

Corporate Governance: The «Cadbury Report» and the Swiss Board Concept of 1991

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Die Aktienrechtsrevision hat auf den 1. Juli 1992 dem Verwaltungsrat neue Rechte und Pflichten der Selbstregulierung und Hauptaufgaben zugewiesen. Ende 1992 kam in London der «Cadbury Report» heraus, der für die britischen Aktiengesellschaften mit kotierten Titeln präzise Regeln der «Corporate Governance» gebracht hat. Ein Vergleich zeigt eine erstaunliche Übereinstimmung in den Hauptanliegen und den Lösungsansätzen.

Avec la révision du 1^{er} juillet 1992 du Droit de la société anonyme, le conseil d'administration s'est vu attribuer de nouveaux pouvoirs et obligations d'autorégulation et de nouvelles fonctions. Fin 1992 paraissait à Londres le «Cadbury Report» qui introduisait des règles précises de «Corporate Governance» pour les sociétés anonymes dont les titres sont cotés en bourse. La comparaison de ces textes fait apparaître une convergence étonnante entre les principaux problèmes traités et les solutions préconisées.

In the revision of Corporation Law, which entered into force and effect on July 1, 1992, the Board of Directors was attributed new powers and obligations of selfregulation and core duties. In late 1992, the «Cadbury Report» was published in London which established precise rules for Corporate Governance applicable to British listed companies. A comparison shows an astonishing concurrence in the principal problems and ways to solve them.

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1. Introduction¹

The discussion of «Corporate Governance» had its origin in the United States and Britain, but spread to Continental Europe and suddenly became a topic in Switzerland in the nineties. Today, it is not without interest to compare the British approach, as laid down in the «Cadbury Report» of 1992, with the Swiss Concept of the three Articles 716, 716a and 716b in the Corporation Law as revised in 1991.

It is a fact that those to whom corporate law really addresses its messages – businessmen – are likely to experience Law and Regulation as a strait-jacket at the worst, and as a nuisance in the best case. Still, in the area of Corporate Governance company law definitely is playing a positive role of guidance and even, to some extent, of innovation.

A few premises:

- (i) This paper addresses *Swiss public or larger private companies*. This is justified through the fact that a considerable number of the more important European companies today are operating under Swiss Corporation Law. Smaller corporations do have their own Corporate Governance problems but they differ in a number of respects.

¹ Reviewed version of the paper presented at a Leadership Session of the St. Gallen University's «International Management Symposium», May 20, 1996. – The author is most grateful to Mr. David Mann for his advice as to both the content and the language of this paper. See at the end: *List of References and Further Reading*, as well as the wording of the main parts of the «Cadbury Report», London 1992.

- (ii) Not only is the term Corporate Governance *Anglo-American*, but also the phenomenon as such. Corporate Governance has been perceived as a problem – and dealt with both in theory and practice – in America first, and then in Britain, as a corollary of another new phenomenon, the growing importance of *institutional shareholders*². In Switzerland it has been taken up as a problem of proper functioning of managerial and monitoring powers at the top of business corporations in the 1983/91 law revision process.
- (iii) «Corporate Governance» is, as a technical term, hard to define and, therefore, hard to translate into French or German. One should see in this term³, whose vagueness adds to its popularity, reference to the *art of structuring the top levels of a business corporation so as to ensure a balanced and efficient functioning of leadership and control*. Although «Corporate Governance» and «Shareholder Value» are topics often discussed in common, the notions are different; «governance» has an organizational importance beyond the question of economical and sociological priorities attributed to the main objective of a business company.
- (iv) The «Cadbury Code of Best Practice» is largely about «NEDs»; to those who are not familiar with the latest Anglo-Saxon acronyms it may help to hear that a «NED» is a «*non-executive director*» in the British variety of the English language, equivalent to an «*outside director*» in Americanese⁴.

The discussion on Corporate Governance has reached a certain stage of maturity also interna-

tionally through the publication in England of the «*Cadbury Code of Best Practice*» for Boards of Directors in late 1992. In the process of juxtaposition of «Cadbury» with the revised responsibilities of the Board of Directors in the Swiss Corporation Law one should keep in mind the antipode of Anglo-American and also Swiss ideas on Corporate Governance: the German «two-tier» system of «*Aufsichtsrat/Vorstand*». Established by 1870, in a remarkably early anticipation of modern ideas about separation of leadership and control, Swiss lawmakers have steadfastly refused to adopt it ever since. In fact, the Swiss law's concept of Corporate Governance probably is the closest of all in Continental Europe to Anglo-Saxon ideas.

Following a glance at the British initiative and the Swiss Board concept of 1991, both will be compared with the two-tier German system. It will be shown that self-regulation of Governance is a striking characteristic of Swiss Corporation Law. Finally, the paper will touch on the current introduction of Board Committees in Switzerland and deal with a significant unresolved problem – effective provision of information for NEDs or outside directors –, to have a look at latest trends.

2. The «Cadbury Report» of 1992

a) Cadbury's Main Messages

It is hard to imagine today how any discussion of Corporate Governance could by-pass the «*Cadbury Report*» and the corresponding «*Code of Best Practice*» which both came out in London as a draft in May 1992. A committee headed by Sir Adrian Cadbury had been set up a year before by a coalition of the London Stock Exchange, the British Accountancy Profession and other influential bodies of the Island set in Silver Sea, to address, precisely defined, the «financial aspects» of Corporate Governance. The committee, clearly created on the background of a general feeling of discontent, was to show ways to raise the standards of Corporate Governance in the United Kingdom.

The influence of the *self-regulatory set of rules* that came out of the effort of Sir Adrian and his colleagues today is by no means limited to Britain where an annual report on compliance with «Cadbury» has become a listing requirement. In Continental Europe, too, it has unfrozen the debate which, for years, was

² Where institutional investors today own the majority of all outstanding shares (pension funds, mutual funds and other institutional investors combined), *Russell Reynolds* (1995) 3; «Institutional shareholders to take a newly active role in enforcing good governance», *Davis/Lowry* (1994) 58.

³ *Cadbury Report* (1992) para. 2.5: «Corporate Governance is the system by which companies are run», an apogee of the English art of definition; more specifically: «Corporate Governance is the system or matrix of responsibilities of directors and shareholders by which companies are governed and controlled», *Cadbury Report*, para 2.5.»

⁴ As regards the discussions in Switzerland, see *Marie-France Berset* (1988) 133, *Peter Forstmoser* (1992) 31, *Peter Nobel* (1995) 1057, *Peter Böckli* (1996) 826 and *Rita Trigo Trindade* (1996) 62.

focused on the German «Aufsichtsrat/Vorstand»⁵ and provoked either enthusiastic adherence or stiff-necked opposition to the two-tier system.

