungsverträge, § 9, N 935, 969, in detail also HINTZ-BÜHLER, p. 121 \textit{et seq}.} (lock-up period) (typically the first few years of an investment and in the aftermath of an IPO\footnote{The underlying rationale is to prevent a substantial tank of the share prices as a result of a flood of secondary shares coming to market, see PEARCE/BARNES, p. 204 \textit{et seq}.}), (ii) a \textit{limitation of any transfer subject to objective standards} (e.g., sale only to purchasers with financial strengths) or only to \textit{objectively defined classes of persons} (e.g., prohibition of sale to competitors), (iii) \textit{consent restraints} prohibiting any disposition of shares unless approved by the company or all or the majority of the other shareholders, and (iv) rights of the company or other shareholders to purchase the shares of a willing seller, such as rights of first offer and rights of first refusal.\footnote{See COX/HAZEN, § 14.08.} In case of a \textit{right of first offer}, the obliged shareholder wishing to sell his/her stake in the company must first give the entitled parties (not necessarily shareholders, but also third parties\footnote{See FRICK, § 11, N 1117.}) an opportunity to purchase his/her...
shares according to terms specified in the agreement. If the parties cannot reach agreement, the seller is typically allowed to negotiate with or sell to a third party. In case of a right of first refusal, the party who receives an offer by a third party to buy his/her shares at a certain price is obliged to first offer the non-transferring shareholders the opportunity to purchase the shares at the same price and on the same terms and conditions. Only if the non-transferring shareholders decline is the obliged shareholder allowed selling to an outsider. In the right of first offer, the entitled shareholder must make the purchase offer, which could be misused by the willing seller to obtain a more favorable third-party offer. On the other hand, a drawback of the right of first refusal is that it requires the willing seller to obtain a third-party offer, the preparation of which takes time and energy and hence, may discourage third-party purchasers from making an initial bid for shares subject to preemptive rights.

Share transfer restrictions may be implemented both at the corporate and the contractual levels (i.e., they may be stipulated in both the articles of association and/or shareholders’ agreements). In case of registered shares of companies not listed on a stock exchange, Swiss corporate law allows the stipulation of restrictions on the transferability of shares in the articles of association that require the company’s consent. The consent may be refused for valid reasons expressly listed in the articles of association. Valid reasons include provisions regarding the composition of the shareholder circle, which justify the refusal in view of the corporate purpose or economic independence. Alternatively, the company may offer, without stating its reasons, the willing seller to take over the shares for its account, the account of other shareholders, or the account of third parties at the real value at the time of the request (escape clause). Beyond these restrictions, the prerequisites for the transferability of shares must not be made more difficult via the articles of association. For example, it would be unlawful to make the company’s consent to transfer shares subject to a requirement that the third party purchaser joins an existing shareholders’ agreement. Legal scholars debate whether rights of first offer and of first refusal can be incorporated in the articles of

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2314 See TREZZINI, p. 226 et seq.
2315 Cf. VON SALIS-LÜTOLF, Finanzierungsverträge, § 9, N 1053.
2316 For statutory rules on the transferability of shares, see CO 685 et seqq. See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 44, N 261 et seqq.
2317 CO 685b II.
2318 CO 685b I. See BÖCKLI, Aktienrecht, § 6, N 195.
2319 CO 685b VII.
association. This would effectively introduce, via the articles of association, a shareholder’s duty to offer shares which would infringe on the principle that shareholders must not be required to contribute more than the subscription amount via the articles of association. The incorporation in the articles of association must certainly be rejected if shares are taken over at a price below the real value. In light of the ongoing legal debate, such provisions could be struck down by a Swiss court and, hence, cannot not be relied upon, but should be agreed upon via contractual arrangements.

The GmbH laws provide more leeway in structuring transfer restrictions at the corporate level. By law, the transfer of company shares requires the meeting of members’ approval, which may be denied without reason with a qualified majority vote. The articles of association may deviate from this rule by excluding transfers entirely, on the one hand, or by waiving the approval requirement, on the other hand. Moreover, GmbH laws explicitly allow the company to stipulate in the articles of association rights of first offer, of first refusal, and rights to purchase company shares for the benefit of members or the company.

Share transfer restrictions additional to or different from those allowed in the articles of association are implemented via contractual agreements. However, while provisions in the articles of association prevent shares from being transferred if the company denies approval, contractual transfer restrictions are effective only inter partes, that is, among the parties to the agreement. Shareholders who transfer shares in breach of the contractually agreed-upon transfer restrictions are liable for damages to the

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2321 For an overview of legal expert opinion, see the following footnote and BÖCKLI, Aktienrecht, § 6, N 296b, 297, FN 650, 561.
2322 CO 680 I. See FN 477.
2323 CO 680 I. See BÖCKLI, Aktienrecht, § 6, N 200a, 296 (strictly rejecting any stipulation in the articles of association); LANG, p. 123. Finding a statutory implementation lawful within narrow bounds, are OERTLE/DU PASQUIER, Basler Kommentar, CO 685b, N 20; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 44, N 266; HINTZ-BÜHLER, p. 131 et seq.; MEIER-SCHATZ, Vorkaufsrechte, 266 et seq.
2324 CO 786 I, 808 b I Sec. 4.
2325 CO 786 II. Alternative options are to establish the reasons which justify a denial of approval of transfer; to provide that the approval may be denied if the company offers the willing seller to take over the company shares at the real value; and to provide that the approval may be denied if the fulfillment of an obligation to make supplementary financial contributions or to provide ancillary performances according to the articles of association is doubtful and a security claimed by the company is not furnished.
2326 CO 776a I Sec. 2.
2327 See BÖCKLI, Aktienrecht, § 6, N 220.
2328 See ibid, § 6, N 211; TREZZINI, p. 233.
2329 See FRICK, § 11, 1087.
entitled parties and, if the shareholders’ agreement so provides, they must pay a contractual penalty. Yet, the transfer of shares remains valid.

2 Exit Routes and Related Rights

Given PEMIs’ need for investment liquidity and in light of their most common exit avenues (see Section II.A.1.1), the primary exit rights commonly agreed upon relate to a sale to fellow shareholders, the company, a third party, or to the general public.

2.1 Sale to Fellow Shareholders or the Company

A PEMI’s exit may be carried out via a transfer of shares to fellow shareholders or, subject to certain limitations, to the portfolio company. Generally, Swiss corporate law does not confer shareholders wishing to sell their shares any right to compel other shareholders or the company to purchase their shares. However, such a sale of shares can be based on a contractual agreement, for example, by the PEMI exercising a put option against other shareholders or the company, or by fellow shareholders or the company exercising a call option on the PEMI’s shares. Put options entitle a shareholder to sell shares to the obliged party, in part or in whole, at a pre-defined strike price. Conversely, call options allow the obligee to purchase the shares held by the obliged shareholder, in part or in whole, at a pre-defined strike price. The company’s purchase of its own stock (buy-back) is subject to statutory limitations because shareholders generally do not have a right to claim the return of their contribution. The company may acquire its own shares only if (i) freely disposable equity in the amount necessary for this purpose is available, (ii) the total nominal value of own shares does not exceed 10% of the share capital, and (iii) the principle of equal treatment of shareholders is observed. Differential treatment demon-

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2330 CO 97 I.
2331 See FRICK, § 11, 1087 (lock-up provisions), N 1115 (regarding the right of first offer), N 1134 (regarding the right of first refusal).
2332 See FRICK, § 11, N 1143.
2333 CO 690 II.
2334 By exception 20%, see CO 659 II. In addition, there is the option to buy-back shares as part of a capital reduction pursuant to CO 732 et seqq.
2335 See Section IV.E.4.1.3. Specifically, in the context of put options, three conditions apply: (i) conferring of put options to certain classes of shares is only admissible if objectively justified, (ii) all willing shareholders in the same circumstances must be able to sell at the same terms, (iii) the purchase must be at arm’s length, (i.e., the strike price must be oriented to the real value of the shares), but objectively justified deviations in individual cases are allowed. See BÖCKLI, Aktienrecht, § 4, N 248 et seqq.; LENTZ/VON PLANTA, Basler Kommentar, CO 659, N 7a; FRICK § 11, N1292.
strated by granting a put option to a Pemi only, is justifiable in the company’s interests only if the Pemi does not invest without receiving such rights and if the company has no access to other reasonable sources of capital, or if the company relies on the Pemi’s value-added services to successfully master a certain development or expansion stage. To be on the safe side, consent of all shareholders should be attained when granting the Pemi a put option.

Put and call options vis-à-vis shareholders can only be agreed via contract and not be incorporated in the articles of association as shareholders cannot be made subject to any duty stated in the articles of association other than to pay the subscription amount of their shares. Whether a put option against the company can be stated in the articles of association is debated by legal scholars. Thus, respective provisions should not be relied upon to hold under a court ruling and should be secured by contractual agreements among shareholders and/or with the company; these provisions are only effective inter partes.

In a GmbH, put and call options of members and the company can be delineated in the articles of association and agreed upon via contract. Put options vis-à-vis the GmbH are subject to the limitations of companies purchasing their own stock. Call options by the GmbH represent members’ duties to provide ancillary performances and are hence subject to respective limitations (i.e., they must serve the corporate purpose, aim to ensure the company’s independence, or maintain the composition of the members’ inner circle).

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2336 CO 659. See Frick § 11, N 1286; Von Salis-Lütolf, Finanzierungsverträge, § 9, N 1139.
2337 See Section IIA.3.2.2.
2338 Of the same opinion is Frick, § 11, N1214.
2339 See Von Salis-Lütolf, Risiko- und Gewinnverteilung, p. 221.
2340 CO 680 I.
2341 See, inter alia, against stipulation in the articles of association, Kurier, Basler Kommentar, CO 680, N 16. Cf. Forstmoser/Meiер-Hayoz/Nobel, § 41, N 36, FN 13, § 44, N 70 (against statutory put options granted to employees, but in favor of statutory withdrawal rights); Trezzini, p. 290. In favor, Von Salis-Lütolf, Finanzierungsverträge, § 9, N 1144 (provided the limitations of companies to acquire their own stock are expressly stated); Groner, p. 281.
2342 See Böckli, Aktienrecht, § 12, N 579; Frick, § 11, N 1281 et seqq.; Groner, p. 281; Von Salis-Lütolf, Finanzierungsverträge, § 9, N 1143. In contrast, against contractual put option against the firm, Kurier, Basler Kommentar, CO 680, N 16.
2343 See Forstmoser/Meiер-Hayoz/Nobel, § 39, N 191.
2344 CO 776a I Sec. 2.
2345 CO 783.
2346 CO 796 II.
The parties must define all material items necessary for concluding a purchase agreement based on the obligee’s unilateral declaration of intent. The material items comprise the entitled and the obliged party (e.g., the company, the other shareholders), the object of the purchase, and the strike price (e.g., the fair value of the shares, book value, a mutually agreed-upon price, a reference price, capitalized earnings, appraisal, or cost plus some guaranteed rate of return\(^{2347}\)).\(^{2348}\) Moreover, triggering events (e.g., a shareholder’s death, disability, termination of employment with the corporation, the company’s failure to meet certain financial targets, a missed alternative liquidity event, loss of key personnel), and other potentially existing conditions may be stipulated (e.g., five years must have lapsed since the initial investment).\(^{2349}\) As put options are a measure of financial downside protection of one party and result in a transfer of risk of loss associated with shares to the obliged party, the stipulation of limitations is advisable to avoid the risk of a Swiss court declaring such rights void because they are qualified as excessive commitments infringing on the obligor’s personal rights.\(^{2350}\)

### 2.2 Sale to a Third Party

PEMIs may also exit an investment via the sale of shares to a third party (e.g., a strategic buyer or another financial investor). As selling a controlling stake is typically easier than selling a minority, PEMIs may want to negotiate that (i) they do not miss any exit opportunity presented to the majority and (ii) that they are in a position to initiate the sale of a control position allowing them to exit at a price reflecting the control premium\(^{2351}\). In fulfilling these objectives, PEMIs can use tag-along and drag-along rights.

