Question 1 (35%)	Points
Generals	35
The question involves a Swiss company with subsidiaries in United Kingdom and Japan. It addresses the lawfulness of the remuneration of a senior employee Ghosich under Swiss and EU/UK law, and whether Ghosich is liable for failing to disclose his full salary and remuneration arrangements. The question also involves possible company and/or director liability under swiss law for having provided a golden parachute in Ghosich compensation package and raises the issue of whether his compensation package had been approved by shareholders. It is not necessary to cite specific provisions or rulings from Swiss, UK, EU and US law, but rather to identify the main issues and discuss them and explain the rationale of the applicable principles and rules. Citing relevant Swiss and UK statutes is fine.	2
Main issues: - 1. Did the Board of the company breach its duty of care and/or loyalty by mis-stating Ghosich's salary and remuneration package? - 2. Lawfulness of Ghosich's remuneration arrangements - 3. Is Ghosich individually liable for failing to disclose and if so was the non-disclosure a form of market manipulation?	2
Fiduciary principle - 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. - Principle-agent problem - Distinction between management practices that harm investors' interests, and practices that at the same time benefit managers and investors - Is the approval of such a compensation package for Ghosich a breach of fiduciary duty? - As a senior manager of the company has Ghosich breached a fiduciary duty by misreporting and at the least failing to disclose the correct compensation.	2 1 1 2
Duty of care, duty of loyalty and duty of disclosure - Duty of care – to act as a prudent person does in the management of his own affairs of equal gravity. - Duty of loyalty – to maximize the investors' wealth rather than one's own wealth (Swiss & UK) - Duty to Disclose Conflicts and Material Interests - Did company board breach duties of care, loyalty, disclosure regarding Ghosich compensation	2 1 1
- Ghosich failing to disclose correct compensation. And company failing to disclose correct salary. - Market abuse can consist of creating false or misleading impressions **and** distorting markets (demand or supply distortion). This means that any deliberate release of inside information that is not already in public domain (not previously disclosed to market) is market abuse and a form of insider dealing. - EU/market law also prohibits disclosing false and misleading information to market. Rationale of market abuse/ID laws. **Relationship based Rationale:** ID= breach of the fiduciary relationship of trust and confidence, where one can be established between typically the insider and the company concerned. Did Ghosich breach duty of care to company by failing to disclose. Did the board of the company breach duty of care failing to disclose correct and lawful salary.	1 2 1 2

CH Law:
- Disclosure requirements on compensation for listed companies in the annual report (663b bis CO)
- Challenge the individual transactions? Maybe, based on 678 CO.
  o Apparent misappropriation of company property (unlawful salary)
  o Misappropriation prejudicial to the economic situation of the company
  o Bad faith of the board and Ghosich in receiving salary
  o if all criteria are not fulfilled →no action
- File a liability suit? Yes, however unclear, if the company or individual shareholders suffered a damage =) if no damage, no suit.
  o Possible to file the liability suit pursuant to art 754 CO (CH) in connection with the breach of the duty of care & loyalty in art. 717 CO. The directors are acting in their own interest instead of the interest of the company which is a breach of the duty of loyalty.
  o For a successful liability action it is necessary to have a damage that was caused by the unlawful behaviour of the director. It is unclear if the company suffered any damage.
	
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- A problem: conflict of interests =) breach of duty to disclose conflicts and material interests - Breach of duty to disclose conflicts and material interests including correct salary/compensation to shareholders and the market potential shareholders (c) CH Law Breach of VegüV / Breach of any other rules on compensations and bonuses Conclusion – summing main points and conclusions on the main issues.	2 2 1 2
Question 2 (20%)	20
The question is normative, asking under what circumstances should auditor/accountant be held liable to shareholders for mis-reporting the company's financial position Can be answered with own view of when auditors and accountants are held liable or Explain what a particular legal system requires (discussed in class) – either UK, EU, US or Swiss law. For example, UK law: Auditors owe a duty of care to the company in the interests of its shareholders. But company only has right to bring action against auditors for negligent audit, unless specific facts of case show the auditors making direct representations to shareholders additionally to reporting to the board	 2 1
Issue = civil liability of auditors based on Tort liability = if no contractual relationship between plaintiff and defendant Duty of care: to whom does auditor/accountant owe a duty of care Proximity of auditors/accountants to shareholders Is the relationship between the auditors and the shareholder proximate enough? Duty of care owed to shareholders as a class = in order for them to be able to exercise their class rights Duty of care owed to shareholders „for the purpose of enabling them to scrutinise the conduct of the company's affairs and to exercise their collective powers to regard or control or remove those to whom that conduct has been confided" (*Caparo* case) But duty of care generally not owed to individual investors	2 2 2 5

