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## Taking Conflicts of Interest Seriously: Why Should Swiss Corporate Law Explicitly Address Conflicts of Interest?

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Over the last ten years, agency theory with its focus on conflicts of interest has become the dominant theory of corporate law in Switzerland and internationally: It is a commonplace to conceptualize the structure of business as involving a specialized but self-interested agent acting for a principal, who must accept a tradeoff between profiting from the expertise of the agent and the costs that arise out of the agent's misuse of the discretion. Under this paradigm, corporate law is thought as a set of institutional rules seeking to ensure that managers will act in the best interest of the corporation and thus of the shareholders and that managers and controlling shareholders will also cater to the interests of the minority investors. This approach underlies both theoretical studies and reform projects internationally and in Switzerland.

Yet, a resolutely positivist outsider who would take on to study Swiss corporate law would be quite surprised: conflicts of interest are not mentioned a single time in the entire set of provisions of the code of obligations governing corporations. An odd provision requires managers and directors to document in writing any contract with themselves with a monetary value of more than CHF 1,000 (Article 718b CO), hardly an insurmountable hurdle even to the most egregious forms of self-dealing. Even in the broader set of rules making up corporate law, they appear once, almost casually, in an implementing ordinance of the Federal Act on Securities Trading and Stock Exchanges, where the board of directors is required to report on conflicts of interest it may face and the measures it adopted to address them in the context of a takeover (Article 32 Takeover Ordinance) This grim outlook extends generally to the duty of loyalty, the positive component of conflicts of interest, which is expressly mentioned in a single provision (Article 717 (1) CO) and enforced through the liability of directors of officers. While this open textured standard is the base for extensive scholarly discussions and could have yielded a richly textured case law on conflicts of interest, this is hardly the case. With the exception of the enhanced standard of review in the presence of self-dealing, Swiss courts did not take on this task.

This observation leaves us with a puzzle: On a theoretical level, does the dominant paradigm of corporate law fail to capture the Swiss legal system in some essential way? On a more practical level, how are shareholders and, specially, minority shareholders protected



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against self-dealing and other forms of conflicts? Are investors left to rely on social norms and the professional ethics of directors and managers, hoping that a few good men will be at the helm of corporate Switzerland? In this paper, I propose to answer to these questions: In a first step, I will show that while the bulk of Swiss corporate law does not address conflicts of interest directly, it acts implicitly as a check on this issue in certain circumstances that are deemed particularly egregious: paying in capital and dealing with directors, managers and shareholders. Moving on from the descriptive to the analytical, I will then seek to show that this implied function is not an appropriate means to address conflicts of interest in the corporate environment. This analysis will account both for the quality of the norms and the institutional capacity of the actors called to apply the rules, namely courts, but also directors and officers as well as to a certain extent other players such as the registry of commerce and the auditors. At the same time, it will also seek to incorporate the costs of such an approach: by failing to express directly the primary concern, the legal system risks being both over and under inclusive, tackling issues that need not be resolved, while leaving certain source of concern unanswered. More, critically, this reliance on rules may fail to engage and reinforce other means of ensuring compliance, such as self-regulation, social norms and professional ethics. In sum, if addressing agency problems and conflicts of interest are the key concern of corporate law, these issues should be addressed directly through a set of rules crafted to solve or at least mitigate them. Only then, will conflicts of interest be taken seriously.