*Tag-along rights*\(^{2352}\) allow the entitled shareholder to join in any sale opportunity presented to a fellow shareholder and to require the third party to buy its shares along with those of the willing seller (typically pro-rata), at the same price and on the same terms and conditions. Conversely, *drag-along rights*\(^{2353}\) allow the entitled party to force the obliged shareholder to

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\(^{2347}\) On these methods in detail, see O’NEAL/THOMPSON, § 7.29 et seqq.

\(^{2348}\) See, for further references, FRICK, § 11, N 1138.

\(^{2349}\) See O’NEAL/THOMPSON, § 7.17.

\(^{2350}\) CC 27 II. See MÖSCHLI/MOSER, p. 58 et seqq.; FRICK, § 11, N 1280; VON SALIS-LÜTOLF, Finanzierungsverträge, § 9, N 1138.

\(^{2351}\) See FN 264.

\(^{2352}\) Also called *piggy-back, come-along rights, or co-sale agreements*. In German, Mitverkaufsrecht.

\(^{2353}\) Also called *bring-along, or take-along rights*. In German, Mitverkaufspflicht or Mitnahmerecht.
join in a sale of shares to a third party and allow the third party to buy both its shares and those of the obliged shareholder (typically pro rata), at the same price and on the same terms and conditions. Tag-along and drag-along rights are agreed upon by contract (in a GmbH, these rights can also be stated in the articles of association) as part of shareholders’ agreements and are hence effective only inter partes. Transfers of shares to a third party in breach of the contractual arrangements remain valid. Yet, if the shareholders’ agreement so provides, the infringing shareholder may have to pay a contractual penalty.

2.3 Public Sale of Shares

Registration rights allow the entitled shareholders of a stock corporation to unilaterally demand an IPO. Such rights are typically granted only after a certain period from the initial investment and/or subject to certain conditions (e.g., once the company reaches an agreed-upon level of profit). Registration rights are agreed upon via contract. To effectively structure registration rights, it is important to determine which corporate organ is legally authorized to decide upon a public listing of shares. The Swiss Code of Obligations does not expressly mention such authorization. In line with the statutory presumption of the board of directors’ default authority that authorizes it to decide on all matters not expressly assigned by law or the articles of association to the general meeting, the board of directors decides whether to take a company public, in the absence of any articles of association stipulating the contrary. If the articles of association provide that only the general meeting decides on whether to take the company public, the shareholders can agree upon a registration right via a contractual voting agreement (see Section IV.D.3.3.5) whereby the obliged shareholders undertake to vote for an IPO at the general meeting if the entitled shareholder so requests. A respective agreement between the PEMI and

2354 See FRICK, §11, N 1252.
2355 See ibid, §11, N 1232, 1252.
2356 See FN 1137.
2357 Also called IPO demand rights or initial public offering clauses. In German, Kotierungsrecht.
2358 See TREZZINI, p. 295.
2359 See FRICK, § 11, N 1193; GRONER, p. 354 et seq.
2360 See FN 1468.
2361 CO 716 I. See GRONER, p. 355; TREZZINI, p. 295. Cf. BÖCKLI, Aktienrecht, § 7, N 21 (finding that the board of directors is authorized to decide on an IPO, although the general meeting’s resolution may be required in many cases in which the articles of association need to be amended).
2362 See FRICK, § 11, N 1196
the company would be void as a company cannot enter into contractual agreements on the exercise of its stockholders’ participation rights and thereby influence decision making at the general meeting.\textsuperscript{2363} If the board of directors decides on whether to take the company public, the board members may enter into a contractual agreement with respect to a potential IPO provided the limitations of shareholder control agreements are safeguarded, particularly the limitations flowing from the duties of loyalty, care, and equal treatment.\textsuperscript{2364}

An IPO can be a suitable solution for all parties as it allows the Pemi to exit the investment realizing an appropriate return and it offers the owner family the opportunity to retain control of the company. Yet, undertaking an IPO requires much effort, money, human resources, and time. Hence, family shareholders not wishing to sell may oppose granting PEMIs registration rights. Even if the Pemi has a registration right, it may be difficult to motivate company leadership to commit the considerable effort necessary for such an endeavor, particularly if the controlling shareholder opposes the listing of shares. Furthermore, whether the IPO exit route is promising at the time when the Pemi wants to exit not only depends on the parties’ intentions, but even more so, on market conditions, investor sentiment, and the size of the issue. It follows that, from the Pemi’s point of view, registration rights should be complemented with other exit options.

\subsection{2.4 Dissolution Rights}

Although certainly not an exit option that PEMIs would likely favor, dissolution rights can provide the necessary ‘teeth’ to reinforce other exit rights since the Pemi’s demand for the company’s dissolution could motivate the controlling shareholder to agree to a more palatable exit route for the Pemi.

By law, minority shareholders representing at least 10% of the share capital of a stock corporation (in a GmbH any member\textsuperscript{2365}) can request the court to dissolve the company for valid reasons, which include a systematic abuse of majority power to the detriment of the company or valid minority shareholder interests, ruinous management, ongoing violation of minority shareholder rights, blocking the company from achieving its purpose, blocking corporate organs, and decisions that deprive the company of its

\textsuperscript{2363} See FN 1130. Also see FRICK, § 11, N 1194.

\textsuperscript{2364} See Section IV.E.3.3.6. In detail on these requirements in the context of contractual IPO demand rights, see FRICK, § 11, N 1195, also see GRONER, p. 355 et seq.

\textsuperscript{2365} CO 821 III.
Part Two: Legal Framework and Tools

In small family-run firms, even personal characteristics can be taken into consideration when a court decides whether the grounds for dissolution exist. Dissolution is, however, a solution of subordinate character: if the court finds that the grounds for dissolution are satisfied, it may instead decide on another appropriate solution that is acceptable to the involved parties. Such an alternative solution can be, for instance, to order the payment of dividends, to amend the articles of association to protect minority shareholders, to demand minority board representation, or a buyout of the petitioner’s shares.

As the company’s dissolution can also be decided by a general meeting resolution, which is subject to a qualified majority vote, PEMIs can obtain a dissolution right via a contractual voting agreement according to which the obliged shareholders vote their shares at the general meeting in favor of the company’s dissolution if the entitled shareholders so wishes and – if so agreed – provided certain triggering events (e.g., the company’s failure to meet financial targets, a missed alternative liquidity event), and other conditions (e.g., five years must have lapsed since the initial investment) materialize. Contractual dissolution rights are effective only inter partes. Votes cast at the general meeting in breach of a voting agreement are valid vis-à-vis the company and must be counted as cast. Yet, the obliged shareholders who cast their votes in breach of the agreement are liable for damages to the entitled parties and, if the shareholders’ agreement so provides, they must pay a contractual penalty.

3 Assessment and Combination of Exit Rights

Even if PEMIs already have a plan for possible exit strategies at the outset of the investment, the exit route finally taken is generally unpredictable ex

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2366 See the decision of the Swiss Federal Supreme Court of 5 March 2010, 4A.475/2009 (E. 2.2); BGE 126 III 266 (E. 1a).
2367 See the decision of the Swiss Federal Supreme Court of 5 March 2010, 4A.475/2009 (E. 2.2: “même s'il est vrai que l'on peut, dans les petites sociétés de familles, tenir compte également dans une certaine mesure des relations personnelles.”). See KUNZ, Zwischenhalt, p. 404; BEELER/VON DER CRONE, p. 330.
2368 CO 736 IV.
2369 See Böckli, Aktienrecht, § 16, N 204; STÄUBLI, Basler Kommentar, CO 737, N 27; KUNZ, Zwischenhalt, p. 406, FN 83 et seq.
2370 CO 786 II, 704 I Sec. 8. In a GmbH, CO 821 I Sec. 2, 808b I Sec. 11.
2371 See FRICK, §11, N 1310.
2372 See FN 1141.
2373 CO 97 I.
2374 See FN 1137.
Therefore, PEMIs should negotiate for various exit rights that cover all reasonably likely liquidity events.

A common model to structure the PEMI’s exit from a private equity minority investment in family-owned firms is to stipulate a protracted lock-up period during the initial years of the minority investment (e.g., two years) during which the parties undertake not to dispose of their shares without the approval of the other parties. Such contractual agreement is reflected at the corporate level via respective provisions in the articles of association that restrict the transferability of shares. At the end of the lock-up period, PEMIs can freely transfer/sell their shares. However, to prevent shares from falling into unwanted hands, controlling shareholders regularly negotiate for a right of first offer and/or right of first refusal. In addition or following another period (e.g., three years after the initial investment), the PEMI’s exit is facilitated via an IPO registration right. In view of a sale to a third party (e.g., a strategic buyer or another financial investor), PEMIs are typically granted a tag-along right by controlling shareholders, which allows PEMIs to join in any exit opportunity presented to the controlling shareholder. Considerably more bargaining power is required for PEMIs to negotiate a drag-along right, which allows the PEMI to sell a controlling stake even if itself in a minority position. If at all, a drag-along right is typically granted after another defined period (e.g., five years from the initial investment) and/or subject to specific events (e.g., a deadlock, continued failure to meet the business plan, non-occurrence of another liquidity event, or non-exercise of other parties’ prior call options). A drag-along right is sometimes combined with the right of first refusal where the parties agree that in case of an offer of a third party to purchase the entire company, the shareholder, not willing to accept such offer, has to buy the other shareholders’ shares on the same terms, or else he/she is obliged to participate in the sale and sell his/her shares (pro rata) at the same price and on the same terms and conditions.

If the owner family does not plan to sell the company and wants to prevent any other shareholder from doing so, and if it is financially expected to be capable at the time of the PEMI’s exit, it can grant the PEMI a put option at a pre-defined strike price (e.g., guarantee the PEMI a pre-defined return on its investment). As a put option for the PEMI’s benefit involves significant financial risk for the controlling shareholder (e.g., an overly optimistic strike price in light of the company’s later performance), the option is

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2375 Cf. FRICK, § 11, N 1218.
2376 Cf. BRÜCK, p. 148.
2377 See VON SALIS-LÜTOLF, Finanzierungsverträge, § 9, N 1131; TREZZINI, p. 293.
typically granted restrictively (e.g., during a certain time frame or subject to achievement of certain milestones to protect the controlling shareholder’s downside). Moreover, put options vis-à-vis the company are severely restrained due to the companies’ limitations to acquire their own shares. In case of the company’s underperformance, in which the PEMI may be inclined to exercise its put option, the company may not have sufficient freely disposable resources to be able to buy back shares or it may already have reached the lawful maximum of own shares. To mitigate the latter risk, tag-along rights of fellow shareholders should be excluded in case put options are placed against the company or else the 10% limit is quickly reached. In case of put options vis-à-vis controlling shareholders, PEMIs run the risk that the controlling shareholders lack the funds to purchase their shares when the PEMIs exercise the option. In this case, the PEMI will want to secure the ability to force the sale of the entire company in order to realize its investment (e.g., by obtaining a drag-along right if unable to exercise its put option).

