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Corporate Social Responsibility: Legal or Political Concept in the Swiss Approach ?

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I. Corporate Social Responsibility (CSR)

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- ❖ Concept born in the mid 20th century in the US
- ❖ Many theoretical attempts to define CSR but the concept remains nevertheless unclear
- ❖ CSR qualifies as voluntary reaction of profit driven firms towards societal issues and the promotion of social well-being
- ❖ European Commission revised its definition of CSR in 2011:

“Corporate social responsibility refers to companies taking responsibility for their impact on society”

II. CSR and Corporate Governance

- ❖ According to the 2004 OECD Principles:
“The corporate governance framework should recognise the rights of stakeholders established by law or through mutual agreements and encourage active cooperation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises”
- ❖ According to Swiss Code of best practice for corporate governance (revised in 2014), *“corporate governance encompasses all of the principles aimed at safeguarding sustainable company interests»*
- ❖ The revised Code *“emphasizes in particular the concept of sustainable corporate success as the lodestar of sensible «corporate social responsibility »”*

III. CSR's components (ICGN)

- ◆ Human rights
- ◆ Integrity and fight against corruption
- ◆ Environment
- ◆ Supplier relationships
- ◆ Relationship with the community (media, public authorities, NGOs, philanthropy)
- ◆ Employees (working conditions, health, security)
- ◆ Intellectual capital
- ◆ Customer satisfaction
- ◆ Corporate and brand reputation

IV. Conventional approach in Switzerland

❖ Prof. Peter Böckli:

“Es [the concept of CSR] handelt sich nicht um einen Rechtsbegriff, sondern um ein sozial-ethisches und dann rasch auch politisches Postulat. [.....]

*CSR fällt, ihrer ideologischen Verbrämung einmal entkleidet, mit dem heute weithin akzeptierten Postulat der **Nachhaltigkeit** unternehmerischen Tuns zusammen.”*

“Corporate Governance ist nicht fähig, auch noch die politische Idee der Corporate Social Responsibility zu verwirklichen.”

V. Scope of Swiss regulation

- ❖ CSR is not regulated as such
- ❖ The interests of the stakeholders of Swiss firms are protected, to some extent, under specific laws
- ❖ Increasing trend towards the protection of stakeholders:
 - Employees
 - Consumers and investors
 - Environment
- ❖ Domestic standards not applicable to international affiliates

VI. Sustainable corporate management :

In general

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- ❖ Swiss approach favors corporate sustainability, i.e. corporate management with a long-term perspective, in view of achieving a sustainable business performance
- ❖ Consensus that a company's best interests encompass its stakeholders' interests
- ❖ The maximization of profits is not a legal requisite
- ❖ The legal framework may impede sustainability or indirectly put pressure on Swiss companies to achieve short term financial results:
 - Interim reports required by financial market regulations
 - Annual election of Board members required by the Minder initiative?
- ❖ Legal trend towards an explicit requisite for Swiss companies to act with a long-term perspective

VII. Sustainable corporate management: Examples

- ❖ Swiss federal Constitution (art. 95 III) compels Swiss corporations, which are publicly traded “to ensure a **sustainable** corporate management”.
- ❖ Swiss accounting law (art. 960a IV CO):
“For replacement purposes and to ensure the **long-term prosperity** of the company, additional depreciation and valuation adjustments may be made [...]”
- ❖ The purpose of the FINMA Circular on remuneration schemes (n° 2010/1) is to influence the remuneration practices in the Swiss financial sector in a **long-term perspective**.

VIII. Paradigm shift

- ◆ Some legal scholars call for a legal recognition of the concept of CSR

- ◆ Prof. Marc Amstutz :

*“While up until the 1970s, CSR was seen primarily as a subject for economics, business management, sociology and, to a certain extent, political science, it has since that time also come to be recognized as a **potential subject for law**, as well”.*

IX. CSR as a best practice (1)

- ❖ Major listed companies have enacted corporate governances measures and processes to promote CSR:
 - CSR committees
 - Codes of conduct
 - Reporting and certification

- ❖ Micro self-regulation turns CSR from a marketing tool or a necessary expense into:
 - an asset to improve the company's reputation
 - a business case as such

IX. CSR as a best practice (2)

- ❖ Recent opinions qualify CSR as a **best practice** becoming part of the business judgment

- ❖ Prof. Henry Peter / M. Guillaume Jacquemet:

*CSR “is no longer seen as simply an exercise in style, but as an integral part of corporate values and overall strategy. It has become a significant factor in **risk management** as a way of seizing opportunities”*

X. New legal trends in Switzerland (1)

- ❖ Recent launch of a federal initiative called « Responsible firms – to protect the human being and the environment »
 - Goal: compel Swiss companies to monitor compliance with human rights and environmental law by all affiliates over the world in accordance with Swiss standards
- ❖ Draft federal bill on corporate whistleblower protection
 - the smooth running of the organization, **as well as ethics**, command that reprehensible acts be revealed
 - when public interests are at stake, interests of the community are opposed to the **reputation** of the firm

X. New legal trends in Switzerland (2)

- ❖ Revision of Swiss corporate law focused on certain specific social issues :
 - “*Comply or explain*” requirements related to the gender composition of Boards and management committees of listed corporations
 - Contribute to overcome the issues related to an aging population and increasing skill shortages
 - Specific disclosure duties for commodities companies
 - Contribute to prevent unlawful payments to governments

XI. In sum

- ◆ The conventional Swiss approach promotes sustainability, without imposing the maximization of profits
- ◆ CSR is progressively becoming a standard of conduct and reporting among listed companies
- ◆ CSR should become an integral part of corporate strategy risk or, at least, risk management
- ◆ Trend towards the incorporation of certain social concerns (such as the aging of the population or Switzerland's international reputation) into corporate law
- ◆ Still no mandatory reporting duty as regards non-financial performance

XII. Conclusion

- ❖ In Switzerland, CSR traditionally viewed as a voluntary compliance with business ethics and integrity principles is progressively becoming a good business practice
- ❖ CSR components may be further governed by law
- ❖ CSR will, as such, remain beyond the law: ethical behavior is a “*moving target*” and is larger than the purpose of the law
- ❖ Function of law: not to impede, or even, to favor sustainability efforts
- ❖ Missing today in the Swiss approach: legal duty to report non-financial performance and incentives for shareholders committed to the long run
- ❖ Best driver remains: protection of reputation and/or business case