



# UIA 7th Winter Seminar

## Corporate Governance Policies and Procedures

### Board Procedures: Conflicts of Interest - How to Address them in Practice

Franz Schubiger, LL.M.  
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# Introduction (1/2)

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# Introduction (2/2)

- Board procedures: a corporate governance topic
- Conflicts of interest: approaching the topic
  1. What are conflicts of interest?
  2. Why are there conflicts?
  3. Rules dealing with interests and conflicting interests?
  4. Specific legal duties to prevent any conflicts?
  5. Good corporate governance
    - a. What do board of directors and board members need to do?
    - b. Structural measures to address conflicts?
    - c. Transactional measures to address conflicts?
  6. Legal consequences in case of breaches?
- Comparative view
  - How does your jurisdiction address this issue?

# Conflicts of Interest – Overview (1/3)

- Starting point: fiduciary duties of board members in Swiss AG:

*The members of the board of directors as well as third parties engaged with the management shall carry out their duties with due care and must duly safeguard the interests of the company.*

*(Article 717 para. 1 Swiss Code of Obligations)*

- Principal agent theory
- Definition of conflict of interest
- Types of conflicts
  - Personal (level of board member)
  - Majority vs. minority (level of the board of directors)
  - Conflicts in control transactions (e.g. acquisitions, mergers)
  - Potential vs. actual, specific vs. permanent conflicts etc.
  - Self-dealing and double representation

... and other categorizations

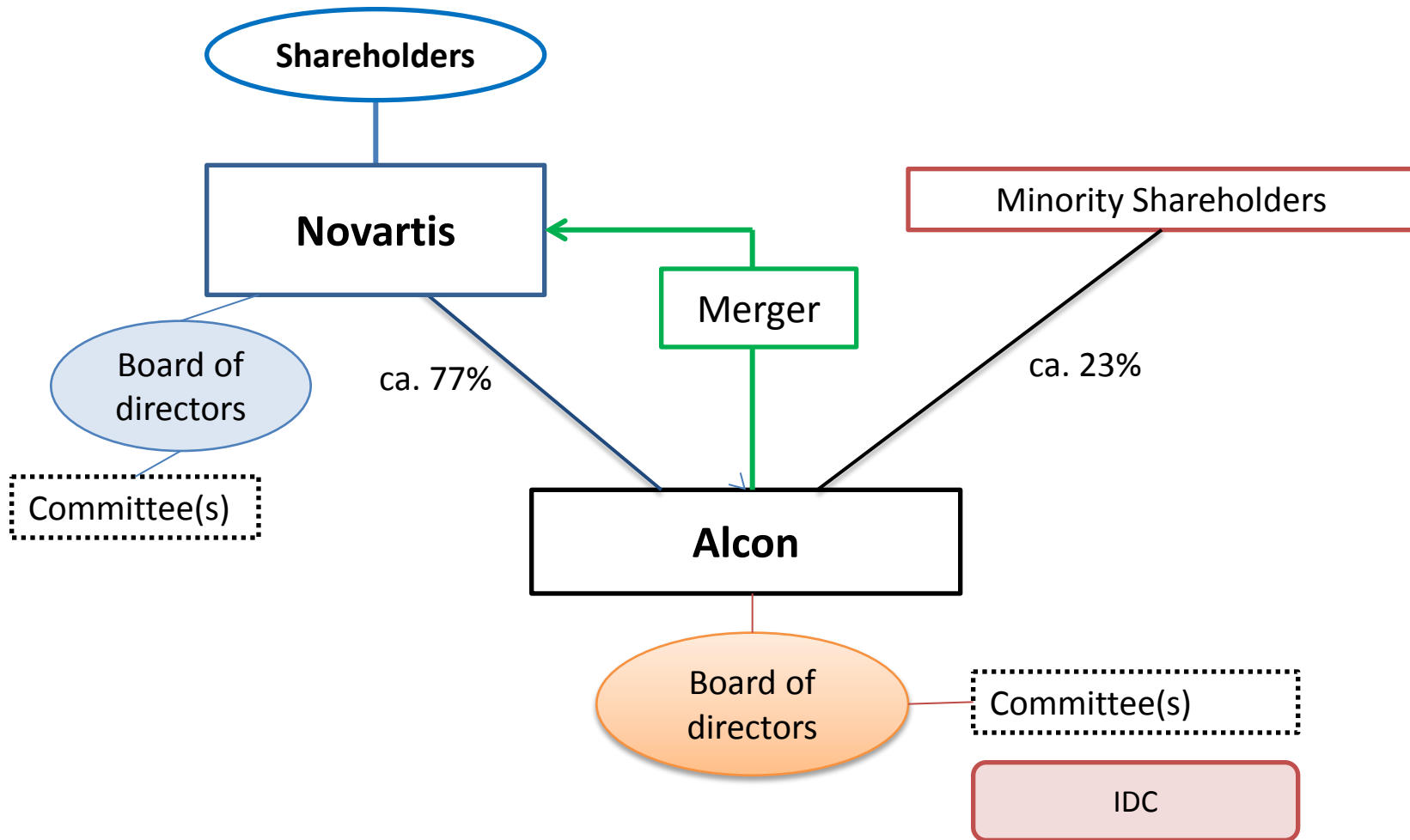
# Conflicts of Interest – Rules (2/3)