Put and call options can also be combined to form mechanisms that are less risky for the controlling shareholder and enable the PEMI to either exit or retain control of the investment (and then later sell a control investment). For example, in a Texas shoot-out, each party has to notify the other of its intention to sell shares at a specific price. If one party offers, the other party must then accept the offer; otherwise it if declines it is obliged to sell all its shares to the offeror at the price indicated in the loser’s sealed bid. In a so-called Dutch auction, the parties submit sealed bids indicating the minimum price for which they would sell their shares. The person with the higher bid (the winner) then buys the shares of the party with the lower bid (the loser) at the price indicated in the loser’s sealed bid. Of course, there is no universal solution to structuring exit rights. The exit structure finally agreed upon depends on the company’s circumstances, shareholders’ interests, and each party’s bargaining power.

2378 See WEINER/LEE, p. 57.
2379 See FRICK, § 11, N1284.
2380 See O’NEAL/THOMPSON, § 7.19.
2381 Also called show-down clause, buy-or-put-option.
2382 See BRECHTBUHL/EMCH, p. 276; VON DER CRONE, Pattssituationen, p. 42 et seq.; VON SALIS-LÜTOLF, Finanzierungsverträge, § 9, N 1225.
2383 Also called blind bid or Mexican shoot-out.
2384 See BRECHTBÜHL/EMCH, p. 276.
4 Enforcement Problem

The structuring of the PEMI’s exit primarily relies on contractual rights incorporated in the shareholders’ agreement as the options to stipulate negotiated exit arrangements in the articles of association are limited. Given that contractual rights are effective only inter partes, a concern is the enforceability of contractual exit rights. The possibility of specific performance is commonly acknowledged.\(^{2385}\) However, as soon as the obliged shareholder has transferred the shares in breach of the shareholders’ agreement and ownership is transferred based on a valid business transaction, the legitimate interest of the infringed party in filing an action for a specific performance recedes.\(^{2386}\) In such case, the infringed shareholders may be entitled to damages\(^{2387}\) and possibly a contractual penalty, but it will likely take a long time to obtain a respective arbitral award or judicial decision. Moreover, damages flowing from the lost opportunity can be difficult to prove and the contractual penalty may not fully compensate the damaged party.\(^{2388}\) It is therefore important that PEMIs use effective non-judicial, self-executing devices for insuring compliance with contractual exit arrangements. In addition to stipulating a contractual penalty, possible measures include placing the shares of the parties to a shareholders’ agreement in joint property, pooling the shares in a holding company owned by the parties, transferring all committed shares to a third-person trustee, or deposing the committed shares to an escrow account.\(^{2389}\) Moreover, contractual exit rights can be combined with transfer restrictions in the articles of association to the extent lawful.\(^{2390}\)

B The Relationship between Voice and Exit

Voice and exit can be described as both alternative and complementary means of protection allowing the PEMI to protect its interests when facing a dissatisfying situation.

\(^{2385}\) See HINTZ-BÜHLER, p. 204; LANG, p. 94 et seq.; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 191. Cf. the decision of the Swiss Federal Supreme Court of 21 November 2003, 4C.214/2003. However, doubtful is whether specific performance of a PEMI’s registration right will be granted by a Swiss court, see RÖTHELI/GROTZER, p. 42; BOHRER, § 11, N 477.

\(^{2386}\) See FORSTMOSER/MEIER-HAYOZ/NOBEL, § 39, N 194; LANG, p. 96.

\(^{2387}\) CO 97.1.

\(^{2388}\) Cf. PEARCE/BARNES, p. 213.

\(^{2389}\) On these methods and potential drawbacks, see Section IV.D.3.3.5.10.

\(^{2390}\) See FRICK, § 11, N 1141.
1 Voice and Exit as Substitutes

From one perspective, voice and exit are substitute means of protection. Ex ante, in the negotiations leading up to an investment, controlling shareholders who recognize the PEMI’s need for protection may be willing to grant one, but not necessarily both types of protection rights. For example, having consented to generous exit rights the controlling shareholders may be reluctant to enhance the PEMI’s position by granting further voice-related rights, arguing that PEMI interests are sufficiently safeguarded via the exit rights. Also from the PEMI’s perspective, if valid exit opportunities exist (e.g., a put option allowing it to sell shares at a price guaranteeing a minimum return), voice-related rights are still desirable, but less pressing as a protection given that the primary target, realizing a financial return, is already safeguarded to a degree with exit rights. Conversely, with less exit options (de facto, based on market conditions; or de jure, based on few legal exit rights), the PEMI is likely to focus on obtaining stronger voice-related rights.2391 Also, voice and exit can appear as substitutes based on the parties’ motivations. Active private equity investors seeking hands-on involvement in the portfolio company,2392 and actively participating in corporate strategy and development, have a strong interest in attaining a strong voice. A private equity investor who, on the other hand, wishes a hands-off involvement – to have very limited input in corporate management – will likely be content with less voice, but will focus on exit paths to enable a cut and run exit if needed.

Ex post, once the investment is made, voice and exit are substitute options in response to dissatisfaction (e.g., due to a deterioration in the firm’s financial performance attributable to management mistakes or short-sightedness).2393 The PEMI can choose between exercising voice which may enable or force a change in management, or exit, selling the investment. Exit is a crude instrument allowing the user to either cut or stay (a black and white instrument). Although private equity investors typically plan to exit their investments after three to seven years in most cases,2394 an early exit triggered by insurmountable fallout with the controlling shareholder or an irreversible loss or mismanagement means that the initially envisioned value-creation strategies are suspended and that incurred losses are permanently realized. Therefore, if a PEMI exercises exit rights to leave an unsatisfactory investment, it is generally a measure of

2391 Cf. HIRSCHMAN, p. 34.
2392 On the approaches, see BADER, p. 31; STRIEBEL, p. 31; TREZZINI, p. 40 et seq.
2393 Cf. HIRSCHMAN, p. 15.
2394 See FN 53.
last resort because the PEMI foregoes the possibility of changing an unsatisfying situation via exercising voice. Hence, at a given point in time (and ignoring for a moment that the PEMI may still exit in the future) voice and exit present alternative strategies. In economic terms, the PEMI makes this decision by weighing the financial return immediately realized upon the exit and the return potential, which can motivate the PEMI to remain invested multiplied by the probability of such a favorable outcome materializing. The PEMI is assumed to choose the option associated with a higher return.

2 Voice and Exit as Complements

From a different angle, voice and exit are complementary means of protection. Ex ante, during the negotiations leading to a minority investment, voice and exit complement and support each other because both are non-financial means of protecting the PEMI’s downside ex post (i.e., they protect the PEMI against being locked into an unprofitable investment and being forced to submit to the controlling shareholder’s will with no chance of exit). The more voice and exit rights the PEMI negotiates for ex ante, the better is its protection ex post.

Ex post, once an investment is made, voice and exit are complementary in that exit rights may give voice the necessary teeth. If a PEMI has effective exit rights, the threat of exit – whether explicitly articulated or not, but well understood by the business partners – effectively is a threat of a drain of capital and/or entry of an unknown third-party investor, along with the danger of loss of non-financial resources (e.g., the PEMI’s support, expertise, advice, networks), and possibly the dissolution of the portfolio company. Hence, the threat of exit can create a strong incentive for the controlling shareholder to accommodate the PEMI’s interests, make compromises, and abstain from opportunistic behavior. In that sense, exit rights can have a preventive effect in that they strengthen the PEMI’s voice which is a defensive form of protection.

Being substitutes and complements, the complex relationship between voice and exit is astutely described by HIRSCHMAN: “The willingness to develop

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2395 See HIRSCHMAN, p. 37.
2396 Cf. ibid, p. 39.
2397 See HIRSCHMAN, p. 83 (“it appears that the effectiveness of the voice mechanism is strengthened by the possibility of exit.”)
2398 Cf. FRICK, § 11, N 1269; HIRSCHMAN, p. 55, 82 (“The chances for voice to function effectively as a recuperation mechanism are appreciably strengthened if voice is backed up by the threat of exit”).
and use the voice mechanism is reduced by exit, but the ability to use it with effect is increased by it.”

It follows from the PEMI’s perspective that PEMIs will generally want to obtain a combination of the two to gain optimum protection and maintain options ex post, whether seen as an alternative or complementary means of protection.

3 Determinants of Voice and Exit Rights

The degree of voice and exit rights that a PEMI attains is a function, inter alia, of (i) the PEMI’s bargaining power vis-à-vis the controlling shareholder, that is, the degree of dependence of the owner family on the investor’s capital and/or value-added services, which in turn depends, inter alia, on the company’s growth options and financial status (e.g., equity ratio, cash-flow characteristics), the state of the capital markets, the percentage and absolute amount of equity at stake, the PEMI’s competences and contacts, media pressure, and reputational effects. (ii) An equally important determinant is the degree of attractiveness of the target to the investor, which is a function of the risk-return profile. For an investment promising high returns, the PEMI may be willing to forego some protection rights. Conversely, investors may only invest in a company with lower return expectations if coupled with lower levels of uncertainty (lower risks) reflected in stronger voice and exit rights and/or other financial benefits (e.g., guaranteed interest, minimum investment return guarantees). (iii) The PEMI’s use of the tools and arrangements discussed in this dissertation also depends on its knowledge, skills, sophistication, and experiences in employing these tools. Only a well-informed, well-advised, and experienced investor is likely to negotiate for a set of investor rights particularly suited for the individual investment situation. (iv) Aspects such as deal complexity and the costs associated with negotiating for and exercising voice-related and exit rights, in terms of time, money, and resources, also determine the degree of voice and exit rights attained. For example, the costs (financial, time, and effort) of issuing several classes of shares can be disproportionate to the value gained from ensuring PEMI board representation, particularly if this goal can be achieved more easily by other legal instruments. PEMIs need not necessarily bargain for a maximum of protection, but rather an optimum and leave the controlling

Hirschman, p. 83.

Cf. Easterbrook/Fischel, Economic structure, p. 17 (“a choice of terms that reduces investors’ expected returns will produce a corresponding reduction in price ... All the terms in corporate governance are contractual in the sense that they are fully priced in transactions among the interested parties.”); Kaplan/Strömb erg, p. 15 (finding that VCs obtain full control if the firm performs poorly, and if the firm performs well VCs relinquish most of their control rights).
shareholder freedom of discretion in areas where interests are aligned and hence the risk of conflict is low. (v) The *characters and interpersonal skills* of the shareholders, their mutual relationship, openness and communication, means of handling conflicts, etc. also play a major role in the PEMI’s quest for and attainment of voice and exit rights.
Part Two: Legal Framework and Tools

VII Stock Corporation versus GmbH

This dissertation focuses on stock corporations as they are the most common business form of privately held companies in Switzerland. Yet, since the revision of the GmbH laws in 2008, the GmbH option is becoming ever more popular (see Figure 13). This section briefly summarizes the voice and exit features of GmbHs discussed throughout the dissertation and contrasts them to those of stock corporations.

A Advantages

In case of long-term minority investments of private equity investors in non-listed, later-stage family-controlled firms, the investors’ and the family members’ individual expertise, culture, and reputation are important success factors for the company aside from their respective financial contributions. With focus on the individual characteristics of business partners, companies often need to allocate internal powers not exclusively in accordance with the parties’ capital participation, but based on their competencies and characteristics and laid out in an individually agreed-upon distribution of roles. In this process, PEMIs, owing to their professional competences, skills, and networks, can negotiate for significant voice even if they are only minority shareholders.2401 The GmbH is particularly suited to address the need for person-oriented structuring because it combines limited liability with flexibility in structuring suitable governance arrangements.2402 Vis-à-vis stock corporations, the following features may offer advantages.