Case law: *Caparo Industries PLC v. Dickman* Under the Caparo test, three elements give rise to a duty of care: (i) foreseeability of damage, (ii) proximity and (iii) fair, just and reasonable to impose liability	2
Duty of care owed to the company in the interest of the shareholders, but duty of care owed to the innocent shareholders that were not given the opportunity to exercise their class rights properly at the general meeting.	1
If auditors/accountants make representations to shareholders directly then a duty arises that those representations should not made negligently or dishonestly	1
However, there were innocent shareholders who relied on the inaccurate audited reports in order to vote at the general meeting and (re)elect the board members	1
Case law: *Moore Stephens v. Stone & Rolls Ltd (in liq)* *Ex turpi causa* defense = illegality defense question of the civil liability of auditors in the case of insolvency of the company If wrongdoing is attributed to the company or shareholders themselves, It is not possible for the company or shareholders to rely on its own illegality to sue the auditors = applies in cases where there are no innocent directors or shareholders	(3)
Duty of care also not owed to creditors even in the case of insolvency proceedings Liquidator will not able to recover money for the creditors if auditors can assert the *ex turpi causa* defense that board and/or controlling shareholder acted dishonestly or legal breach.	(1)
Swiss Law: liability of auditors (755 CO) Conclusion – summarizing main elements of view	(2) 1

Question 3 (25%)	25
The discussion should address whether:	
• Which country's insider dealing/market abuse laws should apply	2
• Was Hannay informing Bertie about the merger negotiations a form of insider dealing or market abuse? EU law and Swiss law can be discussed.	2
• Was Hannay's message 'inside information' – that is, was it specific or precise and likely to have a significant effect on price of securities.	1
- Definition of insider dealing (ID)= trading in organized securities markets on the basis of material, privileged or non-public information in order to make a profit or avoid a loss. - Insider dealing law necessary in order to promote the efficient pricing of securities and to enhance the integrity of the capital markets. Insider dealing is a form of market abuse. Market abuse also can consist of creating false or misleading impressions **and** distorting markets (demand or supply distortion). This means that any deliberate release of inside information that is not already in public domain (not previously disclosed to market) is market abuse and a form of insider dealing. - EU/ID law also includes encouraging or requiring another to commit market abuse/ID	5 1
Rationale of market abuse/ID. **Relationship based Rationale:** ID= breach of the fiduciary relationship of trust and	1