While the substance of the Cadbury Report and the Code of Best Practices cannot be reduced to a few words, its *salient points* carry, in reality, five fundamental messages:

- (1) It maintains a *Unitary Board*, but assigns *special roles to «NEDs»* (non-executive or outside directors) by entrusting them with *specific monitoring functions*.
- (2) It *structures the Board* by formalizing the «NEDs»' selection, insisting on their independence, stressing the need for «NEDs» with «calibre» and giving «NEDs» the right to independent professional advice (at the company's expense, and outside of the legal department of the company, to be sure). An abandoned controversial part of the draft version even went to the heretic point of calling for an «*appointed leader*» of those «NEDs» whenever the Chairman is also the Chief Executive. Sir Adrian retreated on this point, and in the final version of «Cadbury», this obvious Saint Andreas fault in the legal Board landscape was deftly plastered over by the request merely for the NEDs to form a «*strong and independent element on the Board, with a recognized senior member*»⁶.
- (3) «Cadbury» in essence calls for *three special Board Committees* composed of «NEDs», namely (i) an Audit Committee to form an opinion on the quality of auditing, (ii) a Nomination Committee to carry out the selection of outside directors⁷, composed of a majority of «NEDs»⁸, and (iii) a Remuneration Committee to review compensation of all sorts at the top level of the company. Their respective Chairs – the «recognized senior members of calibre», to stay within the terminological world of Sir Adrian – stand in the annual shareholders meeting to directly answer questions from

shareholders (such a thing, incidently, would be quite unthinkable in Swiss corporate practice).

- (4) «Cadbury» calls for a *schedule of matters specifically reserved* for decision by the full Board⁹.
- (5) «Cadbury» finally calls for certain *formal disclosures* by the «NEDs»: Firstly, on the basis on which they assess performance of the Chairman, and, secondly, a report on the effectiveness of internal financial control.

b) Appreciation of «Cadbury»

The «Cadbury» approach is characteristic of present corporate law development inasmuch as it is largely based on *self-regulation* and *soft law*. No democratically elected body or emanation thereof was involved in the shaping of the Code, and no such body is involved in its enforcement. Some hand-picked elite personalities of the British Establishment drew up the Code, and enforcement goes through the powers of the London Stock Exchange towards listed companies¹⁰. Quite characteristically for such a self-regulatory approach, «Cadbury» also carries added recommendations, which are not compulsory but may not be lightheartedly disregarded, such as (i) the insistence on interim reports with balance sheet information to be given to the shareholders (something the Swiss corporate world has to live with, too, due to the 1996 Listing Regulations), (ii) the issuance of a «Statement of directors' responsibilities» in the field of accounting and financials, a concept extremely close to the Swiss law's Article 716a, numbered paragraph 3, and (iii) the rotation of persons responsible for the company's external audit (something completely unknown so far in *Corporatio Helvetica*).

Still, viewed from the concepts of Swiss Company Law, «Cadbury» also has obvious *weak spots*.

- (i) «Cadbury» does not sufficiently stress *internal auditing*, as a part of the entire auditing process and a system without which monitoring is not possible, and also as a source of information for the Audit Committee's practical functioning.
- (ii) A clear statement to the effect that «NEDs» should remain what they are – *non-executive* –

⁵ The 5th European Directive on Company Law (Proposal), too, was – and still is – deadlocked for decades because of the German insistence on «*Mitbestimmung*» at Board level.

⁶ The Code of Best Practice (1992), final version, para. 1.2 (2nd sentence).

⁷ What has been rejected is a more formal and direct role of shareholders in the appointment of directors.

⁸ The Code of Best Practice (1992) Note 7.

⁹ The Code of Best Practice (1992) Note 2.

¹⁰ The listing rules impose a continuing obligation on companies to state in their annual return and accounts whether or not they have complied with the Code. Listing Rule 12.43 (j).

is missing, too. While «Cadbury» appears to recognize the importance of an unhindered area of initiative and free decision for the chief executive management, it lacks a clear-cut caveat against a more and more «managerial role» of NEDs or outside directors¹¹. What has been said by a CEO on the relationship between staff and executive management should be applied to outside directors: «Ideally you should have a minimum of staff to disturb the operating people and prevent them from doing their more important jobs»¹² – one should in fact see to it that non-executive directors are not preventing executives from doing their jobs.

- (iii) Moreover, within the mechanism proposed by «Cadbury», there is a *distinct potential for malfunctioning*. The tasks of assessing key persons and company auditors, nominating candidates and appraising compensation are spread out between three sub-bodies within the main body, each one chaired by a different outside personality «of sufficient weight and calibre». With so many Chiefs among the Indians, a question arises: *Who will monitor these monitors?* The Chairman will have to apply considerable time and effort to inform and rein in his «Sub-Chairmen» if he does not want to lose coordination and guidance within the Board.

A sceptical view questions the basic idea behind the new role to be played by NEDs and has it that «non-executive directors are part of the problem rather than the solution . . . it is hard to believe that the relationship between the two animals will be other than cozy»¹³. A similar view is shared by many observers in Great Britain who suspect that if it is the role of «NEDs» to check and monitor top management, the latter must have a natural tendency to promote candidates to these Boards «*who can be trusted not to rock the boat*»¹⁴. «Cadbury» has by no means squelched bitter criticism of the Board as working institution¹⁵.

¹¹ The danger is that the Cadbury Code «. . . will impose a «strait-jacket» uniformity on companies' structures, a move resisted by the United Kingdom in response to community initiatives over many years», *Janet Dine* (1994) 75.

¹² Percy Barnevik in *Fortune*, June 29, 1992, 25.

¹³ *Financial Times*, May 28, 1992, 14.

¹⁴ *John Cadman* (1995) 347.

¹⁵ «There are strong tendencies for Boards to evolve culture and social norms that reflect optimal behaviour under

c) Proposals Rejected

It may be of interest to have a quick glance at proposals which were rejected in the recent discussion in the UK and the US¹⁶. These include a requirement for shareholders' vote on the remuneration of the Board of Directors¹⁷, the prohibition of combining the functions of Chairman and Chief Executive, the rule of compensating Board members *exclusively in shares*, and disclosure of detailed information to shareholders about the decision making process and decisions taken by the Board¹⁸. It is obvious that such a transparency requirement for Board decisions would be a prerequisite for a new legal instrument, often discussed and always rejected in Switzerland – the right of shareholders to directly challenge Board resolutions in Court¹⁹.

3. The Swiss Board Concept in Comparison with «Cadbury»

a) The Basic Content of the Swiss Provision on Corporate Governance

The revised Swiss Corporation Law which entered into force and effect on July 1, 1992 was essentially drafted in the distant years 1980 and 1981²⁰ by a Government-appointed Work Group. At that time, in a small drafting team, long before anybody in Switzerland was aware of the term «Corporate Governance», a double conclusion was reached:

Firstly, Swiss law should *not adopt the German system*, with its rigid separation in a mandatory two-tier system of control and nomination, on the one hand, and leadership, on the other hand;

prosperity, and these norms make it extremely difficult for the Board to respond early to failure in its top management team.», *Michael C. Jensen* (1993) 867.

¹⁶ As regards better involvement of *shareholders*, many more ideas have been canvassed: «Forms to be attached to Annual Reports on which shareholders could send in *written questions* in advance of Annual Shareholders Meetings so that prepared answers can be given and, secondly, for a brief summary of points raised at the AGM to be sent to all shareholders after the event.», *Vanessa Finch* (1992) 586.

¹⁷ *Financial Times*, May 28, 1992, 14.

¹⁸ *Russell Reynolds* (1995) 13.

¹⁹ There is a legal possibility to challenge Board decision in court in the rare cases of *null and void acts* of the Board, Art. 706b and 714.

²⁰ *Swiss Federal Council*, Bill of February 23, 1983 on the Revision of the Corporation Law, Federal Register 1983 II 745.

Secondly, the Board should either be eliminated as an institution, or then the law *should create a set-up of mandatory functions* to be fulfilled by the Board, and specifically mandate each Board to *self-regulate* its structure and functioning within the new legal framework.

