

# Content Overview

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# Index of Abbreviations

AB	Official Bulletin, Amtliches Bulletin
AG	Aargau
AHGB	General German Commercial Code, Allgemeines Handelsgesetzbuch
AJP	Journal, Aktuelle Juristische Praxis
Art	Article
AS	Official collection of formal norms, Amtliche Sammlung
ASA	Archiv für Schweizerisches Abgaberecht
ASV	Directive for Investment foundations, Verordnung über die Anlagestiftungen of 10 <sup>th</sup> and 22 <sup>nd</sup> June 2011 (SR 831.403.2)
ASV-RAG	Directive for Investment foundations issued by the federal audit supervisory authority, Verordnung der Eidgenössischen Revisionsaufsichtsbehörde über die Beaufsichtigung von Revisionsunternehmen of 17 <sup>th</sup> March 2008 SR (221.303.33)
AUS	Australia
BAG	Federal Office for Public Health, Bundesamt für Gesundheit
BankG	Banking Act, Bundesgesetz vom 8. November 1934 über die Banken und Sparkassen (Bankengesetz, SR 952)
BankV	Banking directive, Verordnung über die Banken und Sparkassen of 30 <sup>th</sup> April 2014 (SR 952.02)
Basel II	Second of the Basel Accords issued by the Basel Committee on Banking Supervision
Basel III	Third of the Basel Accords issued by the Basel Committee on Banking Supervision
BE	Berne
BEHG	Stock exchange act, Bundesgesetz über die Börsen und den Effektenhandel of 24 <sup>th</sup> March 1995 (SR 954.1)
BEHV	Stock exchange directive, Verordnung über die Börsen und den Effektenhandel of 2 <sup>nd</sup> December 1996 (SR 954.11)
BFH	Bundesfinanzhof
BGE	Published verdict of the Swiss Federal Tribunal, veröffentlichter Bundesgerichtsentscheid
BGer	Unpublished verdict of the Swiss Federal Tribunal, unveröffentlichter Bundesgerichtsentscheid
BilMoG	Accounting Law Modernisation Act, Bilanzrechtsmodernisierungsgesetz
BK	Commentary, Bernerkommentar
BSK	Commentary, Baslerkommentar

BV	Federal Constitution of the Swiss Confederation, Bundesverfassung der Schweizerischen Eidgenossenschaft of 18 <sup>th</sup> April 1999 (SR 101)
BVV 2	Directive on Occupational Old-age, Survivors and Disability Insurance, Verordnung vom 18. April 1984 über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge (SR 831.441.1)
CC	Civil Code or Schweizerisches Zivilgesetzbuch of 10 <sup>th</sup> December 1907 (SR 210)
CDN	Canada
cf	confer
CFO	Chief Financial Officer
CHK	Commentary, Handkommentar zu Schweizer Privatrecht
CO	Code of Obligations or Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht) of 30 <sup>th</sup> March 1911 (SR 220)
COBIT	Control Objectives for Information and Related Technologies
COSO	Internal Control – Integrated Framework of the Committee of Sponsoring Organizations of the Treadway Commission
DAS	Domestic Accounting Standards
dFINIG	draft FINIG
DFR	Directive on Financial Reporting
DRSC	German Financial Reporting Standards Committee, Deutsches Rechnungslegungs Standards Committee
E-	Entwurf (draft)
EC	European Commission
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
ed	Edition or editor
eds	Editors
EEA	European Economic Area
EEC	European Economic Community
EF	Journal, Expert Focus
EFV	Federal Finance Administration, Eidgenössische Finanzverwaltung
eg	for example
EIMG	Law on the Federal Institute of Metrology, Bundesgesetz über das Eidgenössische Institut für Metrologie of 17 <sup>th</sup> June 2011 (SR 941.27)
ENSIG	Law on the Federal Nuclear Security Inspectorate, Bundesgesetz über das Eidgenössische Nuklearsicherheitsinspektorat of 22 <sup>nd</sup> June 2007 (SR 732.2)