Veto rights. To enhance the PEMI’s voting power in corporate decision making the GmbH offers the same features as the stock corporation, namely company voting shares and voting caps (but no participation certificates). In addition, the GmbH allows the parties to establish ad personam veto rights for the benefit of certain members against decisions of the meeting of members. Even though such veto rights do not confer active voice, that is, the power to force the meeting of members to pass a certain resolution, they empower the entitled member to prevent certain decisions from being made irrespective of the invested capital (passive voice).2403 Moreover, PEMI’s veto rights against managing officers’ resolutions may be structured indirectly, by providing in the articles of association that the managing

2401 See HANDSCHIN, personalistische GmbH, p. 62.
2403 See HANDSCHIN, personalistische GmbH, p. 62.
officers shall submit certain decisions to the meeting of members for approval and by granting the PEMI a veto right against the meeting of members’ resolution of approval. Veto rights are particularly important for private equity investors who do not actively engage in the day-to-day management of the firm, but who want to have a de facto voice in defining corporate strategy and intervening in case the company deviates from its set course. In a stock corporation, ad personam veto rights at the corporate level via the articles of association cannot be granted, but veto power may be conferred via class voting and qualified majority vote requirements. The drawback of such instruments is that they are impersonal – they are related to shares, not shareholders, and are unaffected if shareholders change.2404 Moreover, they confer de facto veto power to all members holding an equity stake beyond the blocking minority threshold or the majority of a class of stock and not only to particular shareholders. Furthermore, whether the majority vote requirement to pass decisions at the general meeting may be increased to a level that effectively confers veto power to the holders of a blocking minority is contested by legal scholars.2405 Ad personam rights can be structured as part of shareholders’ agreements. However, the rather elaborate and complex coordination with the articles of association can be costly as sophisticated legal advice may be needed, and the contractual stipulation is at times nevertheless fragile.2406 In a GmbH, members can stipulate respective provisions in both the articles of association and contractual agreements and the parties can choose whatever instrument is easiest to structure and most suitable to the individual situation.

Access to information. GmbH members benefit from more extensive information rights than stock corporation shareholders. The annual report and the auditor’s report are directly delivered, thereby allowing for an earlier receipt of relevant information and consequently, better preparation of the meeting of members. Moreover, while the shareholders’ right to information and inspection relates to the general meeting, GmbH members have a right to receive information throughout the year, and they enjoy a right to inspect the books and files without restriction if the GmbH has no auditors. In a stock corporation, shareholders can exercise their information rights only periodically. As the PEMI’s rights to information in a GmbH are more extensive, the law does not provide for a right to initiate a special audit, but, if need be, this right may be granted via the articles of association. In effect, the members’ access to information is on a par with

2404 See BRECHBÜHL/EMCH, p. 275.
2405 See Section IV.D.3.3.4.6.
2406 See BÖCKLI, GmbH-Recht, p. 4, 21.
Part Two: Legal Framework and Tools

those of directors in a stock corporation.\footnote{2407} As a result, private equity investors do not necessarily need to participate in the executive organ of the company to gain stronger rights to access information. The shareholder information rights in a stock corporation can be extended in the articles of association and via contracts, but as shareholders are not subject to a duty of loyalty (as are GmbH members), the scope to do so is narrower.

\textit{Duty of loyalty.} In a stock corporation, board members and executive managers have a duty of loyalty, while shareholders have no such duty. Stock corporation shareholders may exercise their voting rights as they see fit, even if favoring their own interests over those of the corporation and other shareholders. Mutual rights among the shareholders may only be established via shareholders’ agreements. In contrast, in a GmbH, already by law, the members have a duty of loyalty including a duty to maintain confidentiality and, if the articles of association so provide, have a duty to abstain from competing with the company. From the PEMI’s perspective, the GmbH rules may be more advantageous because the members’ duty of loyalty offers protection against the controlling member’s pursuit of personal interests and illegitimate appropriation of corporate assets. By encouraging the partners to work toward the good of the company and abdicate self-interested behavior, the members’ duty of loyalty assures business stability and thereby helps to foster the development of trust among the business partners and maintain it over time.

\textit{Shareholders’/members’ obligations.} Shareholders of a stock corporation cannot be obliged to any personal duties at the corporate level other than to pay the subscription price of their shares.\footnote{2408} Only via contractual arrangements can shareholders undertake personal duties such as to maintain confidentiality or abstain from competing with the company. In the GmbH, the meeting of members can set up obligations for members to make supplementary financial contributions, as well as to provide ancillary performances via the articles of association provided they serve the corporate purpose or aim to ensure maintaining the company’s independence or the composition of its member base.\footnote{2409} For example, the GmbH’s private equity investor (and other members) may be obliged to actively engage in the business and perform value-added services. As a result, the GmbH is quite capable of shifting the weight of the membership based on the capital investment to personal characteristics, without requiring a complex combination of corporate and contractual rules and

\footnotesize{\textsuperscript{2407} See FORSTMOSER, gestern/heute/morgen, p. 19.}

\footnotesize{\textsuperscript{2408} See FN 1204.}

\footnotesize{\textsuperscript{2409} See FN 1237.}
arrangements as is necessary in the stock corporation. 2410 Yet, of note is that under certain circumstances, stipulation of members’ duties at the corporate level in a GmbH allows the meeting of members to request the court to expel members who do not deliver on their obligations. 2411 If the articles of association specify that members’ poor performance or non-performance of duties is a reason for expulsion, the meeting of members may directly vote on the expulsion of a non-performing member. 2412

Organizational aspects influencing voice. With respect to the organizational aspects influencing voice, the GmbH also offers comparatively more flexibility than the stock corporation. For example, in a GmbH, resolutions of the meeting of members may also be passed in writing, but stock corporation shareholders do not have this option. By allowing this option, Swiss lawmakers recognized the need for informality flowing from the often personal acquaintance of the members in the conduct of the GmbH’s affairs.

Allocation of powers. Both in stock corporations and GmbHs, the principle of parity applies to the relationship among corporate organs. 2413 Beyond the non-delegable and inalienable duties defined by law, the GmbH offers comparatively greater scope for adapting the statutory division of powers to the individual circumstances. For example, GmbH laws explicitly allow the articles of association to state that the managing officers can or shall submit certain decisions to the meeting of members for approval. In a stock corporation, such a possibility does not exist. The board of directors is generally and exclusively authorized to manage the company. Shareholders only make resolutions regarding fundamental corporate decisions (e.g., changes of the corporate purpose or the capital structure), but not management decisions (e.g., decisions on sizeable investments). Only the possibility for consultative resolutions by the general meeting remains.

Appointment of managers. If the articles of association so provide, the GmbH’s meeting of members appoint the managing officers. They also appoint the executive directors, the holders of procuration, and the commercial mandate holders unless such power is conferred to the managing officers. Hence, in a GmbH, PEMIs can have a voice in the appointment and removal of managers via respective veto rights on decisions of the meeting of members. Conversely, in a stock corporation,

2410 See FORSTMOSER, gestern/heute/morgen, p. 19.
2411 CO 823 I.
2412 CO 823 II. See BAUDENBACHER/SPEITLER, Basler Kommentar, CO 772, N 36b; NUSSBAUM/SANWALD/SCHEIDEgger, CO 796, N 24.
2413 See Section IV.D.2.1 and FN 557.
the general meeting only appoints the board of directors and if the board chooses to delegate management functions to executive managers, observing the requirement for a lawful delegation, the board is exclusively authorized to appoint the executive managers and not the shareholders. Shareholders can exert only indirect influence in selecting executive managers via election of the board members and contractual voting arrangements to the extent lawful.

Exit. In structuring the PEMI’s exit possibilities, the GmbH offers broader options. By default, the assignment of company shares in a GmbH requires the meeting of members’ approval, which is subject to a qualified majority vote, which may be denied without the need to provide reasons. Via the articles of association, the assignment of company shares can be entirely excluded, or, on the other hand, the requirement of approval of an assignment can be waived. Moreover, by stipulating withdrawal rights in the articles of association, a member’s exit can be facilitated. Conversely, the articles of association may cite certain reasons for the meeting of members to expel members. 2414 Further structuring options available in a GmbH are offered, for instance, by stipulating call and put options as well as drag-along and tag-along rights. 2415 In a stock corporation, only transfer restrictions as outlined in the law can be stipulated with certainty. 2416 Hence, the principal means to structure exit rights are shareholders’ agreements. 2417

B Potential Drawbacks

Board of directors. In a GmbH, there is no governance level between the members and the managing officers. In spite of the far-reaching organizational flexibility of the GmbH, its articles of association cannot create a board of directors equivalent to that of a stock corporation. 2418 It can, however, introduce a second tier within the executive management of a GmbH below the managing officers by tasking executive directors with management duties that do not fall within the non-delegable and inalienable duties of the managing officers. 2419 Hence, the organizational structure of the stock corporation can be largely replicated in the GmbH if need be.

2414 The expelled member is entitled to a settlement corresponding to the real value of his/her shares which essentially prohibits any bad leaver clauses; for further references, see FREY/FISCHER, p. 538.
2415 See Section VI.A.2. See BRECHBÜHL/EMCH, p. 271; FREY/FISCHER, p. 537.
2416 See Section VI.A.1.
2417 See BÖCKLI, Aktienrecht, § 1, N 3.
2418 See FN 1834.
2419 See FN 1835.
Moreover, an advisory board can be installed to perform certain supervisory functions and, in this respect, perform similar functions as the directors in a stock corporation.\footnote{See FN 1836.} A certain drawback can arise if managing officers are too entrenched in the day-to-day management and do not have the distance and perspective necessary for long-term strategy formulation and policy making as independent board members may have. If the controlling member is involved in managerial functions, it is mainly the private equity investor’s task to serve as an independent evaluator of the firm’s business direction. Again, it may be useful to create an advisory board composed of independent advisors who support the GmbH members and managing officers in strategic, operational, technical, and legal matters.

Public listing. GmbH shares cannot be publicly traded on a stock exchange.\footnote{See CO 781 III sentence 3. See BAUDENBACHER/SPETTLER, Basler Kommentar, CO 772, N 25a; in detail, NUSSBAUM/SANWALD/SCHIEDEGGER, CO 784, N 11 et seq.} Only stock corporation shares can. This is a significant disadvantage for PEMIs targeting an IPO of the portfolio company as exit strategy. However, a GmbH can relatively easily be converted into a stock corporation should the members desire to undertake an IPO.\footnote{See procedural facilitations for SMEs, CO 14 II, 15 II, 16 II Merger Act. See FREY/FISCHER, p. 538; BAUDENBACHER/SPETTLER, Basler Kommentar, CO 772, N 2; MEIER-HAYOZ/FORSTMOser, § 18, N 164; Böckli, GmbH-Recht, p. 4; GRIMM/TRIPPEL, p. 52.} Nevertheless, the stock corporation should be used as a legal form if the parties have a definite plan for listing the portfolio company in the near future in order to save on transformation costs and time.