The law, which in the end was enacted practically unchanged by Parliament 10 years later, embodies this concept of a Board with a distinct field of competences. It is, strikingly enough, close to «Cadbury» in its main points, although it is not confined to financial aspects. The Board – without a possibility of a subsequent approval of the shareholders' meeting²¹ –

- (1) has the ultimate responsibility for the *strategy* («Oberleitung» in the German version)²² of the company²³;
- (2) is responsible for the *basic organization* of the company, it must decide on the shaping of the company's *accounting system, financial control and financial planning*²⁴;
- (3) has to see to *monitoring the executive functions*²⁵;
- (4) elects and dismisses the *top executives* of the company²⁶;
- (5) is to draw up *bye-laws* by which it structures the executive branch and determines its functions; and
- (6) it regulates reporting²⁷.

b) Problems of Acceptance in Switzerland

There is no doubt that the significance of this concept of the 1991 Swiss Corporation Law has not been grasped by everybody in the earlier phases of debate. And even after its entering into force and effect there is quite some resistance against a more clearly defined function of the Board as an intermediate corporate body, placed between shareholders and day-to-day management. The law now calls for a distinct «*shaping and structuring work*» to be performed on behalf of the Board and to be adopted by it in its ultimate responsibility. The Board, of course, is a decision-making body responding to the needs of the moment, but it is also called upon to have the final

say in the shaping of strategy, financial organization and hiring of the top executives. While in the Swiss view, it is not the Board which necessarily does the actual foot-work and fine-tunes the alternatives for the ultimate decision, it is the Board that has to order it, discuss it, choose a coherent set of rules, and see to it that these are followed. Articles 716a and 716b are clearly based on the concept of *Board self-regulation* in this core area of Corporate Governance. Indeed, they do call for «*persons on the Board who are*» – as the Cadbury Report puts it – «*non-executive directors of sufficient calibre and number for their views to carry significant weight in the Board's decisions*»²⁸.

Yet resistance against the concept of restricted but final powers for the Board (i.e. in the core areas of strategy, financial organization, and hiring of the top executives) has also been voiced by a legal scholar, Prof. Alain Hirsch²⁹. Rejecting both the wording of the Government Commentary to the 1983 Bill which had explained the specific function of Article 716a excluding interference of the Shareholders' Meeting in the core domain of the Board³⁰, and disregarding the precise term «*unentziehbar*», which was added by Parliament, he considers a charter-based requirement for shareholders' approval in the core area of Article 716a to be possible and legally effective. The fact that the term «*unentziehbar*» cannot be adequately rendered in the French language and, therefore, in the French version of the Swiss law must be noted but does not suffice, of course, to explain Mr. Alain Hirsch's theory which will not fail to shed quite some confusion and uncertainty in this area³¹.

c) A Comparison of the Swiss Approach with «Cadbury»

The Swiss Board rules which entered into effect on July 1, 1992 have a conceptual, although by no means complete, affinity to the «Cadbury» concepts. Article 716a specifically provides, in its second paragraph, for *Board Committees*, and probably the most striking parallel is in the Swiss law requirement of financial control³² and monitoring of executive activities³³.

²¹ See 3 (b) hereinafter.

²² Art. 716a (1) (1.).

²³ *The Code of Best Practice* (1992), para. 1.4 and Note 2.

²⁴ Art. 716a (1) (2. and 3.).

²⁵ Art. 716a (1) (5.).

²⁶ Art. 716a (1) (4.).

²⁷ Art. 716b (2).

²⁸ *Cadbury Code of Best Practice* (1992), para. 1.3.

²⁹ At the Zurich Seminar of June 13, 1996 («Aktienrechts-Forum»).

³⁰ *Federal Monitor* 1983 II, Nr. 215.3.

³¹ Rita Trigo Trindade (1996) 172, takes a position against that of Alain Hirsch, showing that there at least is no firm «Geneva School» in this respect.

³² *Swiss Corporation Law* 1991, Article 716a (1) (No. 3).

³³ *Swiss Corporation Law* 1991, Article 716a (1) (No. 5).

Otherwise, the weights are placed somewhat differently, inasmuch as Swiss law insists on a full area of *decisions reserved to the Board*, a subject which in the Anglo-Saxon discussions is being addressed, but is less dominant³⁴. Swiss law also stresses the final responsibility of the Board for the *basic organization* of the company, something which is not really to be found in «Cadbury».

«Cadbury», for its part, is following the classical Anglo-Saxon approach in its heavier insistence on *disclosure* (explanatory statements and special reports) and in its formal requirement of *three Committees* – the Audit Committee, Remuneration Committee and Nomination Committee. «Cadbury», moreover, only indirectly addresses internal financial control³⁵ by obliging the Board to report on its effectiveness to the shareholders. The Swiss concept makes financial control a central element of the Board's shaping and structuring responsibilities. The Swiss concept also goes beyond «Cadbury» by requiring the Board to establish coherent «organizational by-laws» or regulations for the top layers of executive functions.

4. A Comparison of «Cadbury» with the German Two-Tier System

a) Mutual Exclusivity between Aufsichtsrat and Vorstand

The British were the first to note that the «Cadbury» proposals (at least in their first draft published in May 1992 calling for «an appointed leader» of the NEDs³⁶) went pretty close to splitting up the top body of the corporation in two parts³⁷. Indeed, the «Cad-

bury» approach was said to lead to a fragmentation of the concept of the Unitary Board³⁸, and even to be a «Trojan Horse for the introduction of a two-tier Board»³⁹.

Still, the *German system* of Aufsichtsrat/Vorstand (which was introduced, on an optional basis, into the French corporation law, among others, already 30 years ago⁴⁰) is profoundly different from the Unitary Board⁴¹, whether it be organized along «Cadbury» or along Swiss law lines. The striking difference to the one-tier system is the far-reaching absence under German law of any self-regulatory leeway in this area; there is rigidity and mutual exclusivity of the Supervisory Board, on the one hand, and the Management Board, on the other hand⁴². In a Unitary Board of the American, British or Swiss variety, as structured as it may be, the executive directors are also directly participating in the final debate of the main Board, even if they are in the minority. They have a word in the election of top executives, too, in Board decisions, monitoring, and also in nominating new candidates for Board membership. In the two-tier system, all this is strictly excluded – top managers are legally disqualified from playing a role in these functions which are exclusively assigned to the «Aufsichtsrat». Conversely, under the Unitary Board system, the outside directors are participating in the ultimate shaping and decision on the company's business strategy, while under the two-tier system this again is as a principle excluded⁴³.

b) The Supervisory Board as a «Landing Area» for the German Mitbestimmung

While, upon a closer look, the unitary and the two-tier Board systems remain distinct in spite of many points of convergence, there remains one overwhelming fact which is often and wrongfully excluded from the discussion: The German «Aufsichtsrat» is, in

³⁴ The necessity for decisions reserved to the Board has been stressed e.g. by *Vanessa Finch* (1992) 589. It is striking, too, that the UK Code of Best Practice has no reference to one point on which the American practice, *Russell Reynolds* (1995) 18, and Swiss corporation law (*Peter Böckli*, 1996, 822) converge: The necessity for specific approval by the Board of significant transactions decided by management outside the normal course of business.