EnV	Energy Directive, Energieverordnung of 7 <sup>th</sup> December 1998 (SR 730.01)
EPSAS	European Public Sector Accounting Standards
ERV	Ordinance concerning Capital Adequacy and Risk Diversification for Banks and Securities Traders, Verordnung über die Eigenmittel und Risikoverteilung für Banken und Effekthändler of 1 <sup>st</sup> June 2012 (SR 952.03)
ESTV	Federal Tax Administration, Eidgenössische Steuerverwaltung
et al	and others
et seq	et sequens/sequentes (the following)
ETH	Federal Technical University of Zurich, Eidgenössische Technische Hochschule
EU	European Union
EU-IFRS	IFRS enacted in the European Union
EUR-lex	Database for European Law
EVU	Energy supply companies, Energieversorgungsunternehmen
EY	Ernst & Young
FASB	Financial Accounting Standards Board
FDK	Conference of Finance Directors, Finanzdirektorenkonferenz
FDV	Telecommunications Services Ordinance, Verordnung über Fernmeldedienste of 9 <sup>th</sup> March 2007 (SR 784.101.1)
FEE	European Federation of Accountants, Fédération Européenne des Experts Comptables
FER	Financial Reporting Standards, Fachempfehlungen zur Rechnungslegung
FHG	Financial Budget Act, Bundesgesetz über den eidgenössischen Finanzhaushalt of 7 <sup>th</sup> October 2005 (SR 611.0)
FHV	Financial Budget Ordinance, Finanzhaushaltsverordnung vom 5. April 2006 (FHV, SR 611.01)
FIDLEG	Financial Services Act, Finanzdienstleistungsgesetz
Fig	Figure (Ziffer)
FinfraG	Law on Financial Market Infrastructure, Bundesgesetz über die Finanzmarktinfrastrukturen und das Marktverhalten im Effekten- und Derivatehandel of 19 <sup>th</sup> June 2015 (SR 958.1)
FINIG	Law on Financial Institutions, Finanzinstitutsgesetz
FINMA	Swiss Financial Market Supervisory Authority, Eidgenössische Finanzmarktaufsicht
FinraV- FINMA	FINMA's Directive on Financial Market Infrastructure, Verordnung der Eidgenössischen Finanzmarktaufsicht über die Finanzmarktinfrastrukturen und das Marktverhalten im Effekten- und Derivatehandel of 3 <sup>rd</sup> December 2015 (SR 958.111)
FMIA	Swiss Financial Market Infrastructure Act = FinfraG

