

Gesellschaftsrecht HS 2019

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Question 1 (25 %; 25 points)

	Points
<p>The first parts of the question are not intended to be jurisdiction specific. The last part of the question focuses on the provisions of Swiss Responsible Business Initiative. The answer should focus on general principles of law and regulation regarding the duties of the board of directors and to whom they owe the duty of loyalty (or ‘fiduciary’ duty) and duty of care. At a minimum, it should raise the issue of whether the board’s duties are owed to company or to shareholders – what is the difference? What are the implications of this distinction regarding how the company is managed? Should have some discussion of the rationale of the applicable rules/principles. Also, the answer should consider whether the board should owe duties to other stakeholders who are affected by the company’s activities. How wide should the duty extend – based on lectures and readings? It is not necessary to cite specific provisions or rulings from Swiss, UK, EU and US law</p>	
<p>Main issues: To whom does the board owe the fiduciary duty? How is this different from the duty of care? Main issues of the board of a (Swiss) multinational confronted with the Swiss Responsible Business Initiative – best interest of the multinational corporate group?</p>	2
<p>In considering to whom the board owes a duty, must consider the main theories of the firm/company. Review the main theories – ‘nexus of contracts’/Coase where company as entity is less important relative to shareholders, and duty measured in terms of whether shareholders benefit; concession theory – company created as a contract with state to ensure that the corporate purpose is fulfilled, can be interpreted as an agency issue (whether purpose fulfilled or not),</p>	2
<p>The duty is owed to the company, not the shareholders directly, but often the duty can be assessed in terms of whether most shareholders have benefitted from the board’s oversight company performance. Performance measured in terms of profits (short-term v longer-term) which relates to sustainability of the company.</p>	2
<p>Communitaire theory measured by whether company fulfilling the state’s best interest; in addition to making profits, does company achieve state objectives (society, economy, employees and purpose), some overlap with concession theory but not primacy of shareholders as can be defined in nexus of contracts or concession theory</p>	2
<p>Concession enjoys most adherence - duty fulfilled if principal’s interest are fulfilled ; the duties are measured in terms of the benefit to the company (sometimes determined by whether most shareholders interests are served) over the medium to longer term.</p>	1
<p>Social Institution Model - Corporate social responsibility alters the analysis by modifying primacy of shareholders and extending to other stakeholders (defined by contract, ie., employees and creditors</p>	2
<p>Extra credit: Board does not generally owe a duty to creditors (duty to creditors set by contract)</p>	1

<p>Fiduciary/duty of loyalty principle - rationale</p> <ul style="list-style-type: none"> - The rules deriving from the fiduciary principle preserve the gains resulting from the separation of management from risk bearing, while limiting the ability of managers to give priority to their own interests at the expense of the firm. 2 - Duty of loyalty – to measure duty fulfilment to company, board to maximize the investors’ wealth over short or medium to long term? Which investors wealth to maximise: all or majority? 1 - Fiduciary principles are meant to be rules for completing “incomplete contracts”. Overcome high costs of contracting (the overarching fiduciary principle replaces detailed contracts on agency problems) 1 - Distinction between management practices that harm investors’ interests, and practices that at the same time benefit managers and investors 1 <p>Duty of care and duty of disclosure – rationale</p> <ul style="list-style-type: none"> - Duty of care – to act as a prudent person does in the management of his own affairs of equal gravity. 1 - Duty to Disclose Conflicts and Material Interests: breach of duty to disclose conflicts and material interests. Duty to report in advance or short time thereafter, example board member should disclose to board an opportunity to pursue personal economic benefit if obtained in service being a board member (even if company not harmed by board member’s conduct) 1 	
<p>Swiss Responsible Business Initiative</p> <p>Board’s duty expanded to take into account international norms/law – human rights/ environmental standards/ labour rights/ child/women etc 1</p> <p>Mandatory due diligence to identify potential risks, take effective measures, report measures taken and violations 1</p> <p>Swiss parent companies liable for violations/breaches of international norms committed by all subsidiaries/companies under parent’s control (even abroad), exemption when parent company demonstrates due diligence to reduce risks of violations 1</p> <p>Liability provisions for parent company stricter than the existing Swiss law liability of parent companies acting as de facto corporate organs of their subsidiaries (Art. 754 CO) extra credit 1</p> <p>Implications of the Initiative – parent’s board liability/duty expanded to include violations of international norms. Vagueness of international norms and law. Remedy in Swiss court for violations abroad, evidence problems. Federal Council: Appealing initiative; but: duty of care along the whole corporate group’s structure might be too tenuous to hold board liable. Need for international standardization of violating norms to determine when board duties are violated. 3</p>	
<p>Total</p>	<p>25</p>

Question 2 (30 %; 30 points)