³⁵ It is difficult to see why *Vanessa Finch* has formed the following opinion: «The internal audit is not seen as a useful and continuing source of information for the Audit Committee.», *Vanessa Finch* (1992) 588.

³⁶ *Cadbury Draft Report*, issued for public comment on May 27, 1992, *The Code of Best Practice*, Draft para. 1.2 (second sentence).

³⁷ «If the members of the Cadbury Committee believe in a Unitary Board . . . this is nonsense. If they seek this kind

of Segregation, they should have the courage of their convictions and advocate a two-tier Board structure», *O. Green* «Why Cadbury leaves a bitter taste», *Financial Times*, June 9, 1992, quoted by *Vanessa Finch* (1992) 593.

³⁸ Gerard M.D. Bean (1994) 266.

³⁹ *Ernst & Young* (1992) 10.

⁴⁰ *Loi sur les sociétés commerciales* (1966) art. 96 et seq.

⁴¹ As regards a comparison of the unitary and the two-tier systems, see *Peter Böckli* (1992) and (1996) 925.

⁴² Cf. *Knut Bleicher* (1987); *Münchener Handbuch des Gesellschaftsrechts*, Bd. 4, Aktiengesellschaft, München 1988, 250; *Michael Hoffmann-Becking* (1996).

⁴³ *Jonathan Charkham*, *Keeping Good Company*, Oxford/New York 1995, 347; *Peter Böckli* (1996) 922.

public companies, playing the main role of «landing area» for the «*Mitbestimmung*» of employees⁴⁴. As things now are, «*Aufsichtsrat*» in the German reality of today means, to a considerable extent, «*Mitbestimmungsrat*». It functions, in this context, as a place for practical compromises in social politics which in essence have nothing to do with either monitoring or nominating functions.

If apart from this aspect there is one definite benefit to the two-tier system, it is its clear insistence on a reserved decision area for the top executive management, as, by its legal concept, the German «*Aufsichtsrat*» cannot prevent the operating people from doing their more important jobs.

5. Self-Regulation at Board Level under Swiss Law

a) The Areas of Autonomous Action

The Swiss Board concept of 1991⁴⁵ can be said to comprise four areas of *self-regulation* in which the Board is called upon to elicit a *coherent set of rules*, within a certain legal framework but without a duty to follow any given details. Always in a comparison with «*Cadbury*», they are the following:

- (i) «*Oberleitung*» or strategy (*Cadbury*: «*issues of strategy*», «*full and effective control over the company*», and «*direction of the company firmly in its hands*»);
- (ii) Basic organization (not mentioned in *Cadbury*);
- (iii) Financial control (*Cadbury*: «*Directors' report on the effectiveness of the company's system of internal control*»);
- (v) Monitoring management (*Cadbury*: «*The Board should . . . monitor the executive management*»).

The Swiss Boards, as mentioned before, are also called upon to establish *rules for reporting*⁴⁶.

Viewed from this angle, the Swiss Board concept of 1991 is largely compatible with the latest Anglo-Saxon tendencies⁴⁷. While Swiss Company Law, in clear distinction from «*Cadbury*», does not go so far as to specifically decree Audit, Compensation and

Nomination Committees, it is hard to see how a Board of a Swiss public company could live up to all its self-regulating duties without a formation of an Audit Committee and a combined Compensation/Nomination Committee. Such a Committee can – and should – be small, two to three persons; in a medium size company a single Board member can take on the assignment to specifically prepare the respective proposals for the Board.

b) The Problem of Mutual Interference

An important problem of self-regulation is, however, left untouched by both the «*Cadbury Report*» and the Swiss Board Provisions of 1991.

This is the *paramount factual importance of the leader of the company*. While «*Cadbury*» insists that «no one individual has unfettered powers of decision»⁴⁸, it remains that the leader of a company – be he called CEO or Managing Director, or whatever else – has an absolutely pre-eminent role in leading and inspiring the organization⁴⁹. While it is true that his powers should not be «unfettered», they must be unchallenged in their core area. The more the Board is split up between inside and outside members, divided into Committees and Sub-Committees who end up reporting directly to the shareholders, and the more «*their views carry significant weight*»⁵⁰, the more we should be aware of the fact that a leader, who is in a strait-jacket constantly jumping procedural booby-traps and has to spend his time following meandering committee work, will hardly be able to lead a company to success⁵¹.

c) Hidden Conflict Potential in the Role of NEDs

There is a problem on the side of the «*NEDs*», too. «*NEDs*» are to fulfill demanding roles assigned to them both by «*Cadbury*» and the Swiss Company Law: Without interfering with genuine leadership to be deployed by the company head, they should heed the trap of coziness⁵², they should remain independent enough to resist certain stubborn ideas of their Chairman, but at the same time cooperative enough

⁴⁴ Michael Hoffmann-Becking (1996) 240.

⁴⁵ Art. 716a/716b.

⁴⁶ Art. 716a (2) and Art. 716b (2).

⁴⁷ See e.g. «Self-Regulation at Board Level», Davis/Lowry (1994) 58.

⁴⁸ *Cadbury Report* (1992) para. 4.6 and *Code* para. 1.2 (first sentence).

⁴⁹ Cf. *Russel Reynolds* (1995) 6.

⁵⁰ *Cadbury Code of Best Practice* (1992) para. 1.3.

⁵¹ «For most investors, Corporate Governance becomes an issue only when triggered by the circumstances of poor financial performance», *Russel Reynolds* (1995) 5.

⁵² *Financial Times*, May 28, 1992, 14.

to participate in confident teamwork. Those gifted tight-rope walkers will be hard to find.

6. Board Committees

At this point, it is appropriate to add some brief remarks to the most visible outgrowth of «Cadbury», and, of course, of American corporate life in the last 25 years: the *Board Committees*⁵³.

a) The Audit Committee

The Audit Committee, which has made its way to the larger Swiss public companies in the last few years, is a *valuable institution* in general. Indeed it fills an empty space, fulfilling a task which cannot completely be taken on by either the Chairman or the main Board:

- (i) following the work of both outside and inside auditors,
- (ii) viewing the quality of their cooperation;
- (iii) reviewing their work products,
- (iv) drawing conclusions for follow-up by Management, Auditors and themselves⁵⁴, and
- (v) assisting the Board in selecting new auditors, when necessary.

Such a committee is valuable as long as the list of its core duties is focused on obtaining a fair view of the audit functions. Of course, the Audit Committee certainly will blow the whistle and alert the Chief Executive whenever it comes across a really serious impropriety or functional disorder. Yet its assignment will become an impossible task as soon as it is called to proceed to audit steps by itself, as its slightly misleading name indicates, or to independently ascertain compliance with auditing standards by its own

means⁵⁵. Such a tendency, to be noted especially in the publications emanating from the accountancy profession, as well as the trend to engage Audit Committees in specific investigating activities⁵⁶ and to extend their scope of activities to legal compliance – which is a function proper to executive management and monitoring – are bound to confuse responsibilities and will be counter-productive in the end. *The Audit Committee does not audit* – this is one of the most basic rules for its functioning⁵⁷. The Audit Committee, in any way, is treading a difficult path between the auditing bodies, executive management and the main Board⁵⁸: It should never act as a barrier⁵⁹, but as a synapse. It should not «stifle entrepreneurial skills»; instead of weakening the main Board's awareness of auditing matters, it is to strengthen it.

b) The Remuneration Committee

The *Remuneration Committee*⁶⁰ also has a valuable function as long as the scope of its activity is strictly defined. It should shape its opinion not only on the remuneration of the Board's executive and non-executive members⁶¹, but should also have a distinct role in determining the total compensation, basic pay, performance-related stock options and pensions of top executives who are not members of the Board. «Cadbury» specifically assigns it the role of determining the basis on which the performance of the chief executive is assessed – something unheard of in corporate Switzerland during these last years of the mil-

⁵³ As regards developments in Switzerland, see *Peter Böckli* (1994) 44 and (1996) 826, 932.