FR	Fribourg
FS	Jubilee publication, Festschrift
GAAP	Generally Accepted Accounting Principles
GE	Geneva
GeBüV	Directive on the Preparation and Storage of Account Books, Verordnung über die Führung und Aufbewahrung der Geschäftsbücher of 24 <sup>th</sup> April 2002 (SR 221.431)
GesKR	Journal, Schweizerische Zeitschrift für Gesellschafts- und Kapitalmarktrecht sowie Umstrukturierungen
GFSM2001/ ESVG95	Government Financial Statistics Manual
GR	Graubünden
HRM	Handbook Harmonized Model on financial reporting for Cantons and Communes, Handbuch Harmonisiertes Rechnungslegungsmodell für die Kantone und Gemeinden
HRM2	Handbook Harmonized Model on financial reporting for Cantons and Communes, Handbuch Harmonisiertes Rechnungslegungsmodell für die Kantone und Gemeinden 2
HWP	Swiss Handbook of Auditing, Schweizer Handbuch der Wirtschaftsprüfung
i.c.w.	in conjunction with
IAS	International Accounting Standards
IASB	International Accounting Standards Board
IASC	International Accounting Standards Committee
ICAEW	Institute of Chartered Accountants in England and Wales
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ie	id est (das heisst)
IFRIC	International Financial Reporting Interpretations Committee
IFRS	International Financial Reporting Standards
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
IPSAS	International Public Sector Accounting Standards
IPSASB	International Public Sector Accounting Standards Board
ISACA	Information Systems Audit and Control Association
ISR	Israel
Jusletter	Journal, Jusletter weblaw
KAG	Swiss Federal Collective Investment Act, Bundesgesetz vom 23. Juni 2006 über die kollektiven Kapitalanlagen (Kollektivanlagengesetz, SR 951.31)
KFG	Law on the promotion of culture, Bundesgesetz über die Kulturförderung of 11 <sup>th</sup> December 2009 (SR 442.1)
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KKV	Swiss Federal Collective Investment Ordinance, Verordnung über die kollektiven Kapitalanlagen of 22 <sup>nd</sup> November 2006 (SR 951.311)
KKV-FINMA	FINMA's Swiss Federal Collective Investment Ordinance, Verordnung der Eidgenössischen Finanzmarktaufsicht über die kollektiven Kapitalanlagen of 27 <sup>th</sup> August 2014 (SR 951.312)
KPMG	Klynveld Peat Marwick Goerdeler
KR	Listing rules Kotierungsreglement (of SIX Swiss Exchange)
KVAV	Directive on the Supervision of Social Health Insurance, Verordnung betreffend die Aufsicht über die soziale Krankenversicherung of 18 <sup>th</sup> November 2015 (SR 832.121)
LeGes	Journal, Mitteilungsblatt der Schweizerischen Gesellschaft für Gesetzgebung (SGG) und der Schweizerischen Evaluationsgesellschaft (SEVAL)
LiqV	Directive on the Liquidation of Banks, Verordnung über die Liquidität der Banken of 30 <sup>th</sup> November 2012 (SR 952.06)
Lit	Litera (Buchstabe)
MFHG	Model for the Federal Budget Act for Cantons and Communes, Musterfinanzhaushaltsgesetz für Kantone und Gemeinden
MSG	Law on Museums and Federal Collections, Bundesgesetz über die Museen und Sammlungen des Bundes of 12 <sup>th</sup> June 2009 (SR 432.30)
n	Footnote
N	National Assembly, Nationalrat
Nato	North Atlantic Treaty Organization
NBV	Ordinance on the Federal Act on the Swiss National Bank, Verordnung zum Bundesgesetz über die Schweizerische Nationalbank of 18 <sup>th</sup> March 2004 (SR 951.131)
NCC	(English) National Consumer Council
NGO	Non-governmental organisation
NR.	Number
NRM	The New Federal Financial Reporting Model, Das neue Rechnungsmodell des Bundes
NZ	New Zealand
NZZ	Journal, Neue Zürcher Zeitung
oCO	old CO (meaning the CO in act in 2012)
OECD	Organisation for Economic Co-operation and Development
OFK	Commentary, Orell Füssli Kommentar
OR	Code of Obligations, Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht) of 30 <sup>th</sup> March 1911 (SR 220)
p/pp	page(s)