Capital-related issues. Even though financial aspects are peripheral to this dissertation, for the sake of completeness, it is pointed out that in a GmbH, the company shares must have a nominal amount of at least CHF 100 issued at least at their nominal value.\footnote{CO 773, 774, 777c I, 793. The nominal values of the company shares may be different provided that the company shares with the lowest nominal value have at least one tenth of the nominal value of the other company shares (CO 806 II). See BAUDENBACHER/SPETTLER, Basler Kommentar, CO 774, N 1; NUSSBAUM/SANWALD/SCHIEDEGGER, CO 774, N 2.} A smaller nominal amount, as is possible in the stock corporation, would be more advantageous from a private equity investor’s perspective as it would offer more flexibility in light of possible future restructuring and capital increases.\footnote{See FREY/FISCHER, p. 536.} A drawback is that in the absence of conditional capital, it is more difficult to structure management incentives via share options.\footnote{See ibid.} Moreover, the lack of an authorized or conditional capital increase in the GmbH as is available in the stock corporation may prove cumbersome in high-growth companies planning for
several successive financing rounds. Yet, this aspect is likely concern venture capital investors, rather than investors in later-stage companies where private equity capital is sought to finance a particular stage of expansion. Moreover, the ordinary capital increase should still prove to be a sufficiently flexible instrument in situations with a limited number of shareholders in a closely held firm.

**Publicity.** If the GmbH is chosen as a business form, the members must accept that the co-members and the general public at large can discover their existence and identity as they are listed in the public Commercial Register. In contrast, the names of shareholders, even if holders of registered shares, remain confidential since not even co-shareholders have a right to inspect the share register. Moreover, while implementation of privately negotiated arrangements in the articles of association of both stock corporations and GmbHs improves enforceability, the downside is that such provisions are in the public record. To increase confidentiality, for instance, with respect to ancillary rights and duties, a GmbH could only provide for such rights and duties in the articles of association, in principle, and regulate details in non-public regulations.

**Legal sophistication.** The numerous dispositive statutory provisions and the resulting flexibility in devising the GmbH’s articles of association presents an opportunity, but also a challenging task when devising a suitable legal arrangement in the individual investment situation. Significant legal consulting expenses may be the consequence. Aside from having legal sophistication or expert advice, PEMIs must also have sufficient bargaining power since legal flexibility is to their advantage only if they have the bargaining power to gain respective rights and implement corporate arrangements that serve their interests. Otherwise, flexibility can have the precisely opposite effect. On the other hand, the negotiations of shareholders’ agreements in the context of investments in stock corporations and the coordination with the articles of association and other corporate documents may be equally – or even more – complex and time-consuming.

**Further caveats.** Even if GmbH laws allow for more flexibility in structuring members’ rights and duties at the corporate level, it is the
company that asserts claims to enforce members’ duties (e.g., non-compete obligations). The company acts through its organs; ascertaining a claim requires a resolution by the managing officers or, if the articles so provide, the meeting of members, so that the infringing party – if controlling the majority of the votes in the respective organs – could prevent a respective resolution to assert a claim against him/herself. It is highly debatable whether individual members are also entitled to take legal action. In the absence of relevant court rulings, one should not rely upon this avenue. It follows that additional precautionary measures should be taken such as contractual penalties and put or call options for the PEMI’s benefit in case a member does not live up to his/her duties. Secondly, with more options to structure person-centered elements in the articles of association, one must consider that, whereas contractual agreements may be altered only by the parties’ mutual consent, provisions in the articles of association may be altered, by default and apart from specific rules, at any time by the absolute majority of the votes represented at the general meeting (in a stock corporation) or the meeting of members (in a GmbH) without necessarily requiring the PEMI’s consent. Consequently, from the PEMI’s perspective, any advantageous provisions inserted in the articles at the time of investment can be altered or curtailed ex post by a resolution passed by the majority of shareholders or members at a later date. As a consequence, if the PEMI successfully negotiates additional rights at the corporate level in a GmbH, it is important to protect such arrangements against unfavorable amendments via high majority vote requirements, veto rights, and suitable contractual provisions.

Extra-legal factors. While the lack of an IPO option is certainly a key drawback for PEMIs considering investing in a GmbH, another key reason why PEMIs tilt away from the GmbH and prefer stock corporations could be called the status quo barrier. The stock corporation is Switzerland’s uncontested number one form of corporate organization. Its rules are widely used, well-developed, standardized, and tested, which has resulted in numerous learning and network effects, a comparatively large amount of judicial precedents, and common business practices. Private equity professionals are familiar with stock corporation laws and private structuring options, while professional experience, legal expert opinion, and judicial precedent is still developing for many aspects of the GmbH. Apart

2433 See BRECHBOHL/EMCH, p. 281.
2434 See Section VI.A.2.
2435 Cf. McCahery/Vermeulen, p. 85.
2436 See Figure 13.
2437 Cf. McCahery/Vermeulen, p. 31.
from lack of tradition and practical experience, a less established reputation affects the investors’ choice of the legal form. A better reputation can also positively affect the valuation of the PEMI’s portfolio company.\textsuperscript{2438} Aside from path dependences,\textsuperscript{2439} most target companies are stock corporations and the benefits associated with changing the business form may not offset the costs of transformation.

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<thead>
<tr>
<th>Criteria</th>
<th>GmbH</th>
<th>Stock corporation</th>
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<tr>
<td>Voting rights</td>
<td>• In principle, based on a shareholder’s capital contribution</td>
<td>• In principle, based on a member’s capital contribution</td>
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<td>Voting shares</td>
<td>• Concealed and – debated – open voting shares</td>
<td>• Concealed voting shares only</td>
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<td>Voting caps</td>
<td>Yes</td>
<td>Yes</td>
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<td>Participation certificates</td>
<td>No</td>
<td>Yes</td>
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<td>Quorum requirements, qualified majority vote requirements &amp; unanimous consent</td>
<td>• More decisions subject to qualified majority vote requirement by law than in stock corporations&lt;br&gt;• Indirect quorum requirement for resolutions defined as important&lt;br&gt;• Stipulation of quorum &amp; majority vote requirements different from law possible&lt;br&gt;• Unanimous consent subject to debate&lt;br&gt;• Other decision-taking rules possible (e.g., cumulative voting)</td>
<td>• No quorum requirement by law&lt;br&gt;• Stipulation of quorum &amp; majority vote requirements different from law possible&lt;br&gt;• Unanimous consent subject to debate&lt;br&gt;• Other decision-making rules possible (e.g., cumulative voting)</td>
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<td>Ad personam veto rights</td>
<td>At the corporate level:&lt;br&gt;• Directly against resolutions of meeting of members&lt;br&gt;• Indirectly against resolutions of managing officers&lt;br&gt;• Ad personam veto right at the corporate level not transferable&lt;br&gt;Also contractually</td>
<td>• Ad personam veto rights at the contractual level only&lt;br&gt;• Veto power possible via high majority vote requirements/class voting</td>
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\textsuperscript{2438} Ibid.  
\textsuperscript{2439} See HOFSTETTER, Controlled companies, p. 607 (describes path dependencies as the notion that “embedded structures of ownership perpetuate themselves on efficiency as well as political grounds.”).
<table>
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<tr>
<th>Access to information</th>
<th>Duty of loyalty</th>
<th>Shareholders’/ members’ obligations</th>
<th>Organizational aspects influencing voice</th>
<th>Allocation of powers</th>
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<tr>
<td><strong>• Automatic delivery of annual report &amp; auditor’s report</strong>&lt;br&gt;<strong>• Requests for information &amp; inspection at any time</strong>&lt;br&gt;<strong>• Unrestricted right of inspection if company has no auditors</strong>&lt;br&gt;<strong>• Extension via AoA or contract option</strong></td>
<td><strong>• Duty of loyalty also for members</strong>&lt;br&gt;<strong>• Duty to maintain business secrets</strong>&lt;br&gt;<strong>• Prohibition of competition can be introduced for members in the AoA</strong>&lt;br&gt;<strong>• Contractual agreements possible</strong>&lt;br&gt;<strong>• Higher risk of members qualifying as de facto organs</strong></td>
<td><strong>• Flexible structuring options at both the corporate &amp; contractual level (e.g., obligation to perform value-added services)</strong>&lt;br&gt;<strong>• Members’ ancillary performances can relate to actions, tolerations, or non-actions; provided that certain purposes are served</strong></td>
<td><strong>• Resolutions of the meeting of members may be passed in writing</strong>&lt;br&gt;<strong>• Notice period for calling a meeting of members: at least 10 days</strong></td>
<td><strong>• Meeting of members has more inalienable powers (than the GM of shareholders)</strong>&lt;br&gt;<strong>• Limited scope for changes to the statutory division of powers, but obligatory approval requirement &amp; facultative approval of managing officers’ decisions by meeting of members possible</strong>&lt;br&gt;<strong>• Consultative resolutions possible</strong>&lt;br&gt;<strong>• Delegation of management duties to executive managers possible</strong></td>
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<td><strong>• Requests for information &amp; inspection of books &amp; files at the GM only</strong>&lt;br&gt;<strong>• Extension via AoA or contract option</strong></td>
<td><strong>• None for shareholders, only for BoD &amp; executive managers</strong>&lt;br&gt;<strong>• Contractual agreements possible</strong>&lt;br&gt;<strong>• Liability as de facto organ possible</strong></td>
<td><strong>• Only contractually</strong></td>
<td><strong>• No circular resolutions</strong>&lt;br&gt;<strong>• Required notice for calling a GM at least 20 days</strong></td>
<td><strong>• Limited scope for changes to the statutory division of powers</strong>&lt;br&gt;<strong>• Consultative resolutions possible</strong>&lt;br&gt;<strong>• Delegation of management duties to executive managers possible</strong></td>
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<td>Part Two: Legal Framework and Tools</td>
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<tr>
<td><strong>Management organization</strong></td>
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<td>• Principle of self-management, but third-party management possible</td>
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<td>• No BoD, but a second tier within the executive management possible</td>
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<td>• Advisory board possible</td>
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<tr>
<td>• Principle of third-party management (shareholders providing capital vs. directors/officers managing the firm)</td>
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<tr>
<td>• BoD mandatory – at least one member</td>
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<tr>
<td>• Advisory board possible</td>
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<tr>
<td><strong>Appointment of management personnel</strong></td>
<td></td>
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<tr>
<td>• Meeting of members appoint managing officers if the AoA so provide</td>
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<tr>
<td>• Meeting of members also appoint executive directors, holders of procuration, commercial mandate holders; appointment by managing officers also possible</td>
<td></td>
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<tr>
<td>• Contractual agreements possible</td>
<td></td>
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<tr>
<td>• GM appoints BoD</td>
<td></td>
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<tr>
<td>• Subordinate management personnel appointed by BoD (not the GM)</td>
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<tr>
<td>• Contractual agreements possible</td>
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<tr>
<td><strong>Exit</strong></td>
<td></td>
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<tr>
<td>• Dispositive limited transferability of company shares</td>
<td></td>
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<tr>
<td>• Facilitation possible by waiving the requirement of the meeting of members’ consent</td>
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<tr>
<td>• Increases possible, e.g., by stipulating valid grounds for denial of approval &amp; higher approval requirements</td>
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<tr>
<td>• Withdrawal rights at the corporate level</td>
<td></td>
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<tr>
<td>• Definition of grounds for expulsion possible in the AoA</td>
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<tr>
<td>• Put/call options, drag-along, tag-along rights possible at the corporate level (via obligations to provide ancillary performances); also via contract</td>
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<tr>
<td>• Dispositive free transferability of company shares</td>
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<tr>
<td>• Increases possible, e.g., by stipulating valid grounds for denial of company’s consent in the AoA</td>
<td></td>
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<tr>
<td>• Refusal of consent also possible if company offers to take over the shares at the real value</td>
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<tr>
<td>• Contractual exit rights</td>
<td></td>
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<tr>
<td><strong>Public listing</strong></td>
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<tr>
<td><strong>No</strong></td>
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<tr>
<td><strong>Yes</strong></td>
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<tr>
<td><strong>Capital-related aspects</strong></td>
<td></td>
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<tr>
<td>• Minimum nominal amount of each company share of CHF 100 resulting in less flexible capital structure</td>
<td></td>
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<tr>
<td>• Only ordinary capital increase resulting in less flexibility in structuring</td>
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<tr>
<td>• Minimum nominal amount of each share of CHF 0.01 resulting in more flexible capital structure</td>
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<tr>
<td>• Ordinary, conditional &amp; authorized capital increase</td>
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<td></td>
<td>management incentive plans</td>
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<td>-----------------------------------------------------------------</td>
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<tr>
<td>Publicity of shareholder &amp;</td>
<td>• Members names in public record</td>
<td>• Shareholders’ names not in public record</td>
<td></td>
<td></td>
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<tr>
<td>legal arrangement</td>
<td>• Legal arrangements in the AoA public</td>
<td>• Legal arrangements in the AoA public</td>
<td></td>
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<tr>
<td>Legal sophistication necessary</td>
<td>Yes</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legal certainty</td>
<td>• Person-oriented elements structured at the corporate &amp; the contractual level</td>
<td>• Person-oriented elements largely structured at the contractual level</td>
<td></td>
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</tr>
<tr>
<td></td>
<td>• Structuring in the AoA results in better enforceability &amp; duration,</td>
<td>• Alteration of shareholders’ agreements only by mutual consent</td>
<td></td>
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<tr>
<td></td>
<td>but risk of alteration by controlling member if not protected accordingly (e.g.,</td>
<td>• Shareholders’ agreements effective only inter partes</td>
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<tr>
<td></td>
<td>via high-majority vote requirement for alteration of AoA, contractual agreements)</td>
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<tr>
<td>Extra-legal factors</td>
<td>• New legal territory for many practitioners</td>
<td>• More target companies incorporated as stock corporations</td>
<td></td>
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<td></td>
<td>• Status quo barrier</td>
<td>• Path dependencies</td>
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<td></td>
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<td>• More well-developed, standardized, tested rules → learning &amp; network effects, judicial precedents &amp; established business practices</td>
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<tr>
<td></td>
<td></td>
<td>• Better reputation</td>
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</tbody>
</table>