⁵⁴ The proper attributions of an Audit Committee have been described as follows by *Vanessa Finch* (1992) 593: «The committee should have authority to investigate and seek external professional advice – its duties should include making recommendations to the Board on auditor appointments, dismissals and fees, reviewing half-yearly financial statements, conducting discussions with auditors on the nature of the audit, reviewing internal audit programmes and reviewing the auditors' management letter and the company's statement on internal control systems.» (Emphasis added).

⁵⁵ «The Audit Committee should have explicit authority to investigate any matters within its terms of reference, the resources which it needs to do so, and full access to information. The committee should be able to obtain outside professional advice and if necessary to invite outsiders with relevant experience to attend meetings», *Cadbury Code*, Audit Committees, para. 6 (e).

⁵⁶ *Cadbury Code* (1992), Audit Committee, para. 6 (e). Of course, the Audit Committee should have «explicit authority to investigate any matters», but this should be an exception under exceptional circumstances.

⁵⁷ It would be even more disastrous for Audit Committees in practice if certain initiatives should be followed which call for the Audit Committees to be «beefed up to take on greater responsibility for monitoring aspects of management performance on behalf of shareholders», *Financial Times*, December 10, 1994.

⁵⁸ *Cadbury Report* (1992), Audit Committee, para. 5.

⁵⁹ *Cadbury Report* (1992), Audit Committee, para. 5.

⁶⁰ *Cadbury Code of Best Practices* (1992) para. 3.3 and Note 9.

⁶¹ «Greenbury Report» on Directors' Remuneration (1995), Section A.

lennium. The Remuneration Committee is instrumental in avoiding outgrowths of conflicts of interest, thereby supporting the public credibility of the Board as a corporate institution.

c) The Nomination Committee

The *Nomination Committee* (which often is combined with the Remuneration Committee) is not yet a standing institution of Swiss corporate practice⁶². Traditionally, all the functions which «Cadbury» assigns to the Audit, Remuneration and Nomination Committees were matters for the so-called «*Ausschuss*» or inner circle of the Board (formed by the Chairman, the Vice-Chairman and two or three senior Board members) – if these functions were at all taken care of in a distinct manner. In view of the responsibility of the Swiss Board regarding appointment of top management it is, however, almost mandatory today that the functions of a Nomination Committee – whether or not combined with the Remuneration Committee – be taken seriously. The cases where the Board was asked to elect «names» – people it never saw – to top executive posts were frequent, but by now definitely should be historic reminiscences.

In all areas of Committee work, the main Board holds on to its ultimate power of decision. The Committee's work product, as important as it may be in practice, legally is a structured proposal to the Board. The Committee members are appointed by the main Board, operate in a transparent way, and annually report on their work and results in writing – even if such statements may be brief. Rumors that in some Swiss companies the Chairmen used to discreetly hand-pick some Board members and convene them in the dark, keeping both their proceedings and their results secret, could refer to myths and legends of the past.

7. An Unresolved Question: Effective Provision of Information for Outside Directors

At this point, an *unresolved problem* must be mentioned: Although Swiss Company Law has greatly improved the access of each Board member to company information⁶³, in this area shortcomings abound. While in a corporation where the Chairman is himself also fulfilling the functions of the chief executive officer,

outside Board members are called to monitor and control this central function, it is again this one person at the centre and nobody else who decides on the time, scope and depth of information given «NEDs» to exercise their monitoring and control⁶⁴. But also in other configurations, the combination of legal monitoring duties with a lack of any independent source of information is a conceptual fault of the present Corporate Governance system. This is true, by the way, whether we look at the «Cadbury» or the Swiss legal system. It has been warned that non-executive directors, through this functional weakness of the system, «*can be expected to be unable to perform the policing role effectively*»⁶⁵.

The basic information problem for «NEDs» has in fact been recognized and briefly addressed by the Cadbury Report⁶⁶. But, significantly enough, the 1992 Code of Best Practice itself does not provide any help in this respect⁶⁷. The right for «NEDs» to resort to independent professional advice at the company's expense aims more at the intellectual processing of information and its legal appraisal than at the proactive sourcing of new information. Apart from the unique «right to advice» there is no assistance to «NEDs» in getting at information potentially detrimental to the inside directors and, more precisely, damaging to the power of the top executive and his inner circle. Lately, there have been a considerable number of publications also in Switzerland on this subject⁶⁸, but the information problem remains to a large extent what it was ten years ago – unresolved.

8. Present and Future Trends in Corporate Governance

Having taken a view on present Corporate Governance developments mostly in the UK and Switzerland, and, to some extent, in Germany, it is now the time to look at the latest trends:

⁶² *Cadbury* only refers to it in an indirect way, see para. 2.4 and Note 7.

⁶³ *Swiss Corporation Law* 1991, Art. 715a.

⁶⁴ «CEOs have the power to control the Board . . . the CEO almost always determines . . . the information given to the Board. This limitation on information severely hinders the ability of even highly talented Board members . . .», *Michael C. Jensen* (1993) 863/64.

⁶⁵ *John Cadman* (1995) 347; *Gerard M. D. Bean* (1994) 270.

⁶⁶ *Cadbury Report* (1992) para. 4.5.

⁶⁷ «As to the information made available to «NEDs», this has often been sighted as a weakness of the outside director», *Vanessa Finch* (1992) 591.

⁶⁸ *Marcel Dietrich* (1990); *Jean Nicolas Druey* (1993) 49; *Peter V. Kunz* (1994); *Müller/Lipp* (1994); *Martin Wernli* (1994); *Peter Böckli* (1994) 60; (1996) 779.

- (i) *The pressure of institutional shareholders for a more professional Corporate Governance will continue to be felt.* This is a fact, but, on the other hand, the very persons exerting such power as speakers for anonymous investment institutions will *themselves* undergo more serious scrutiny as regards their legitimacy, procedural propriety, and control.⁶⁹ Eventually, there must be «Institutional Governance» rules as well.
- (ii) *The Swiss Board Concept and Corporate Governance Rules of 1991 generally are in conformity with the «Cadbury» approach.* They call, although some companies and public opinion have not yet fully grasped this fact, for substantial self-regulatory functions of each Board in the core domains of *basic organization, financial control, monitoring, auditing review and nomination.* The next few years will bring about clearer structures in Swiss Boards in all these areas, and five years from now a Swiss public company's Board without an Audit Committee and a Compensation/Nomination Committee – however the respective committees will be actually called – will be quite unthinkable.
- (iii) *The dispute on splitting up the functions of the Chair and the Chief Executive is unresolved.* The «Chairman and CEO» remains frequent in practice. Recent tendencies, however, both in the Anglo-American world and in Switzerland, favour separation of the two functions⁷⁰. Yet separation, as nice as it looks from a theoretical point of view, may bring about terrible practical problems as soon as the two corporate heads become rivals and start politicking against each other.
- (iv) *There must be a strong commitment to maintain an autonomous area of executive responsibility.* Top executive prerogatives must remain unhampered by Board interference, if the company is

not to lose speed. Tendencies to create an entangled series of Board sub-bodies, of certain Board members responding directly to shareholder questions in the Annual Shareholders' Meeting, and, generally speaking, Board paperwork, must be resisted if all these wonderful Corporate Governance ideas are not to end up in Corporate Indigestion.