confidence, where one can be established between typically the insider and the company concerned.	
Misappropriation theory. Insider information is property which when disclosed illegally is stolen information (or property)	1
EU Market Abuse Regulation (MAR) 2014. Administrative liability and criminal sanctions MAR creates maximum administrative fine of not less than euros 5 million or 10% of annual turnover of legal person. Art 7.	1
MAR defines inside information as 'a precise nature', 'not been made public', relates to one or more issuers of financial instruments', and if information made public it would have a significant effect on the prices of those financial instruments'	(1)
MAR Art 8 (1) – insider dealing arises when a person possesses inside information, uses that information by acquiring or disposing of it for its own account or account of third party involving financial instruments to which the information relates.	1
Use of inside information includes by cancelling or amending an order concerning a financial instrument to which information relates and order was placed before the person concerned possessed the inside information	(1)
EU MAR 12 (1) – Market manipulation – any other behavior which gives or likely to give false or misleading signals as to supply or demand or price of financial instrument or related spot commodity contracts or auctioned product based on emission allowances.	1
Market distortion – MAR 12 (2) (a-e) securing dominant position over supply or demand, fixing or creating unfair trading conditions	1
UK Criminal Justice Act, part V, section 57 (1) & (2). Also section 118B Financial Services and Markets Act 2000 – defining insider as any person who has inside information.	(1)
UK market abuse law section 118 creates liability for individuals or entities ('person') and therefore should the Hannay's employee JB Morton bank be liable	2
UK inside information defined as specific and/or precise, not been made public, and if made public would have a significant effect on price of any securities. 'Ýou might be interested in this deal. A favour for a friend.'	2
Was the information 'specific' or 'precise' ? or likely to have an impact on price of securities	2
Hannay's leak to Bertie is a form of insider dealing/market abuse, even though Bertie never acted on the information. The act of leaking is unlawful under EU law	2
- Swiss law position (extra credit). Art 143 (a) FinfraG – unlawful to disseminate information which individual should know gives false or misleading signals regarding the supply, demand for price of securities trading on a trading venue in Switzerand	(2)
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Question 4 (20%)	Points
	20
Introduction - Discuss what the role of limited liability in enhancing corporate law and historical development of limited liability in European law.	2
What is the understanding of a company in corporate law. Shareholders separate legal persons from the company. Shareholders subscribe to the company to purchase shares.	1
History of companies across Europe. Companies had different purposes set by legislation. But the objective of legislation was to attract shareholder investment. But there was no limited liability in 16th/17th/18th centuries until UK legislation in 1844 (for joint stock banks) and 1857 creating limited liability for shareholders for all types of companies.	2
• Late 18th/early 19th centuries - Unincorporated joint stock companies • Incorporation by registration (1844 UK Companies Act) • Limited liability enabling & incentive to invest. Facilitate efficient management of business (1855 UK Limited Liability Act) • Number of promotions grew substantially after 1855 in England • US state restricted limited liability for corporations: eg., *double or triple liability of value of shares* • US National Banking Act 1863 – *par value of share + value of investment*	(2)
Salomon case. Discussion of facts. Salomon a single shareholder of Salomon Ltd. Salomon Ltd borrows from bank. Salomon Ltd defaults. Bank sues Salomon individually and argues that Salomon was agent of company and/or had a fiduciary duty to company to ensure it paid its debts to creditors. Court rejects this view holding separation of personality between shareholder and company and without more shareholder only liable for investment contract to subscribe for shares in the company and not liable beyond that for debts of the company. Shareholder not ow property of company, only entitled to residual profits.	2
Theoretical justification of Salomon. Encourage more investors to subscribe for company shares during a time of market expansion. Downside: costs to creditors if company not able to pay. Costs to third parties who are injured and suffer losses from company's action, even though they may not have wanted to engage with the company prior to the injury (accident law).	1 2
Corporate group liability and piercing corp veil, holding company liable for subsidiaries contracts. Adams Cape Industries (1992) South African subsidiary of UK holding company.	
• strict application of the Salomon principle even though the group had been restructured so as to avoid liability • Germany: *"Konzernrecht"* = law of groups • Switzerland - Principle: Parent company and subsidiary are separate legal entities – creditors of the subsidiary cannot get the parent company's assets Exception: Possible to pierce the corporate veil if the parent company misuses the group structure in order to escape from liability – creditors can get the parent company's assets when the subsidiary is insolvent	2 1 1
• Principally the parent company as a mere share holder of the subsidiary has no duties going beyond the obligation to pay in full for its shares and is not liable for the debts of its subsidiary (Art. 620 II and Art. 680 I OR). • However the parent company might be liable if she is found to be a «de facto corporate organ» of the subsidiary. The same applies for her employees or members of her corporate bodies who are «de facto» corporate organs of the subsidiary (UBS	1

Case BGer 4A_306/2009 from 8. February 2010). • CH limited liability CO and liability of holding company for actions of subsidiary 754 CO liability for directors – piercing the veil. o Liability for a Swiss corporate parent that has acted as a de facto corporate organ in case of violation of a duty (Art. 754 OR) o Liabilities arising from other legal grounds: ➢ Liability arising from trust in the group (Swissair Decision, BGE 120 II 331) ➢ Liability arising from Swiss tort law in the event that a corporate organ of the parent company harms a subsidiary through an unlawful act in terms of Art. 41 et seq OR Liability arising from the impossibility to tell apart the parent company and the subsidiary (eg. the entities have similar names of their firms, same headquarters, same buildings, same persons with authorisation powers, same telephone lines etc., see the Givaudan-Case, BGE 137 III 550) Theoretical basis of limited liability discussion - **Property Model** (Anglo-American Tradition). Limited liability based on property model of company law o Shrds = owners of the company o Separation of ownership and control o Right to company's residual income =) legitimates the shareholders' right to have company run exclusively in their own interest (private property right) ▪ public company vs private company. Model does not match to public companies ▪ ownership of company vs. ownership of ordinary property ▪ the way companies are operated has wide implications for other groups + success of the economy as a whole	(1) (1) (1) 2 2
- **Nexus of contracts model** (UK / USA) o Criticizes the property model – separation of ownership and control is a conceptual error; shrds are not seen as owners of the company, but as capital suppliers o Corporations are nothing but a collection of contracts between different parties o No authority relationship between managers and employees o All disputes about the obligations should be settled by resort to the methods used to interpret contracts =) no fiduciary duties, no additional duties owed by companies as institutions	(2)
Conclusion – take a view summarises beneficial and disadvantages of limited liability	1
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