

The governance of subsidiaries

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Many of the companies in Zug are subsidiaries of foreign groups, whose governance raises questions that differ from those of independent companies. The board of a Swiss subsidiary owes its duties to the subsidiary itself, with no direct duty towards the parent company or the group. It must act in the interest of the subsidiary and may take into account the interest of the group only insofar as this is compatible with the interest of the subsidiary.¹ In practice, the board of a subsidiary follows the instructions of the parent company in most matters, but it must refuse instructions that would harm the subsidiary or its creditors, such as the transfer of assets to the parent without adequate consideration, the grant of upstream guarantees that endanger the subsidiary's solvency or the participation in transactions that violate the law.

The questions become acute in two situations. The first is the financial distress of the subsidiary or of the group. The revised company law requires the board to monitor the solvency of the company and to take measures when its liquidity is threatened. The board of a subsidiary may therefore find itself in conflict with the parent company when the group wishes to use the subsidiary's resources to support other parts of the group.² The second is the involvement of the subsidiary in conduct that raises legal risks, such as the circumvention of sanctions, corruption or money laundering, where the members of the board may incur personal criminal liability.

For the Swiss resident director of a subsidiary of a foreign group, often the only Swiss member of the board, these questions are of personal importance. The director is exposed to liability under Swiss law for the conduct of a company whose business is managed from abroad and whose decisions he may not fully control. The practitioner who advises such a director should ensure that the director has access to the information he needs, that the organisational regulations of the board define his

responsibilities clearly, that the company has adequate directors' and officers' insurance, and that the director is prepared to resign if the company engages in conduct that he cannot prevent.

1 Notes

1. OR, Art. 717 para. 1 (SR 220), gesetzestexte.help.ch: duty of the board of directors to safeguard the interests of the company in good faith; Federal Supreme Court, BGE 130 III 213 of 9 January 2004, consid. 2.2, servat.unibe.ch: a board member of a group company is bound to safeguard the interests of that company alone and breaches his duty of loyalty where he acts to its detriment in favour of other group companies. ↩
2. Source as cited in the printed edition. ↩

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