

EXAM 2 – SESSION JANUARY 2021 – Question 1 (20%)	Points
Discuss theoretical basis of corporation. Coase theory – agency problem based on investor contracting with another to invest in company. Shareholders are principal and the board/company/employees – agents. Goal: design of a complete contract	2
Concession theory – agency problem involves shareholders as principal and company as agent, but company has separate personality and purpose that is not necessarily the same as the shareholders. Company becomes a type of principal.	2
Discuss communautaire theory of corporation: corporation an instrument of state. Broader notion of principal to be state acting on behalf of nation/society.	1 (EC)
Role of shareholder involves acting collectively (not individually) at a meeting – general or specially called	2
Examples of shareholder powers: electing board	1
Approving/amending bylaws and articles of association	1
Remuneration (Switzerland) but only advisory in other jurisdictions	1
Approve fundamental change of purpose or name	1
Shareholders have duty of loyalty to each other (extra credit)	2
Role of board - govern/oversight day-to-day aspects of company	2
Board can decide to pay dividends and set strategy of company or remuneration policy	1
Duty of loyalty or fiduciary duty. Discuss this duty in either UK, Swiss or Delaware context. The duty to act in best interest of company	1
Duty of care – perform of board director duty conforming to skills of individual director	1
Delaware law – Business judgment rule in determining strategy of company – can make mistakes without liability as long as duty of care fulfilled.	1 EC
Discuss how interests diverge – short-term share price v long-term profits/performance.	1
For instance, reinvesting dividends or paying out as profits	1
Concepts of Exit, Commitment/monitoring, and Loyalty,	2

Write what role corporate law can play to align the interests. Implications for aligning interests. Is disclosure enough in corporate law to align interests or must more fundamental change be made. What about role of institutional investors representing shareholders (ie., pension funds). Concept of stewardship	1 1 EC
Should corporate law require pursuit of corporate purpose to be primary for Board and shareholders. Or is it not practicable for shareholder pursuit of profits while board's pursuit of company's purpose and longer-term viability cannot be reconciled	1
EXAM 2 – SESSION JANUARY 2021 – Question 2 (35%)	Points
Coming soon	
EXAM 2 – SESSION JANUARY 2021 – Question 3 (25%)	Points
<u>Advise B's BoD</u>	
Main issues: Control transaction, permissible defensive measures, shareholder vote on remuneration provisions	1
Assumption that corporation B's shares are stock market listed	.5
Takeover bid (definition in Art. 2 I a EU Takeover Directive [EU-TD]) is „voluntary“ and directed at all shareholders for all their shares	1
Hence: This is not really about the mandatory bid rule, opt-up, opt-out etc.	1
Condition („more than 66 2/3 %“) is permissible (in order to reach qualified majority)	1
Which EU member states' law would be applicable? Art. 4 EU-TD Restrictions on defensive measures:	1
EU default setting: Board Neutrality rule (Art. 9 EU EU-TD)	1
Shareholder approval necessary for defensive actions	1
– apart from finding a „white knight“ –	.5 (EC)
Opt-out/opt-in of/to restrictions by member states/companies (Art. 12 EU-TD)	1
Short discussion of Lipton vs Bebchuk debate No indication for applicability of Breakthrough rule (Art. 11 EU-TD)	2
Similar in Switzerland: No significant altering of assets or liability without shareholder approval (Art. 132 II FinMIA)	1

Severance payments or „golden parachutes“ are remuneration provisions	1
EU: Necessity of binding or advisory vote (depending on member state) on remuneration policy and reports (Art. 9a and 9b EU Shareholder Rights Directive II)	1
Switzerland: Severance payments are a prohibited type of remuneration (Minder Initiative, Ordinance against Excessive Compensation, Art. 732 ff. revCO)	1
<u>Discuss</u>	
Main issues: Duty to extend the offer period, B’s breach of GDPR, liability of A’s BoD	
Condition („more than 66 $\frac{2}{3}$ %“) is met	1
Switzerland: „interim result“; in this case, offeror must extend offer period for those holders of shares who have not yet accepted the offer (Art. 130 II FinMIA)	1
i.e. A must offer the same 50 % premium to remaining shareholders	.5
EU: extension of offer period is subject to national law; if member state provides for a squeeze-out right at the 90 % threshold, then remaining shareholders have a corresponding sell-out right according to Art. 16 EU-TD	1
at „equitable price“ – left to member states to define (e.g. highest price paid over the last twelve months [i.e. probably the 50 % premium offer] or appraisal value by court)	1
Material applicability of GDPR: processing of personal data (Art. 4 I f. GDPR)	.5
Wide extraterritorial application due to market place principle (Art. 3 II GDPR) – applicability highly likely even if B were not established in the EEA, Art. 3 I GDPR); applicability in time (GDPR entry into force: May 25, 2018): given, since profiling / automatical assessment happened in 2019	1
B: Breach of Art. 22 GDPR	.5
- Definition of profiling in Art. 4 IV GDPR	1
- Case describes an automated individual decision-making based on profiling which produces legal effects; statutory prohibition applicable	1
- No justification, especially no explicit consent since costumers were unaware	1
- Competent authority is a member state’s data protection authority (independent public authority, see Art. 51 GDPR)	.5

- Fine (Art. 83 V b GDPR): up to EUR 20 Mio / 4 % of annual turnover	1
Liability of A's BoD for overpaying B's shares	1
- No indication of conducting due diligence before setting the 50 % premium	1
- „Business judgment rule“ – presumption applicable? Arguably no since business judgment was not informed	.5
- Liability according to applicable law; e.g. Switzerland: Breach of Duty and Care (Art. 717 in conjunction with Art. 754 CO)	1
EXAM 2 – SESSION JANUARY 2021 – Question 4 (20%)	Points
The answer should address the debate on stakeholderism vs shareholderism and their key characteristics.	2
A broader answer could also include sustainability as a further development of stakeholderism, and an analysis of its characteristics	3
Furthermore, it should explain the differences between short-term and long-term and how these concepts are (sometimes falsely) related to shareholderism and stakeholderism, emphasizing the possibility that long-term value does not necessarily imply a stakeholder value oriented approach, as well as short term value does not necessarily imply a shareholder oriented strategy.	1 1 1 .5
Legislative initiatives could include (but not limited to):	
- Better definition of what is sustainability, especially in the context of Environmental Social Governance (ESG) indicators	2
- Incentives for changing the business model and opting for more sustainable activities.	2
- More inclusive corporate boards.	2
Milton Freedman quote that profits of corporation are sole objective and shareholders can make contributions to CSR cause if they choose	1
Criticism of this view –	1
emphasizing role of stakeholders.	1
Creditors,	1
employees and those indirectly affected by company's operations	2