- (v) *The traditional large and unwieldy Swiss Board of Directors is being phased out*⁷¹. The shrinking of Swiss Boards is under way⁷². Still, if those venerable gatherings of up to twenty-two and more people⁷³ are gone, not all of the older ideas were completely without merit: the Board may also in the future, *to a very minor extent*, have a certain additional function of binding the top body of a company into social realities. Where possible, both men and women, both French and German speaking members should have a seat on a Swiss public company's Board, and the addition of younger people in an overlapping period of time may be a good idea, even if the Board then will comprise 12 instead of 10 members. The problem really was that many Boards were composed *predominantly* or *exclusively* along the lines of group representation and personal relations.

Today there is only one tendency for the quality of candidates for non-executive positions on Swiss Boards: up. The trend goes to *smaller Boards* of 5 to 12, or at the *most*, in big companies and under special circumstances, 15, with a median size of 7 to 11. The trend goes for the recruiting of new Board members through a formal selection process, and on the basis of clearly defined criteria⁷⁴. Boards will have to be composed of people who in fact qualify for the judgement and work which, from the day they are elected, will be specifically assigned to them in the three areas

⁶⁹ See *Neue Zürcher Zeitung* No. 137 of June 15/16, 1996, 21.

⁷⁰ The Cadbury Committee did not go as far as to edict a recommendation in this respect. Favoring separation of the functions is a majority view among US institutional investors according to *Russell Reynolds* (1995) 5, in the same sense also *Vanessa Finch* (1992) 593 who says that in the Unitary System the roles of Chairman and Chief Executive offices are often «incompatible.» «Therefore, for the Board to be effective, it is important to separate the CEO and Chairman's position.», *Michael C. Jensen* (1993) 866.

⁷¹ A most striking criticism of traditional Board customs is to be found in the paper of *Michael C. Jensen* (1993) 831: «The great emphasis on politeness and courtesy at the expense of truth and frankness in boardrooms is both a symptom and cause of failure in the control system».

⁷² *Grünbichler/Oertmann*, Die optimale Grösse des Verwaltungsrats, *Neue Zürcher Zeitung* No. 131 of June 8/9, 1996, 29.

⁷³ «When Boards get beyond seven or eight people they are less likely to function effectively and are easier for the CEO to control.», *Michael C. Jensen* (1993) 865.

⁷⁴ As regards the developments in Germany see *Michael Hoffmann-Becking* (1996) 231 ff., in Switzerland see *Rita Trigo Trindade* (1996) 114.

of Monitoring, Audit review, and Nomination. A Board member who does not understand the basic concepts of the company's Financial Statements and cannot draw concrete conclusions from its Flow of Funds will become a rarity.

Still, there remains an unresolved problem on which corporate lawyers and business executives will have to work intensively: the provision of information to non-executive Board members, and the final question, as the Roman jurists already knew: *QUIS CUSTODIAT CUSTODES* – who will monitor the monitors? The answer is clear: the shareholders. Their job will be more effectively done in a System of good Corporate Governance.

List of References and Further Reading

- Anderson/Anthony*, Corporate Directors, Insights for Board Members and Executives, New York 1986
- Bacon Jeremy*, Corporate Boards and Corporate Governance, Report Number 1036, The Conference Board, New York 1993
- Bacon/Brown*, Corporate Directorship Practices: Role, Selection and Legal Status of the Board, The Conference Board, New York 1975
- Bean Gerard M.D.*, Corporate Governance and Corporate Opportunities, The Company Lawyer, 15 (1994) 266
- Berset Marie-France*, L'administrateur non-directeur de la société anonyme en droit suisse et américain, thèse Neuchâtel 1988
- Biland Thomas A.*, Die Rolle des Verwaltungsrates im Prozess der strategischen Unternehmensführung, Diss. St. Gallen 1989
- Bleicher Knut*, Der Aufsichtsrat im Wandel, Gütersloh 1987
- Bleicher/Leberl/Paul*, Unternehmungsverfassung und Spitzenorganisation, Wiesbaden 1989
- Böckli Peter*, Verwaltungsrat oder Aufsichtsrat? Konvergenz der Systeme in der Spitzenverfassung der Aktiengesellschaft, Festschrift für Walter Reist, Verlag Neue Zürcher Zeitung, Zürich 1992
- Die unentziehbaren Kernkompetenzen des Verwaltungsrates, Schriften zum neuen Aktienrecht Nr. 7, Zürich 1994
 - Schweizer Aktienrecht, Darstellung für den Praktiker, 2nd revised and enlarged edition, Zürich 1996
- Brown Courtney C.*, Putting the Corporate Board to Work, New York/London 1976
- Buxbaum Richard M.*, Comparative Aspects of Institutional Investment and Corporate Governance, in: Baums/Buxbaum/Hopt (Publ.), Institutional Investors on Corporate Governance, Berlin/New York 1994
- Cadbury Adrian*, The Company Chairman (FitzWilliam Publishing), Cambridge 1990
- Restoring Trust and Confidence in the Corporate System, Opinion, London 1992
- «*Cadbury Report*», The Cadbury Committee Report: Financial Aspects of Corporate Governance, London 1992
- Cadman John*, Non-executive Directors: Are They Truly Independent? Solicitors Journal 1995, 346
- Charkham Jonathan*, Keeping Good Company, A Study of Corporate Governance in Five Countries, Oxford/New York 1995
- Davis/Lowry*, Corporate Governance and Cadbury: Self-regulation and Alternatives, Journal of British Business Law 1994, 51
- Demb/Neubauer*, The Corporate Board, Confronting the Paradoxes, New York/Oxford 1992
- Dietrich Marcel*, Der Verwaltungsrat und seine Information, Diss. (oec.) Fribourg 1990
- Dine Janet*, The Governance of Governance, The Company Lawyer, 15 (1994) 73
- Druey Jean Nicolas*, Das Informationsrecht des einzelnen Verwaltungsratsmitglieds, Schweizerische Zeitschrift für Wirtschaftsrecht 65 (1993) 49.
- Ernst & Young*, Response to the Cadbury Proposals, A critique of the Draft Report (. . .), London 1992
- Finch Vanessa*, Board Performance and Cadbury on Corporate Governance, JBC 1992, 581
- Fleischer/Harvard/Klipper*, Board Games: The Changing Shape of Corporate Power, Boston 1988
- Forstmoser Peter*, Organisation und Organisationsreglement nach neuem Aktienrecht, Schriften zum neuen Aktienrecht Nr. 2, Zürich 1992
- Glaus Bruno U.*, Corporate Audit Committee, in: Festschrift André Zünd, Zürich 1988
- «*Greenbury Report*», Directors' Remuneration, Report of a Study Group, London 1995
- Hoffmann-Becking Michael*, Rechtliche Möglichkeiten und Grenzen einer Verbesserung der Arbeit des Aufsichtsrates, in: Festschrift für Hans Havermann, Düsseldorf 1996, 230
- Hopt/Teubner* (Publ.), Corporate Governance and Directors' Liabilities, Berlin/New York 1985
- Houston/Lewis*, The Independent Director: Handbook and Guide to Corporate Governance (Butterworth-Heinemann), Oxford 1992
- Institute of Directors* (Publ.), Guidelines for Directors, London 1991
- Jensen Michael C.*, The Modern Industrial Revolution, Exit, and the Failure of International Control Systems, Harvard Business School, The Journal of Finance, 48 (1993) 831