*Table 8: Comparison of business form: stock corporation vs. GmbH*
VIII Conclusion and Wider Context

This dissertation focuses on the Swiss legal framework along with the possibilities and limitations of a wide range of privately negotiated legal tools and arrangements available at the corporate and the contractual level of both the Swiss stock corporation and the GmbH that allow actively engaged private equity minority investors to amplify their voice in corporate decision making. As voice relies on the PEMI’s access to information and must be considered in relation to the PEMI’s exit rights, those two aspects are also discussed in this dissertation. Of course, there is but one efficient corporate governance model and means to allocate control among PEMIs, fellow shareholders, boards of directors, and the executive management of the firm. Which of the legal tools and arrangements presented in this dissertation and which business vehicle is selected by the business partners depends upon the individual investment situation and numerous factors such as the ownership structure, parties’ legal knowledge, sophistication, experience, negotiation skills, agendas, interests, bargaining power, set of risks and opportunities, market forces, type of business and the company’s financial structure, culture and history, path dependencies, deal complexity, and associated negotiation costs, amongst others. Needless to say, not every tool is suitable and appropriate for every investment situation. Every transaction is different warranting a tailor-made legal structure that reflects not only the endless permutations of circumstances and objectives, but also complex trade-offs that are made between PEMIs and majority shareholders. Therefore, rather than to provide a single set of terms or simple checklist with voice, exit rights, and related arrangements that PEMIs should negotiate for in each investment situation, this dissertation provides a tool box for those negotiating minority investments from which they can select an optimal mix of legal structuring tools. The various tools have different effects and various associated costs. Some of the instruments considered present alternatives; others complement each other at the contractual and the corporate level.

Whatever the legal voice and exit rights an investor negotiates, these tools can play a key role in preventing minority and majority opportunism and disputes from occurring and from escalating to full-blown and costly schisms in the partnership. In the absence of any conflicts, they may be of minor importance; however, they can gain significance if difficulties arise. As NOBEL astutely points out, “Wenn alle gut miteinander auskommen (wollen), sind die formalen Aspekte bloss ein Tummelfeld für bürokratische Geister; sind Friede und Einigkeit jedoch dahin, werden sie gar zum
Despite this dissertation’s focus on the non-financial legal arrangements in the context of private equity minority investments, which are no doubt extremely important in case of minority-majority shareholder conflicts, the fact should not be lost that a suitable legal arrangement, is but one, albeit important, element of a successful investment deal, along with many other factors – financial, economic, structural, cultural, and psychological.

In fact, it is the extra-legal factors that form the foundations of a successful investment relationship. Even if contractual agreements are perfectly structured, the reality is that they can never save an economically bad deal or mend a poor relationship among the parties.

Moreover, legal agreements never replace personal trust among the shareholders and others involved in corporate management. With a trusted relationship and culture that values openness and discussion of differences the business partners are likely to solve potential divergences of opinion or conflicts of interest arising ex post amicably. Trust cannot leap off the pages of contractual agreements or corporate documents, but results from a mix of extra-legal factors such as personal chemistry between the parties, credibility gained from time, interactions and experience, mutual understanding, sympathy, cultural fit, loyalty, reliability, integrity, competence, shared visions of the firm’s strategy and future development, and the social norms of ‘good’ behavior.

Nevertheless, legal tools and arrangements can help to build trust, or in business parlance, they provide trust-enhancing effect, because the parties put their intentions, desires, and promises on paper and thereby enhance credibility. In this respect, the PEMI’s request for voice, extended access to information, and exit rights can be viewed not as a sign of mistrust, but rather as a tool for building sustainable, mutual trust necessary for successful investment cooperation.

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2440 NOBEL, Formelle Aspekte, p. 20.
2441 Of equal opinion, HESS, p. 80.
2442 See also, PEARCE/BARNES, p. 46.
2443 Similarly, TREZZINI, p. 306.
2444 For definitions of trust, see BÜHLER, Regulierung, § 6, N 515 (“eine das Verhalten bestimmende Überzeugung, dass ein anderer Mensch nicht hinterrücks eine schädigende Handlung vornimmt oder überraschend in der Zusammenarbeit versagt”); BÖCKLI, Corporate Governance und Vertrauen, p. 2; MAYER/DAVIS/SCHOORMAN, p. 712 (“the willingness of a party to be vulnerable to the actions of another party based on the expectation that the other will perform a particular action important to the entrustor, irrespective of the ability to monitor or control that other party”); AMSTUTZ, Macht und Ohnmacht, p. 86 (seeing trust as the cement that holds where cognitive and rational contemplations fail, where decisions that have a black-box character must be made, and where one has to credit those who are better informed).
2445 See DEAKIN/MICHE, p. 58 et seq.; PEARCE/BARNES, p. 64; AMSTUTZ, Macht und Ohnmacht, p. 87; STÜCKELBERGER, p. 161; DREY, Stimmbindung, p. 8.
Part Three: Case Study – SimilorGroup
The minority investment of Swiss-based Madison Private Equity Holding AG (hereafter Madison, today Zurmont Madison Private Equity L.P.) in SimilorGroup (hereafter Similor or the Company) is an excellent example of the type of private equity investments analyzed in this dissertation. At the time of the investment in 2002, Similor had nearly 150 years of history as a private, closely held family firm. Madison is a Swiss private equity fund primarily focused on majority investments in SMEs partnering with entrepreneurs and company owners who are looking for a succession solution or change in the shareholder structure, and/or require additional equity capital. Madison also partners with group companies and management teams seeking to conduct a spin-off or management buyout or buyin (MBO/MBI).

The search for a succession solution and opportunities for business expansion led Similor’s owner family to partner with Madison. The owner family wanted to undertake a gradual transition of the firm’s ownership and management and to become acquainted with the private equity investor’s practices first. Hence, in the first phase of the investment, Madison was offered to purchase only a minority stake (45% of the equity) from the family shareholders, which it did in 2002. From the outset, the parties planned a subsequent majority takeover provided they built a cooperative relationship that proved successful. The majority takeover took place two years after the initial minority investment, and three years later, Madison sold Similor to a strategic investor.

The case study was prepared based on three types of sources: (i) personal interviews with Dr. Björn Böckenförde, Founding Partner of Madison Management AG and CFO of Zurmont Madison Private Equity,\textsuperscript{2446} (ii) an analysis of legal documents (primarily the shareholders’ agreement), and (iii) a review of press articles, Similor’s company website, company publications (e.g., company brochure), and Madison’s investor relations materials.

A Company Overview

1 Business Description

When the investment was made in November 2002, Similor was the #2 manufacturer in the market for water taps and water control systems in Switzerland with approx. 44% market share. The firm’s product range

\textsuperscript{2446} The interviews were conducted in October 2009 and January 2011.
includes aesthetic, high-quality water faucets and water control systems for kitchens, bathrooms, and public areas. The products are marketed under the brand names Similor, Kugler, and Sanimatic. Similor’s diversified customer base ranges from real estate developers to private homeowners, and private and public institutions.

The Company’s roots stretch back to the establishment of Kugler SA in Lausanne in 1854 by Charles Kugler. The company made brass products and, in 1863, was the first to manufacture water and gas taps in Switzerland. Through takeovers and acquisitions the Company transformed into Similor which became a holding company in 1997. As of 2002, the Company generated CHF 70 million of net sales and CHF 9 million of EBITDA. It had approx. 340 employees and was controlled by Anton Kräuliger, owner of the Company (together with his sisters), CEO, and chairman of the board of directors.

2 Company History

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1854</td>
<td>Charles Kugler establishes a brass products company in Lausanne</td>
</tr>
<tr>
<td>1917</td>
<td>Messrs. Hürlimann, Brandt, and Stoklass establish Similor SA</td>
</tr>
<tr>
<td>1988</td>
<td>Takeover of Similor SA by Metalyss AG, under the leadership of A. Kräuliger, who inherited the Lyss plumbing fittings factory from his father, who had been the second-generation owner</td>
</tr>
<tr>
<td>1996</td>
<td>Takeover of Kugler SA by Similor SA</td>
</tr>
<tr>
<td>1997</td>
<td>Takeover of Sanimatic AG; integration of Similor SA, Kugler SA, and Sanimatic AG into Similor Holding</td>
</tr>
<tr>
<td>2002</td>
<td>Minority investment by Madison Private Equity Holding AG (45%); A. Kräuliger remains CEO and chairman of the board</td>
</tr>
<tr>
<td>2003</td>
<td>Merger of Similor and Kugler brands; takeover of Arwa AG; brand names, Similor Kugler, Arwa, and Sanimatic are now united under one umbrella; Similor Kugler is awarded the City of Geneva Industry Prize</td>
</tr>
<tr>
<td>2004</td>
<td>Majority takeover by Madison; leadership handover to Ingo Kübler as CEO</td>
</tr>
<tr>
<td>2006</td>
<td>Appointment of Martin Sägesser as interim CEO</td>
</tr>
<tr>
<td>2007</td>
<td>Sale of SimilorGroup to a strategic investor, the Spanish Roca Group</td>
</tr>
</tbody>
</table>
B Transaction Overview

1 Transaction Background and Terms

A. Kräuliger was introduced to Madison’s chairman, through a common private banking relationship. Despite expressions of interest from other strategics and investors, the owner family decided against running an auction and instead engaged in intensive discussions with Madison to explore a potential partnership. The family firm leaders saw Madison as the most suitable business partner due to its well-established and trusted relationship, its willingness to undertake a gradual succession (as opposed to a complete sale), and a shared understanding of the firm’s future goals and desired strategy. Following a due diligence phase of approximately three months, Madison purchased 45% of the common equity of the parent company in November 2002 from A. Kräuliger and his sisters in an all-equity deal. The transaction was based on an enterprise value representing an EBITDA multiple of 7.3x. As the capital proceeds flew exclusively to the owner family, the Company’s equity ratio of 63% remained unaffected. Additional capital was not borrowed due to risk considerations upon the owner’s request. In August 2004, Madison purchased the remaining 55% of the firm’s equity from A. Kräuliger. In July 2007, Similor was sold to ROCA of Spain, the world leader in the water taps and water control systems industry.