para/paras	paragraph (describing the location in the law in an article)
para/paras	paragraph(s) (describing the location in the source)
PKK	Partiya Karkerên Kurdistanê
PublV	Directive on the Collection of Federal Laws, Verordnung über die Sammlungen des Bundesrechts und das Bundesblatt of 7 <sup>th</sup> October 2015 (SR 170.512.1)
PWC	PricewaterhouseCoopers
RAB	Federal audit supervisory authority, Revisionsaufsichtsbehörde
RAG	Law on Audit Supervisory, Revisionsaufsichtsgesetz
RDAF	Journal, Revue de droit administratif et de droit fiscal
recht	Journal, recht Sämpfli Verlag
RFA	Regulatory Impact Assessment, Regulierungsfolgenabschätzung
RIA	Regulatory Impact Analyses
RKV	UVEK's Directive on the Accounting of Officially Licensed Companies, Verordnung des UVEK vom 18. Januar 2011 über das Rechnungswesen der konzessionierten Unternehmen (RKV, SR 742.221)
RLR	Directive on Financial Reporting, Richtlinie betreffend Rechnungslegung
RRG	Law on Financial Reporting and Auditing, Gesetz betreffend Rechnungslegung und Revision
RSA	Republic of South Africa
RTVG	Radio and Television Act, Bundesgesetz über Radio und Fernsehen of 24 <sup>th</sup> March 2006 (SR 784.40)
RTVV	Radio and Television Directive, Radio und Fernsehverordnung of 9 <sup>th</sup> March 2007 (SR 784.401)
S	Council of States, Ständerat
SAFIG	Law on the Federal Agency Promoting Innovation, Bundesgesetz über die Schweizerische Agentur für Innovationsförderung of 17 <sup>th</sup> June 2016 (SR 420.2)
SEC	United States Securities and Exchange Commission
SERVG	Law on the Federal Insurance of Exports, Bundesgesetz über die Schweizerische Exportrisikoversicherung of 16 <sup>th</sup> December 2005 (SR 946.10)
SFT	Swiss Federal Tribunal (Federal Supreme Court of Switzerland)
SIC	Standard Interpretations Committee
SIX	Formerly SWX, Stock Exchange in Zurich
Sjv	Schweizerischer Juristenverein
SJZ	Journal, Schweizerische Juristen-Zeitung
SMEs	Small and Medium Entities
SO	Solothurn

SR	Systematical Collection of Law, Systematische Gesetzessammlung
SRO	Self-regulatory organisation
ST	Journal, Schweizer Treuhänder
StE	Tax Verdict, Steuerentscheid
StromVV	Electricity Supply Ordinance, Stromversorgungsverordnung of 14 <sup>th</sup> March 2008 (SR 734.71)
Swiss GAAP	Swiss Generally Accepted Accounting Principles,
FER	Fachempfehlungen zur Rechnungslegung
SZW	Journal, Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
UN	United Nations
UNTS	United Nations Treaty Series
US	United States
USA	United States of America
US GAAP	United States Generally Accepted Accounting Principles
UVG	Federal Law on Accident Insurance, Bundesgesetz über die Unfallversicherung of 20 <sup>th</sup> March 1981 (SR 832.20)
VAG	Insurance Supervision Act, Bundesgesetz betreffend die Aufsicht über Versicherungsunternehmen of 17 <sup>th</sup> December 2004 (SR 961.01)
VASR	Recognized Financial Reporting Directive, Verordnung über die anerkannten Standards zur Rechnungslegung vom 21. November (SR 221.432)
VCLT	Vienna Convention on the Law of Treaties
VD	Vaud
VE-	predraft, Vorentwurf
Vorbem.	Preliminary Remarks, Vorbemerkungen
VPG	Postal Ordinance, Postverordnung of 29 <sup>th</sup> August 2012 (SR 783.01)
VPOG	Postal Organisation Ordinance, Postorganisationsverordnung of 24 <sup>th</sup> October 2012 (SR 783.11)
VStV	Ordinance of Withholding Tax, Verordnung über die Verrechnungssteuer of 19 <sup>th</sup> December 1966 (SR 642.211)
XBRL	eXtensible Business Reporting Language
ZBJV	Journal, Zeitschrift des Bernischen Juristenvereins
ZBl	Journal, Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht

Zewo	Swiss monitoring agency for charitable fundraising, Schweizerische Zertifizierungsstelle für gemeinnützige Spenden sammelnde Organisationen
ZfR	Centre for Legislature, Zentrum für Rechtsetzungslehre
ZGB	Civil Code, Schweizerisches Zivilgesetzbuch of 10 <sup>th</sup> December 1907 (SR 210)
ZH	Zürich
ZK	Commentary, Zürcherkommentar

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# Abstract

This thesis analyses the influence of IFRS (International Financial Reporting Standards) on Swiss commercial accounting law. The effects appear from different directions: on a national level, the legislature considered the IFRS in the norm-setting process. Swiss law refers to IFRS with incorporations, references, and general clauses. In addition, Swiss case law and the doctrine use IFRS to interpret Swiss law. However, the influence does not stop at Swiss commercial accounting law. IFRS also have an impact on public accounting law through the IPSAS (International Public Sector Accounting Standards). At the international level, IFRS have been endorsed by a few jurisdictions as their domestic accounting standard; hence, IFRS also influences Swiss law through the comparative law approach.