- Kunz Peter V., Die Auskunfts- und Einsichtsrechte des Verwaltungsratsmitglieds, *Aktuelle Juristische Praxis* 3 (1994) 572
- Mackenzie Craig, *The Shareholder Action Handbook, Using Shares to Make Companies more Accountable*, Newcastle-upon-Tyne 1993
- Matter/Ball, *Handbook for Corporate Directors*, New York 1985
- Müller/Lipp, *Der Verwaltungsrat, Ein Handbuch für die Praxis*, Zürich 1994
- Neue Zürcher Zeitung*, Britischer Verhaltenskodex für Unternehmensführung, Bericht des Cadbury-Komitees, NZZ Nr. 282 vom 3. Dezember 1992
- Nobel Peter, *Corporate Governance – Möglichkeiten und Schranken gesellschaftsrechtlicher Gestaltung*, Der Schweizer Treuhänder 1995, 1057
- Price Waterhouse (Publ.), *Improving Audit Committee Performance: What Works Best*, Altamonte Springs (Florida) 1993
- Russell Reynolds Associates, *Redefining Corporate Governance, 1995 U.S. Survey of Institutional Investors*, (s.l.) 1995
- Schmitz Ronaldo, *How can the Supervisory Board's Monitoring Function be made more efficient?* Conference of the Dräger Foundation: Corporate Governance, Heidelberg 1995 (not in print)
- Sprüngli Luzius R., *Die neue Rolle des Verwaltungsrates*, Diss. St. Gallen 1990
- Thiel/König, *Die Ausgestaltung des Rechnungswesens, der Finanzkontrolle und der Finanzplanung als unübertragbare Aufgabe des Verwaltungsrates*, in: *Jahrbuch zum Finanz- und Rechnungswesen*, Hans Siegwart (Publ.), Zürich 1994
- Trigo Trindade Rita, *Le conseil d'administration de la société anonyme* (Thèse Genève), Bâle et Francfort-sur-le-Main 1996
- Ulrich/Fluri, *Management*, STG Coopers & Lybrand (Hrsg.), 7. Aufl. Bern/Stuttgart/Wien 1995 171 («Organization»)
- Wernli Martin, *Kommentar zum schweizerischen Privatrecht*, Honsell/Vogt/Watter (Hrsg.), Basel/Frankfurt am Main 1994, Art. 715a
- Wunderer Felix Rolf, *Der Verwaltungsrats-Präsident*, Diss. (oec.) Zürich 1995.

References to «Articles» or «Art.» are to the *Swiss Code of Obligations*, Corporation Law, Art. 620 et seq. in the version adopted on October 4, 1991, in force and effect as from July 1, 1992 (Art. 663e/f/g as from July 1, 1993). See Swiss-American Chamber of Commerce, *Swiss Code of Obligations, English Translation of the Official Text*, Zurich 1992.

Appendix

«Cadbury Report»

Excerpts relevant for Swiss Companies

The Cadbury Code

i. The Code of Best Practice

1 The Board of Directors

- 1.1 The board should meet regularly, retain full and effective control over the company and monitor the executive management.
 - 1.2 There should be a clearly accepted division of responsibilities at the head of a company, which will ensure a balance of power and authority, such that no one individual has unfettered powers of decision. Where the chairman is also the chief executive, it is essential that there should be a strong and independent element on the board, with a recognized senior member.
 - 1.3 The board should include non-executive directors of sufficient calibre and number for their view to carry significant weight in the board's decisions. (Note 1)
 - 1.4 The board should have a formal schedule of matters specifically reserved to it for decision to ensure that the direction and control of the company is firmly in its hands. (Note 2)
 - 1.5 There should be an agreed procedure for directors in the furtherance of their duties to take independent professional advice if necessary, at the company's expense. (Note 3)
 - 1.6 All directors should have access to the advice and services of the company secretary, who is responsible to the board for ensuring that board procedures are followed and that applicable rules and regulations are complied with. Any question of the removal of the company secretary should be a matter for the board as a whole.
- ###### 2 Non-Executive Directors
- 2.1 Non-executive directors should bring an independent judgement to bear on issues of strategy, performance, resources, including key appointments, and standards of conduct.
 - 2.2 The majority should be independent of management and free from any business or other relationship which could materially interfere with the exercise of their independent judgement, apart from their fees and shareholdings. Their fees should reflect the time which they commit to the company. (Notes 4 and 5)
 - 2.3 Non-executive directors should be appointed for specified terms and reappointment should not be automatic. (Note 6)

2.4 Non-executive directors should be selected through a formal process and both this process and their appointment should be a matter for the board as a whole. (Note 7)

3 Executive Directors

3.1 Directors' service contracts should not exceed three years without shareholders' approval. (Note 8)

3.2 There should be full and clear disclosure of directors' total emoluments and those of the chairman and highest-paid UK director, including pension contributions and stock options. Separate figures should be given for salary and performance-related elements and the basis on which performance is measured should be explained.

3.3 Executive directors' pay should be subject to the recommendations of a remuneration committee made up wholly or mainly of non-executive directors. (Note 9)

4 Reporting and Controls

4.1 It is the board's duty to present a balanced and understandable assessment of the company's position. (Note 10)

4.2 The board should ensure that an objective and professional relationship is maintained with the auditors.

4.3 The board should establish an audit committee of at least 3 non-executive directors with written terms of reference which deal clearly with its authority and duties. (Note 11)

4.4 The directors should explain their responsibility for preparing the accounts next to a statement by the auditors about their reporting responsibilities. (Note 12)

4.5 The directors should report on the effectiveness of the company's system of internal control. (Note 13)

4.6 The directors should report that the business is a going concern, with supporting assumptions or qualifications as necessary. (Note 13)

Notes

These notes include further recommendations on good practice. They do not form part of the Code.

1 To meet the Committee's recommendations on the composition of sub-committees of the board, boards will require a minimum of three non-executive directors, one of whom may be the chairman of the company provided he or she is not also executive head. Additionally, two of the three non-executive directors should be independent in the terms set out in paragraph 2.2 of the Code.

2 A schedule of matters specifically reserved for decision by the full board should be given to directors on appointment and should be kept up to date. The Committee envisages that the schedule would at least include:

(a) acquisition and disposal of assets of the company or its subsidiaries that are material to the company;

(b) investments, capital projects, authority levels, treasury policies and risk management policies.

The board should lay down rules to determine materiality for any transaction, and should establish clearly which transactions require multiple board signatures. The board should also agree the procedures to be followed when, exceptionally, decisions are required between board meetings.

3 The agreed procedure should be laid down formally, for example in a Board Resolution, in the Articles, or in the Letter of Appointment.

4 It is for the board to decide in particular cases whether this definition of independence is met. Information about the relevant interests of directors should be disclosed in the Directors' Report.

5 The Committee regards it as good practice for non-executive directors not to participate in share option schemes and for their service as non-executive directors not to be pensionable by the company, in order to safeguard their independent position.