2 Transaction Rationale

Family perspective. From the owner family’s perspective, succession planning led to the consideration of a sale to a private equity investor. Madison was willing to accept a gradual succession with A. Kräuliger staying involved in the business on a transitional basis. The owner family appreciated Madison providing added value beyond the provision of financial capital. Moreover, the interpersonal relationship between the owner family and the private equity investor played a critical role in the owner family’s decision to partner with Madison, fostered by a common understanding on the Company’s strategic direction. The transaction’s financial terms were important for the family shareholders, albeit not the decisive factor in the decision to partner with Madison.

Investor perspective. From Madison’s perspective, Similor was an interesting investment opportunity, being one of the two sizeable players dominating the water tap industry in Switzerland and together representing approx. 88% of the overall market in 2002. With almost 150 years of history, the Company had a sound business record and A. Kräuliger, the
CEO and chairman of the board of directors, had an excellent reputation as an entrepreneur, having successfully navigated and consistently expanded the business. Heightened need for cleanliness and improved comfort in the home promised increasing demand for top-quality, design-oriented kitchen and bathroom fittings. With its brands known for top quality, experience, innovative technology, and design, Similor had superb competitive positioning. In addition to the identified value enhancement via strategic and operational improvements, Similor identified opportunities for growth through the acquisition of smaller market players. Particularly, the potential add-on acquisition of Arwa AG offered Similor the opportunity to become the market leader in Switzerland and, as a result, to present an attractive target for a large internationally operating strategic buyer, which in turn offered a promising exit opportunity for Madison.

3 Investment Concerns

Apart from the risks inherent in the business (dependence on the Swiss market, the copying of designs, technical breakthroughs by competitors, etc.), Madison faced particular risks associated with minority investments where the owner family retains control of the business. Minority investor-specific risks followed, inter alia, from A. Kräuliger’s ownership of one of Similor’s suppliers, which could have resulted in related-party transactions unfavorable to Madison. Moreover, Madison faced considerable key man risk given that A. Kräuliger’s leadership and strong personality had primarily driven Similor’s past performance and expansion. These concerns were mitigated by a clear plan that the partners devised for a gradual succession, leading to the minority investor’s full control over a defined timeframe. In addition, the parties agreed upon appropriate corporate governance measures and legal arrangements to ensure the alignment of their interests.

C Post Investment Added Value

During the first two years as a minority investor, Madison helped the Company to adopt numerous value-enhancing measures. Firstly, it helped develop an expansion strategy and it was instrumental in sourcing and exclusively negotiating the add-on acquisition of Arwa AG, another succession solution. As the market leader of high-quality water taps in German-speaking Switzerland and the third largest player in the Swiss market, Arwa was the ideal complement to Similor, which had a strong sales network in French-speaking Switzerland. The acquisition was realized in 2003, shortly after Madison took over the majority stake from the owner family. As a result, Similor became the undisputed market leader of
Switzerland’s water tap and water control systems industry. Secondly, Madison undertook a brand repositioning and merged the Similor and Kugler brands, which enabled the Company to realize considerable sales and marketing synergies. Arwa was positioned as an architecture brand in the upper-price segment. With the clear positioning of its brands, Similor gained further market share. Moreover, the Company benefitted from a diversified customer base as it sold both reasonably priced fittings for rental accommodations and condos, and also extravagantly decorative items for luxury villas. Prestigious institutions, such as the Tinguely Museum in Basel, the University Clinic in Innsbruck, and the Frankfurt Towers were among Similor’s customers. In 2003, the Company was awarded the City of Geneva Industry Prize. Thirdly, Similor’s business activities were streamlined by selling the non-core building water tap division. Moreover, upon Madison’s request, IFRS accounting standards were introduced along with a stringent forecast and budgeting process. Controlling and reporting procedures were professionalized and decision-making processes made more objective. Finally, the private equity investor was closely involved in selecting new board members as well as recruiting a new CEO and CFO. Madison also improved the quality of staff and fostered a strong corporate culture via regular personnel training sessions, seminars, and company events. As a result of these value-enhancing measures, during Madison’s minority investment period, net sales increased from CHF 70 million in 2002 to CHF 102 million in 2004, an increase of 46% over two years; EBITDA increased by 49% between 2002 and 2004.

D Structuring of the Business Cooperation

1 Legal Documents

1.1 Legal Arrangements

The principal legal documents used to regulate the relationship between the owner family and Madison, as well as to regulate corporate governance aspects included a share purchase agreement, a shareholders’ agreement, the Company’s articles of association, and organizational regulations.

The shareholders’ agreement, concluded between A. Kräuliger and Madison, regulated the size and composition of the board of directors, business policy, and the parties’ management involvement; it set rules on the financing of add-on acquisitions and profit distribution, information policy, veto rights against resolutions of the general meeting and board of directors, transfer restrictions and exit rights, conflict resolution procedures, and ancillary provisions. The shareholders’ agreement was concluded for
the duration of the parties’ shareholder status. The enforceability of the shareholders’ agreement was secured with a contractual penalty in addition to claims (if any) for compensation. The contractual penalty amounted to 0.6% of the minority investment and was to be paid by the party infringing any of the voting agreements concerning board representation and veto rights. In addition to the contractual agreement, standard articles of association were implemented. Also, the parties scrutinized Similor’s organizational regulations prior to the minority investment, and critical provisions were changed. Regarding the hierarchy between these legal documents, the shareholders’ agreement stipulated that, concerning the parties inter se, contractual arrangements took precedence over the articles of association and the organizational regulations.

1.2 Assessment and Lessons Learned

Based on interviews, Madison sees shareholders’ agreements as the principal instrument to govern investor influence. In the particular investment case, the articles of association and the organizational regulations were perceived as less important given that all shareholders were parties to the shareholders’ agreement. Moreover, Madison appreciates the flexibility of contractual arrangements allowing for easy amendment without having to observe the cumbersome formal requirements when changing the articles of association. Another perceived advantage is the option to maintain confidentiality for any contractually agreed-upon arrangement. Concerning the level of detail of the contractual arrangement, Madison believes that shareholders’ agreements, with hundreds of pages of text, are excessive. In the minority investor’s view, these contracts are overly complex, costly, and time-consuming to negotiate, and counterproductive to the business partners’ relationship. Madison prefers simple and clear-cut agreements. Critically viewed is, however, the enforceability of shareholders’ agreements in case of conflict between the parties.

With hindsight, and never having faced any enforceability issue in the context of the Similor transaction, Madison acknowledges that primarily relying on a contractual penalty, in addition to claims for compensation to ensure the enforceability of the contractual agreements, was hardly sufficient. Firstly, the amount of the contractual penalty was relatively small in comparison to Madison’s overall investment amount. Secondly, proving any infringement to the contractual agreements would have been difficult. Hence, today, Madison would consider implementing additional enforcement measures (for examples, see Section IV.D.3.3.5.10). Moreover, instead of using standard articles of association with no
protection against any ex post unfavorable changes by the controlling shareholder, Madison now tries to reflect the contractual arrangements made among the shareholders in the articles of association and the organizational regulations to the greatest extent possible. Thereby, the contractual agreements are secured twice, once by contractual mechanisms and the second time, under corporate law. Madison reports that in order to protect itself against any unfavorable ex post changes unilaterally undertaken by the controlling shareholder, the private equity firm negotiates for increased majority vote requirements applicable to all or certain amendments of the articles of association and the organizational regulations as agreed to at the outset.

In the author’s view, the duration of the shareholders’ agreement, namely the duration of the parties’ shareholder status, also requires close attention. Shareholders can provide that the shareholders’ agreement terminates upon a specific event. However, such an event must be certain to occur, which is not necessarily the case with the end of the parties’ shareholder status. The risk is that the agreement is qualified as an excessive commitment infringing upon the parties’ personal rights in which case it is subject to early termination. To avoid such a risk and in the interest of legal certainty, it would have been advisable to regulate the duration of the shareholders’ agreement more specifically, for example, by expressly stating a specific duration period (e.g., 10 years).

2 Minority Investor Voice at Shareholder Level

2.1 Legal Arrangements

The parties did not provide for any voice-enhancing tools at the corporate level for Madison’s benefit, such as voting shares, voting caps, or participation certificates. With respect to critical resolutions of the general meeting, the minority investor had a contractual veto right via respective voting agreements. Resolutions classified as critical were those defined as important by law\textsuperscript{2447} and additional resolutions, comprising (i) amendments of the articles of association, (ii) the dissolution of the Company via liquidation, (iii) an increase or decrease in the number of board seats, (iv) the approval of the management report and consolidated financial statements, (v) the approval of the annual financial statements, and resolutions on the use of the balance-sheet profit, particularly the declaration of dividends, and (vi) the election of the auditors. Concerning

\textsuperscript{2447} See Section IV.D.3.1.2.3.
Part Three: Case Study – SimilorGroup

these resolutions taken at the group level or at any subsidiary, the parties contractually undertook to cast their votes in a way that prevented the respective resolution from being taken if opposed by the other party. The articles of association did not provide for any special quorum or majority vote requirements or other organizational aspects for the general meeting to deviate from the statutory rules.

2.2 Assessment and Lessons Learned

Swiss corporate law requires certain important decisions to be made by a qualified majority vote of two-thirds of the votes represented at the general meeting and the absolute majority of the nominal value of the shares represented at the general meeting. Madison, controlling 45% of the votes at the general meeting (provided all shares were represented), had a blocking minority regarding these resolutions (i.e., de facto veto power). The contractual agreement reinforced the investor’s veto power at a contractual level. The situation was different concerning the resolutions defined as important by the shareholders, but classified as ordinary decisions by statutory law. In this case, the minority investor had a contractual veto right. Yet, at the corporate level, these decisions were subject to the absolute majority vote requirement as the articles of association did not stipulate majority vote requirements deviating from the dispositive statutory provisions. By amending the articles of association, the parties could have reflected and secured the contractual veto right at the corporate level by increasing the absolute majority vote requirement to a qualified majority, with regard to the matters defined important, thereby conferring the investor veto power at a corporate level.

With hindsight, Madison acknowledges this lack of protection and now seeks to reflect contractual arrangements in the articles of association, and the organizational regulations, to the extent possible, for example, by increasing majority vote requirements, so that the minority investor effectively obtains a blocking minority for critical transactions. Negotiation for particular organizational aspects concerning the general meeting (e.g., convening, agenda) was less important in this investment situation, as Madison had shareholdings in excess of the statutory thresholds necessary to request the convening of a general meeting or to place items on the agenda.