Unfortunately, this impact comes with problems. IFRS are issued by the IASB (International Accounting Standards Board), making them a set of private norms. Consequently, their influence on domestic law raises the question of democratic legitimacy. Another issue is the clash of two different concepts in financial reporting: the true and fair view versus the prudence concept. The first concept characterises IFRS and relies on a transparent and fair presentation. The second is the underlying principle of the CO (Swiss Code of Obligations). It demands careful reporting, which can lead to intransparency. How can these differences be resolved?





# Introduction and Personal Remarks

This thesis concerns mainly Swiss law, but it can also be of value in other jurisdictions with similar conceptual problems concerning the impact of IFRS on domestic law. In addition, other legal fields can adopt the concepts regarding the influence of a private standard on domestic law presented in the following pages. 1

## A. Subject of Investigation

Explanations regarding financial reporting must be preceded by remarks concerning the entity. A corporation is the sum of different contracts.<sup>1</sup> To understand the entity, one must study its financial numbers. ‘If you can’t have faith in a company’s numbers, then you can’t have faith in anything about the company at all.’<sup>2</sup> Financial reporting, like other areas of life, is regulated by standards. These ‘accounting standards are too important to be left to accountants’, proclaimed a member of the US Congress a few years ago.<sup>3</sup> On the following pages, legal issues arising from IFRS’ impact on Swiss commercial accounting law are analysed. The judicial perspective is of vital importance because financial reporting cannot survive without a normative structure.<sup>4</sup> 2

The CO regulates Swiss commercial accounting. It consists of Art 957 et seq CO, which adds up to 15 pages. Due to this limited space, the regulation was written in open wording and must be interpreted.<sup>5</sup> Therefore, the interpreter must ask himself which instruments he can use. Answering this question is not only of relevance in the field of financial reporting but also in any other technical sector. This is because the legislature tends to limit the regulation of technical issues to the creation of fundamental principles.<sup>6</sup> 3

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<sup>1</sup> Easterbrook/Fischel, *The Corporate Contract*, p 1418; Müller/Henry/Barmettler, *veb.ch Praxiskommentar*, Art 958 para 6.

<sup>2</sup> Stiglitz, p 45.

<sup>3</sup> Beresford, p 73.

<sup>4</sup> With further reference to Brendt, *Das neue Rechnungslegungsrecht*, p 156.

<sup>5</sup> Cf in general for the open wording of the Swiss Civil Code, which consists of the Code of Obligations, which incorporates the commercial accounting rules, Leupold, *recht* 2008, p 64.

<sup>6</sup> ZK-Bossard, *Vorbemerkungen* para 441; Müller, *FS Richli*, p 760.