	Points
a) 8 points total	8
Applicability of EU Takeover Directive	1
UK law applicable both for securities regulation and company law matters (here: defense measures) since target company has registered office there and target company is listed on the London Stock Exchange (art. 4)	2
B AG <u>and</u> A plc's disclosure requirements (art. 6 ff.)	1
reasons: equivalent treatment of shareholders, informed decision making, market efficiency	1
B AG's mandatory takeover bid requirement (art. 5) since it has acquired "control"; requirement of "equitable price" (both terms defined at member states' → UK level)	2
General remarks on implications of Brexit, applicability of EU regulation in future	1
b) 9 points total	9
Board neutrality rule (art. 9)	1
- Discussion of possible hostile takeover defenses and their limited admissibility	2
- Extensive application of Board neutrality rule in the UK for efficiency considerations	2
- Context: Lipton vs. Bebchuk debate	1
- Alternative concept: Breakthrough rule (art. 11), not applicable under UK law	1
- Discussion of art. 12 options since B AG is incorporated in Germany, which to a certain degree opted out from the Board neutrality rule and gives even further discretion to the companies (stronger opting-in or opting-out through adaption of bylaws)	2
c) 10 points total	10
Squeeze-out right of A AG (art. 15)	1
- fair price requirement	1
- Switzerland: 98 % threshold for squeeze-out (art. 137 FMIA) but further option: cash-out merger when acquired 90 % (art. 8 II and 18 V MA)	2
Backdating minutes of company meetings	
- is prohibited under the UK CA 2006 (s. 248, cf. s. 1138)	1
- may qualify as document forgery under the Swiss Criminal Code (art. 251) and lead to directors' liability (art. 754 CO)	1
"Golden parachutes" arrangement	
- vs. Board neutrality rule	1
- Discussion if breach of fiduciary duty	1

- Switzerland: Severance payments inadmissible under the Ordinance against Excessive Compensation (Minder Initiative); if admissible would need shareholder approval since they significantly alter the assets or liabilities of the company (art. 132 II FMIA, art. 36 f. TOO)	1 1
<i>d) 3 points</i>	3
A case of unlawful financial assistance (criminal offense under UK CA 2006 s. 677 ff.)?	1
- Is the reduction of R&D expenditures a misuse of company assets or	1
- a lawful business judgment?	1
Total	30

Question 3 (25 %; 25 points)

	Points
Data Protection aspects (18 points)	18
Applicability of the GDPR	1
- Material scope: Processing (very broad term) of personal data (art. 6; art. 9, since special category)	2
- Personal scope – insurance company as controller, Irish cloud provider as processor	2
- Territorial scope (art. 3, applicable also in EEA states)	1
Presentation of different service models (IaaS, PaaS, SaaS) and deployment models (Private, Community, Public, Hybrid Cloud) ;	3
discussion that risks are different depending on the models (problematic are especially SaaS and Public clouds)	2
Risks with regard to the U.S. CLOUD Act: U.S. based holding company has "control"; mandatory disclosure based on CLOUD Act is regularly a breach of art. 48 GDPR (no disclosure treaty on mutual judicial assistance)	1
	1
Measures:	
- Clarification of data residency: Needs to be beyond U.S. control	1
- "Data custodian model" or better: Irish subsidiary would need to become independent	1
- Pseudonymization/Anonymization of personal data	1
- Make sure that cloud provider can fulfill GDPR duties, such as right to erasure	1
- Contractual exclusion of sub-processing	1
Corruption/Bribery aspects (7 points)	7
Applicability of UK Bribery Act 2010/US Foreign Corrupt Practices Act 1977	1
- Potential corrupt behavior of an employee of the Indian subsidiary "for the company" falls under the personal-material scope of these acts	1
- Extraterritorial application (to Indian subsidiary or even to Norwegian parent company) when subsidiary or parent carries business in the UK or the USA	2
Risk of high fines/reputational damage	1
Measures:	
- Raising awareness for special "geographic risks"	1
- Implementing anti-bribery compliance systems; culture of non-corruption; decision-making tools	1
Total	25

Question 4 (20%; 20 points)

	Points
Quote from Milton Friedman “There is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits”	
This is opinion question. No correct answer. How you justify and make your argument is most important.	
Raise question – what is purpose of corporation? Shareholder wealth maximization – either through nexus of contracts or company as creation of law to make profits for principals/shareholders.	1
Or are there broader social responsibilities – corporate social responsibility debate. Should generally state what issues they will address in essay	1
Shareholder wealth maximization argument: If shareholders want to give profits to society free to do so out of their profits earned as shareholders of corporation. But corporation only duty is to distribute profits to shareholders. All corporate activity must be measured in terms of whether goal is met.	2
Discussion should state whether agreement with this proposition. Are other theories of corporate law relevant? Which theories? Can discuss several. Most important to discuss Social institution model and related corporate social responsibility issues – responsibility to broader society – which part of society.	2
Parkinson’s idea of social institution model – extra credit	1
Janet Dine article – corporate stakeholder obligations and companies should have purpose – extra credit	1
Social institution model suggests that companies serve broader social role that should be measured in terms of company’s impact on employees, suppliers, creditors, customers, and local (and international) communities. Elaborate on these responsibilities	3
Cite New Jersey Supreme court case in which corporate donation to university upheld as Not violating duties of board of directors to company - extra credit	1
Not merely ‘private organizations’ but ‘social enterprises’ which the state influences for the ‘public good’. Or is the company purely a private entity whose profits (and losses) are only a concern of shareholders as contracting parties.	2
Historically, companies had stated purposes and making profits was only one criterion to determine whether they were fulfilling social responsibilities. Discussion of other responsibilities	2
Should companies be required to state a purpose? Discuss	2
Should purpose of corporate law and company operations be mainly to serve interests of Members/shareholders? Discuss	2
Should the purpose of the company be broader? Than serving shareholder interests? Discuss pros and cons of moving away from the shareholder exclusiveness model	2
Conclusion and summing up of overall argument	1
Total	20