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2448 Decisions other than those listed in CO 704 I.
3 Minority Investor Voice at Board of Directors Level

3.1 Legal Arrangements

The minority investor’s representation on the Company’s board of directors was agreed upon by contract. The shareholders’ agreement fixed the size of the board of directors to five members with two to be determined by A. Kräuliger, two by Madison, and one upon mutual agreement. The parties to the shareholders’ agreement agreed to vote their shares at the general meeting accordingly. The members to be elected to the first board of directors were listed by name in the shareholders’ agreement. Eligibility criteria stipulating certain qualifications for board members were not implemented. The parties agreed that A. Kräuliger was to remain chairman of the board. Conversely, Madison had the right to determine the vice chairman. At the corporate level, no particular arrangements were used to ensure Madison’s contractual board representation rights.

The shareholders’ agreement defined certain board resolutions as important and provided Madison with a respective veto right. Resolutions classified as important included resolutions of the Company and its subsidiaries concerning (i) changes to the corporate strategy, (ii) approval of the annual budget, (iii) approval of business and investment plans, (iv) approval of expenditures/investments outside the budget in excess of CHF 100,000, (v) definition of costs as extraordinary expenses in excess of CHF 250,000 p.a., (vi) appointment and removal of executive managers, (vii) consent to new shareholders, (viii) decisions on IPOs and other forms of capital restructurings, (ix) the sale of shares of subsidiaries and/or formation or acquisition of new subsidiaries, (x) changes to the organizational regulations, (xi) incurring or amending loans and credit as well as establishing commitments, particularly guarantees and surety, (xii) determining salaries and other forms of compensation of board members and managers, particularly salary increases of more than 10%, and (xiii) the introduction of employee stock participation programs. With respect to these resolutions taken at the group level or at any subsidiary, the parties contractually undertook to cast their votes at board meetings in a way that prevented the respective resolution from being taken if rejected by the other party. Neither the articles of association nor the organizational regulations stipulated any changes to the statutory majority vote requirements applicable to board resolutions. Organizational aspects concerning the board of directors (e.g., the term of office, board meetings, board committees, or an advisory board) were not addressed in the shareholders’ agreement.
3.2 Assessment and Lessons Learned

With board representation rights secured only at the contractual level, Madison acknowledges with hindsight that respective agreements could have been better secured by implementing board representation rights at the corporate level, as well (e.g., via explicit representation rights, a separate class of shares, or suitable election procedures such as cumulative voting). Moreover, in the author’s view, Madison could have better protected itself against the risk that its representatives are removed by the controlling shareholder by making the removal of board members subject to increased majority vote requirements stated in the articles of association, effectively giving Madison veto power against the removal of its board representatives. Thirdly, even though the representatives appointed to the first board of directors were fully qualified, the parties could have stipulated eligibility criteria to prevent any subsequent nomination of unqualified board members.

With regard to Madison’s voice at the board of directors through its representatives, only contractual instruments were used. The contractual voting obligations, as agreed upon in the shareholders’ agreement regarding board resolutions, effectively constituted a board of directors’ agreement, which is subject to more stringent limitations than voting agreements among shareholders. The voting agreements as agreed between Madison and A. Kräuliger were beyond a mere duty of safeguarding the entitled party’s interests and required abstention from voting concerning matters falling within the board of directors’ non-delegable and inalienable duties if the other party did not agree to the respective resolutions at issue. As legal scholars heatedly debate, if and to what extent board of directors can validly enter voting agreements, Madison could not rely upon them as the only means of attaining veto power at the board level. In any case, these agreements should have been made subject to an express reservation that directors’ are only bound by these agreements to the extent they observe the law, bonos mores, and corporate interests. Moreover, Madison could have secured its contractual arrangements with respective instruments at the corporate level (e.g., via increased majority vote requirements regarding board resolutions), so that its board representatives would effectively have obtained a blocking minority regarding critical board resolutions and the investor would not have had to rely on possibly shaky contractual voting agreements concerning board matters.
4 Minority Investor Influence on Management

4.1 Legal Arrangements

The parties agreed via contract that A. Kräuliger continued to function as CEO. With A. Kräuliger also holding the position as chairman of the board of directors, Madison effectively agreed to personal leadership unity. As is typical for private equity investors, Madison had no intention of performing managerial functions or holding executive positions in the Company. Only in case of A. Kräuliger’s unavailability due to vis major would Madison serve as reserve management, and would do so on a temporary basis. While Madison did not plan to be involved on a day-to-day basis, the parties agreed that both make their operative experience available to each other, along with their know-how, and networks to enhance the value of the firm. Madison’s contribution was explicitly defined: (i) to actively contribute to the development and implementation of the corporate strategy, (ii) to serve as a sounding board and sparring partner to A. Kräuliger, (iii) to serve as reserve management, (iv) to provide access to its network, (v) to advise and support the Company in expansion and/or acquisition projects, (vi) to proportionally co-finance any expansion and/or acquisition projects, and (vii) to lead the planning and implementation of a common exit to maximize the parties’ returns. Regarding top management, Madison had a contractual veto right as board member if it opposed to the appointment and removal of managers.

4.2 Assessment and Lessons Learned

In principle, the management arrangement chosen was geared toward helping A. Kräuliger maintain strong control of the Company. In light of its veto rights against any critical management and personnel-related decisions at the board of directors level, Madison felt comfortable with A. Kräuliger functioning both as CEO and chairman of the board. This arrangement also assisted the firm for a gradual transfer of ownership and management. Another reason that induced Madison to accept the joint leadership, at least on a temporary basis, was its experience that in patriarchal companies, the second and third management level is oftentimes weak. The managers on these levels function adequately, but are not fully exposed to competition. Therefore, Madison agreed to have A. Kräuliger retain all his management functions and powers until it was comfortable that the second-level management was ready to take over the firm’s leadership. Concerning other senior management positions, a potential problem that Madison notes was that, in case of a conflict, a deadlock could have arisen concerning the appointment of management personnel, thereby creating a management
vacuum. In such a case, Madison could have been forced either to consent or exercise its exit rights, and thus ‘cut and run’. A solution could have been a legal ex ante arrangement allocating control in dependence on firm performance, so that the minority investor would have received control of the business if it had headed south. Secondly, with A. Kräuliger remaining in a strong leadership position, Madison accepted significant key man risk. This risk was addressed by agreeing that in case of A. Kräuliger’s incapacity (particularly due to death, prolonged illness, or incapacitation) Madison had a call option on his shares at a pre-defined strike price or could sell the entire Company (drag-along right). A third critical aspect arising from A. Kräuliger’s strong management position putting Madison at a potential disadvantage was the risk of unfavorable related-party transactions. Particularly the fact that A. Kräuliger owned a company supplier posed a risk of tunneling. To address these risks, the parties separately agreed on the quantity of products to be supplied and set a price at arms’ length. Other previously existing related-party transactions or private benefits of control were eliminated. Despite this measure, Madison acknowledges that profound trust for the owner family was essential.

5 Minority Investor Access to Information

5.1 Legal Arrangements

As a condition for investment, Madison requested detailed reporting. The shareholders’ information rights were regulated in the shareholders’ agreements. Firstly, the parties acknowledged, in principle, their need for information on the course of business of the Company and its subsidiaries. A. Kräuliger agreed that Madison received access to respective information in consultation with A. Kräuliger. A principal distinction was made between unsolicited reporting and information upon request. As part of the unsolicited reporting, the chairman of the board of directors and the executive management were obliged to provide the board members with key performance indicators concerning the course of business of the Company and its subsidiaries on a monthly basis. Moreover, the board members had to be informed ad hoc of special occurrences. Neither a specific disclosure period nor a preparation period was agreed upon in the shareholders’ agreement. Generally, the shareholders’ agreement followed a principles-based approach and separately provided the Company with a reporting template defining the critical KPIs expected to be reported on a monthly basis. The shareholders agreed upon the application of the Swiss

2449 See Section II.B.1.2.1.3.
GAAP FER orally. Apart from the reporting standards, further quality standards or rules on the procedure of the exchange of information were not agreed upon. Confidentiality undertakings were not part of the shareholders’ agreement. Moreover, no specific information-related cost sharing arrangements were stipulated as part of the shareholders’ agreement.

Regarding information upon request, the shareholders’ agreement stated that the chairman of the board authorized each director to request information at any time directly from the Company’s or its subsidiaries’ executive management on both the general course of business and singular business matters. Moreover, each board member was granted a direct right to inspect company files.

5.2 Assessment and Lessons Learned

The shareholders’ agreement did not stipulate any particular shareholders’ information rights. Only the board members’ information rights were regulated as all shareholders were present or represented on the board of directors. The board members were granted broad information rights in terms of information providers (access to both the board chairman and executive management), time (monthly and ad hoc reporting, requests at any time, i.e., also outside board meetings), and scope (both information concerning the general course of business and singular business matters). The directors’ information rights had no expressly stated limitations (e.g., concerning the type of information, circumstances of the requests, set dates). In essence, the parties attempted to remove any existing information asymmetries to the extent possible, at least on paper.

With hindsight, Madison reports that it is satisfied with the legal structuring of information rights. This is not surprising given the comprehensive access to information it had negotiated for its board members. The board meetings, which were scheduled every second month and where the most important KPIs were discussed, served as the main platform for exchanging information. Requests for information were generally placed with A. Kräuliger or, at least, Madison informed him of information requests in case it approached employees directly. Moreover, Madison views the auditor as a critical source of information. While the access to information of Madison’s board representatives may have been comprehensive, its information rights as shareholder were not enhanced via the shareholders’ agreement. As a result, Madison ran the risk of having no better access to information as provided by law if the controlling shareholder voted the minority investor’s representatives off the board (even though thereby infringing upon the shareholders’ agreement). Hence, in the author’s view, it would have been
worthwhile to implement broader shareholder information rights both contractually and in the articles of association.

6 Rules on Deadlocked Situations and Exit Mechanisms

6.1 Legal Arrangements

In principle, the parties agreed via the shareholders’ agreement to try to solve any differences of opinion or strategic plans amicably and by mutual agreement. Deadlocked situations were defined as fundamental and enduring divergences of opinion with respect to corporate strategy that could result in blocking the general meeting and/or the board of directors from being able to resolve matters (defined as important by the shareholders’ agreement) for more than six months. In case of such a deadlocked situation, the parties agreed on a unilateral exit mechanism allowing the willing seller to sell its stake to a third-party investor if the other party did not exercise its pre-emption right. The third-party investor had to undertake to purchase both the stake of the willing seller and the stake of the other party if such party decided to join the deal and to sell its stake at the agreed price (tag-along right). If this unilateral exit mechanism was not applied, a second exit mechanism to be applied after additional six months was agreed upon provided two years and eight months had lapsed after signing the share purchase agreement. According to such mechanism, A. Kräuliger had a call option at a defined strike price on the Madison’s shares. If A. Kräuliger did not exercise this option within 90 days, Madison was granted a call option at the same price. Deadlock-breaking devices other than those targeted at the parties’ exit were not agreed by contract.

6.2 Assessment and Lessons Learned

By protecting itself against deadlocked situations via exit rights, Madison effectively mitigated the risk of being locked into the investment and being forced to sell at an artificially low price. Madison sees contractual exit arrangements as suitable protection against the other parties’ opportunistic behavior. However, in the author’s view exit solutions are only somewhat satisfying because an early exit triggered by an insurmountable fallout between the minority investor and the controlling shareholder is just a measure of minority investor protection of last resort used to resolve conflicts and deadlocked issues since it effectively means to cut and abandon the project, while voice has a precautionary effect and allows for the possibility of turning the unsatisfactory situation into a successful investment. Hence, enhancing voice is critical in addition to securing exit rights.
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