- 4 Such regulation is often issued by private standard setters (cf para 264 et seq). Since a private group creates informal norms, they are not necessarily a private standard. Their legal nature can also change. Depending on how a state considers the informal norm, namely IFRS, their nature transforms. If a state implements IFRS, they become formal law. This state now accepts IFRS as a part of its legal system. Meanwhile, other states still regard IFRS as a set of informal norms. Therefore, it depends on the point of view the observer takes regarding the legal nature of IFRS (cf para 137 et seq). If a state implements IFRS into its legal system, IFRS become its national law. At the same time, other states can still regard IFRS as informal norms.
- 5 IFRS also affected the legislature in the revision of the commercial accounting rules (in effect since 1<sup>st</sup> January 2013). The draft foresaw the possibility (Art 962 para 1 d-CO) of reporting only according to a recognised standard (such as IFRS).<sup>7</sup> This possibility disappeared in the parliamentary process due to the lack of knowledge on the effects of the interaction between IFRS and the CO (cf para 247 et seq).
- 6 The following legal thesis will contribute mainly to the economic literature.<sup>8</sup> It is part of a project entitled, ‘Influence of the International Financial Reporting Standards (IFRS) on Swiss Accounting and Company Law’, submitted by Prof. Dr. iur. Lukas Handschin to the Swiss National Science Foundation. The project proposal does not specify the methodical procedure. However, the following questions will surely need to be answered as part of this work:<sup>9</sup> ‘A section dealing with fundamentals to analyse the legal nature of IFRS as a standard of self-regulation (cf para 137 et seq), and an embodiment of the principles of proper accounting (cf para 353 et seq). Also to be answered is the question of whether IFRS as EU-IFRS are foreign law, or comprise international standards of self-regulation, and how this impacts their influence on the Swiss legal system (cf para 226 et seq). In this context, it is also necessary to examine whether a mandatory application of IFRS changes their character for certain listed enterprises and moves them from a norm of self-regulation closer to statutory law (cf paras 94 et seq, 137 et seq). It is necessary to examine the fundamentals whereby IFRS’ rules may be consulted to determine Swiss accounting law and the principles of proper accounting (cf para 353 et seq).

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<sup>7</sup> Cf Art 1 VASR.

<sup>8</sup> ‘Für viele Juristen ist das Rechnungslegungsrecht wie eine heisse Kartoffel, die man gerne den Kollegen der Wirtschaftswissenschaften weiterreicht.’ Translation: ‘For many lawyers, financial reporting is like a hot potato that one likely passes to the colleagues in economics’. Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 1.

<sup>9</sup> Internal references added by the author; proposal of the research project, available at: <https://ifrs.ius.unibas.ch/en/23-2/influence-of-ifrs-on-co/> (accessed on 15.05.2017).

This includes an examination of the extent to which general standards of self-regulation may be consulted during interpretations of Swiss law (cf para 417 et seq). This objective necessitates dealing with IFRS regulations. Only this makes it possible to ascertain where evaluations and principles are identical or different. If evaluations are identical to those in Swiss law, an adoption of IFRS principles is easier to justify (cf para 303 et seq). One question arising in this context is whether IFRS regulations, which observe or concretise the principle of prudence in CO, should be adopted instead of regulations that are the outcome of considerations related to transparency (cf para 303 et seq). Also to be clarified is the issue of whether IFRS regulations may or must be applied; in other words, whether their application is mandatory or optional (cf para 509)'.

## B. Process of Investigation

This work can be put into context with various other related projects. On a 7 general level, this work draws inspiration from the following publications: 'Informal International Law Making and Accountability',<sup>10</sup> 'Why not Epistocracy? Political Legitimacy and "the Fact of Expertise" (EPISTO)',<sup>11</sup> 'To the Use of International Soft Law before National Courts'.<sup>12</sup> The present study focuses on the influence of IFRS on domestic rules, especially in Switzerland.

The main part of this thesis consists of a jurisprudential analysis. The 8 starting point was the creation of a correlation table. The table consisted of a comparison of the old CO's (oCO) wording with the new CO and IFRS. With that and the corresponding jurisdiction and literature in mind, an overview of the specific impact of IFRS on the Swiss commercial accounting rules was created. Subsequently, it was necessary to take a step back and ask a more fundamental question: Can IFRS have an impact on Swiss accounting rules? This leads to a more general way of thinking about the influence of informal norms on formal ones and the problems that arise with this issue, mainly democratic legitimacy. In answering this question, solutions were sought in the