- Swiss corporate law
  - Fiduciary duties
  - Rules governing self-dealing and double representation
  - Duties of board members re (potential) conflicts:
    - Diligence in structuring own affairs (acceptance of mandates)
    - Information duty, duty to abstain
    - Resignation from office, etc.
  - Duties of board of directors (e.g. organization of board)
- Organizational regulations (e.g. rules re dealing with conflicts, committee(s))
- Swiss takeover law / practice of Takeover Board
  - Establishment of independent committee
  - Fairness opinion
- (Non binding) governance codes (e.g. Swiss Code of Best Practice)
- Stock exchange rules (e.g. SIX Directive Corporate Governance)

# Conflicts of Interest – Rules (3/3)

- Which are sanctions
  - if actions and/or transactions are influenced by conflicts of interest; and
  - no appropriate measures are taken to address them.
  
- Legal consequences, e.g.
  - Civil liability of directors and managers (breach of fiduciary duties)
  - Invalidity of transaction (e.g. self-dealing or double representation)
  - Challenging of resolutions of shareholders' meeting
  - Invalidity of board resolutions
  - Actions under Swiss Takeover law / practice of Takeover Board
  - Actions under the Swiss Merger Act
    - Appraisal suits
    - Challenge of resolutions and/or civil liability

# Case Study – The Facts (1/2)



# Case Study – The Facts (2/2)

- Novartis – Alcon case 2010 / 2011
- Pre-transaction structure
  - The Parties
  - Two Swiss share corporations
  - Novartis listed on SIX Swiss Exchange, other exchange
  - Alcon listed on NYSE
  - Board composition
- The going private transaction
  - Merger of Alcon with Novartis under the Swiss Merger Act, followed by delisting of Alcon shares and deregistration under Exchange Act
  - Merger consideration
  - The fair merger consideration issue, minority interests
  - Merger approved and completed in April 2011



# Case Study – Going private by Merger

- Relevant sources of law and rules, i.a.
  - Swiss corporate and merger law
  - Securities laws
  - Listing rules of NYSE
  - ... and many more
- The Swiss Merger (key issues)
  - Ordinary statutory merger (Swiss Merger Act)
  - Merger agreement, merger report
  - Approval by board of directors (mandatory, non-transferable)
  - Inspection and display periods
  - Approval by shareholders' meetings of Alcon and Novartis
  - Registration in commercial register(s)

# Case Study – Board Procedures (1/3)

- Conflicts of interest situation
  - Within board of directors of Alcon?
  - Majority shareholder vs. minority shareholders?
- Board procedures in this transaction – some aspects
- Structural measures
  - In place prior to transaction
  - Organizational regulations of Alcon
    - Provisions on conflicts of interest
    - Independent Director Committee (IDC)
      - Role, function
      - Powers, recommendations

# Case Study – Board Procedures (2/3)

- Transactional measures / procedural safeguards
  - Separate and independent evaluation of merger (side of Alcon)
    - Evaluation by board of directors of Alcon
    - Evaluation by IDC
  - Some measures used in connection with evaluation, e.g.
    - Own legal and financial advisors
    - Legal opinion from leading Swiss corporate governance expert
    - Fairness opinions (fairness of merger consideration)
  - IDC negotiated terms and conditions of merger agreement with Novartis

# Case Study – Board Procedures (3/3)

- Transactional measures / procedural safeguards (con‘t)
  - Board approval process
    - Recommendation from IDC
    - Approval by board of directors of Alcon
  - Shareholder information (merger report etc) described procedural safeguards and steps
- Approval by shareholders‘ meetings

# Discussion

- Enhanced awareness for conflicts of interest by board members / directors
- Board procedures and rules on (potential) conflicts of interest are important and need to be in place
- M&A and other major transactions require special attention: fairness issue and procedural safeguards
- International standards of good corporate governance influence both domestic and cross-border transactions

# Contact

Thank you for your attention

**Pestalozzi** Attorneys at Law

Löwenstrasse 1, CH-8001 Zürich, Switzerland

Phone: +41 44 217 91 11, Fax +41 44 217 92 17

Franz Schubiger, LL.M.

Partner, Corporate / M&A

Phone (direct): +41 44 217 92 49

E-mail: [franz.schubiger@pestalozzilaw.com](mailto:franz.schubiger@pestalozzilaw.com)