6 The Letter of Appointment for non-executive directors should set out their duties, term of office, remuneration, and its review.

7 The Committee regards it as good practice for a nomination committee to carry out the selection process and to make proposals to the board. A nomination committee should have a majority of non-executive directors on it and be chaired either by the chairman or a non-executive director.

8 The Committee does not intend that this provision should apply to existing contracts before they become due for renewal.

9 Membership of the remuneration committee should be set out in the Directors' Report and its chairman should be available to answer questions on remuneration principles and practice at the Annual General Meeting. Best practice is set out in PRO NED's Remuneration Committee guidelines, published in 1992.

10 The report and accounts should contain a coherent narrative, supported by the figures, of the company's performance and prospects. Balance requires that setbacks should be dealt with as well as successes. The need for the report to be readily understood emphasizes that words are as important as figures.

11 The Committee's recommendations on audit committees are as follows:

(a) They should be formally constituted as sub-committees of the main board to whom they are answerable and to whom they should report regularly; they should be given written terms of reference which deal adequately with their membership, authority and duties; and they should normally meet at least twice a year.

(b) There should be a minimum of three members. Membership should be confined to the non-execu-

tive directors of the company and a majority of the non-executives serving on the committee should be independent of the company, as defined in paragraph 2.2 of the Code.

- (c) The external auditor and, where an internal audit function exists, the head of internal audit should normally attend committee meetings, as should the finance director. Other members should also have the right to attend.
- (d) The audit committee should have a discussion with the auditors at least once a year, without executive board members present, to ensure that there are no unresolved issues of concern.
- (e) The audit committee should have explicit authority to investigate any matters within its terms of reference, the resources which it needs to do so, and full access to information. The committee should be able to obtain outside professional advice and if necessary to invite outsiders with relevant experience to attend meetings.
- (f) Membership of the committee should be disclosed in the annual report and the chairman of the committee should be available to answer questions about its work at the Annual General Meeting.

Specimen terms of reference for an audit committee, including a list of the most commonly performed duties, are set out in the Committee's full report.

- 12 The statement of directors' responsibilities should cover the following points:
 - The legal requirement for directors to prepare financial statements for each financial year which give a true and fair view of the state of affairs of the company (or group) as at the end of the financial year and the profit and loss for that period;
 - the responsibility of the directors for maintaining adequate accounting records, for safeguarding the assets of the company (or group), and for preventing and detecting fraud and other irregularities;
 - confirmation that suitable accounting policies, consistently applied and supported by reasonable and prudent judgements and estimates, have been used in the preparation of the financial statements;
 - confirmation that applicable accounting standards have been followed, subject to any material departures disclosed and explained in the notes to the accounts. (This does not obviate the need for a formal statement in the notes to the accounts disclosing whether the accounts have been prepared in accordance with applicable accounting standards.)

The statement should be placed immediately before the auditors' report which in future will include a separate statement (currently being developed by the Auditing Practices Board) on the responsibility of the auditors for expressing an opinion on the accounts.
- 13 The Committee notes that companies will not be able to comply with paragraphs 4.5 and 4.6 of the Code until

the necessary guidance for companies has been developed as recommended in the Committee's report.

- 14 The company's statement of compliance should be reviewed by the auditors in so far as it relates to paragraphs 1.4, 1.5, 2.3, 2.4, 3.1 to 3.3, and 4.3 to 4.6 of the Code.

ii. Audit Committees

- 1 In the main body of the report the Committee recommends that all listed companies which have not already done so should establish an audit committee, and places great emphasis on the importance of properly constituted audit committees in raising standards of corporate governance.
- 2 Many UK companies already have an audit committee, and a recent research study («Audit Committees in the United Kingdom», published by the ICAEW, April 1992) has found a steady growth in their number. Audit Committees are now established in 53% of the top 250 industrial firms in the Times 1000, and the figure rises to 66% if unlisted companies and foreign subsidiaries are excluded from the calculation. Most major UK listed financial institutions have also formed an audit committee.
- 3 Audit Committees are well established in the United States, where they have been a listing requirement of the New York Stock Exchange since 1978. A 1989 study revealed that 97% of major corporations had them. In Canada, they are a legal requirement.
- 4 If they operate effectively, audit committees can bring significant benefits. In particular, they have the potential to:
 - (a) improve the quality of financial reporting, by reviewing the financial statements on behalf of the Board;
 - (b) create a climate of discipline and control which will reduce the opportunity for fraud;
 - (c) enable the non-executive directors to contribute an independent judgement and play a positive role;
 - (d) help the finance director, by providing a forum in which he can raise issues of concern, and which he can use to get things done which might otherwise be difficult;
 - (e) strengthen the position of the external auditor, by providing a channel of communication and forum for issues of concern;
 - (f) provide a framework within which the external auditor can assert his independence in the event of a dispute with management;
 - (g) strengthen the position of the internal audit function, by providing a greater degree of independence from management;
 - (h) increase public confidence in the credibility and objectivity of financial statements.

- 5 The effectiveness of audit committees will be reduced, however, if they act as a barrier between the auditors and the executive directors on the main board, or if they encourage the main board to abdicate its responsibilities in the audit area, so weakening the board's collective responsibility for reviewing and approving the financial statements. They will also fall short of their potential if they lack the understanding to deal adequately with the auditing or accounting matters that they are likely to face, if they remain under the influence of any dominant personality on the main board, or if they simply get in the way and obstruct executive management, and stifle entrepreneurial skills.
- 6 Audit committees will be as good as the people on them: effectiveness depends crucially on a strong, independent chairman who has the confidence of the board and of the auditors, and on the quality of the non-executive directors. Structure is also important, however, and adherence to the following recommendations, repeated here from the main part of the report, will ensure that audit committees are soundly based.
- (a) Audit committees should be formally constituted as sub-committees of the main board to whom they are answerable and to whom they should report regularly; they should be given written terms of reference which deal adequately with their membership, authority and duties; and they should normally meet at least twice a year.
 - (b) There should be a minimum of three members. Membership should be confined to be non-executive directors of the company and a majority of the non-executives serving on the committee should be independent of the company. This means that apart from their directors' fees and shareholdings, they should be independent of management and free from any business or other relationship which could materially interfere with the exercise of their independent judgement as a committee member. It is for the board to decide in individual cases whether this definition is met.
 - (c) The external auditor and, where an internal audit function exists, the head of internal audit should normally attend audit committee meetings, as should the finance director. Other board members should also have the right to attend.
 - (d) The committee should have a discussion with the auditors, at least once a year, without executive board members present, to ensure that there are no unresolved issues of concern.
 - (e) The audit committee should have explicit authority to investigate any matters within its terms of reference, the resources which it needs to do so, and full access to information. The committee should be able to obtain outside professional advice and if necessary to invite outsiders with relevant experience to attend meetings.
 - (f) Membership of the committee should be disclosed in the annual report and the chairman of the committee should be available to answer questions about its work at the Annual General Meeting.
- 7 Specimen terms of reference for an audit committee, compiled from the many examples that are available, are annexed. They are intended simply as a guide for companies who will wish to adapt and build on them to suit their own circumstances. They will particularly need tailoring for group rather than single company audit committees. The list of duties in the annex reflects the most commonly performed duties in the UK and the US but no single set of duties has emerged as standard practice.
- 8 (..)