<sup>10</sup> Link: <https://www.hiil.org/> (accessed on 16.10.2018); cf also [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=2ahUKEwjIu8KthJDeAhVLtosKHYY\\_gAgMQFjAHegQIBxAC&url=https%3A%2F%2Fwww.eui.eu%2FDocuments%2FDepartmentsCentres%2FLaw%2FProfessors%2FCafaggi%2FcvCafaggi.doc&usg=AOvVaw3\\_BYdwWhWwq-1ca-VGfmKC](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=2ahUKEwjIu8KthJDeAhVLtosKHYY_gAgMQFjAHegQIBxAC&url=https%3A%2F%2Fwww.eui.eu%2FDocuments%2FDepartmentsCentres%2FLaw%2FProfessors%2FCafaggi%2FcvCafaggi.doc&usg=AOvVaw3_BYdwWhWwq-1ca-VGfmKC) (accessed on 16.10.2018).

<sup>11</sup> Link: <http://www.sv.uio.no/arena/english/research/projects/episto/> (accessed on 16.10.2018).

<sup>12</sup> Original title: Zur Verwendung von völkerrechtlichem Soft Law vor staatlichen Gerichten, a combination of a qualitative and quantitative study run by Matthias Goldmann. The project is still in progress.

legislation process, asking what the consequences are, and whether the legislature considers private norms in the legislation process. The research on the interpretation enhances the understanding that, although one standard is applied, its interpretation can differ. This leads to the creation of different forms of IFRS' influence.

## C. Terminology

- 9 Before diving into the subject, the terminology used in this thesis is enumerated. 'Accounting' means bookkeeping (*Buchführung*)<sup>13</sup> and 'financial reporting' refers to '*Rechnungslegung*'. Accounting is the basis for financial reporting (Art 957a para 1 CO<sup>14</sup>).<sup>15</sup> In my view, this distinction does not matter for this work, so the terms 'financial reporting' and 'accounting' will be used interchangeably. Proper accounting and financial reporting are achieved if the preparer fulfils the legal regulations.<sup>16</sup> This positive definition is followed by the negative: accounting, or financial reporting, is not proper if it is not possible to derive a lawful financial report from the accounting or the minimal requirements in the documentation.<sup>17</sup> Accounting is also not proper if the accountability functions are not met because of incompleteness, without system or due to incorrectness of the financial report.<sup>18</sup> In this study, the 'preparer' is the person creating the financial report. The 'user' reads the financial report and uses it as the basis for his decision to invest in the company, to evaluate the credit rating, to measure the tax, etc.
- 10 In my view, it is not necessary to differentiate between the terms 'private standards', 'self-regulation', and 'soft law' in this work. Only the following difference concerning informal norms is used:<sup>19</sup> every norm issued by an

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<sup>13</sup> For explanations cf von Bhicknapahari, veb.ch Praxiskommentar, Art 957a para 9 et seq; cf also Madörin/Bertschinger, Accounting and auditing in Switzerland, p 42.

<sup>14</sup> Art 957a para 1 sentence 1 CO 'Accounting forms the basis for financial reporting'; authoritative German version: '*Die Buchführung bildet die Grundlage der Rechnungslegung*'.

<sup>15</sup> Behr/Leibfried, Rechnungslegung, p 31; von der Crone, Aktienrecht, § 7 para 7; cf also Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 63 et seq; CHK-Lipp, Art 957a para 1.

<sup>16</sup> Cf Böckli, Rechnungslegung, para 156; Handschin, Rechnungslegung, para 27; HWP 2014, p 19 et seq; CHK-Lipp, Art 957a para 11.

<sup>17</sup> Cf Böckli, Rechnungslegung, para 156; Handschin, Rechnungslegung, para 27; HWP 2014, p 19 et seq; CHK-Lipp, Art 957a para 11.

<sup>18</sup> HWP 2014, p 19 et seq; CHK-Lipp, Art 957a para 11.

<sup>19</sup> I will follow the terminology of Pauwelyn/Wessel/Wouters, Informal International Lawmaking, p 2.

organisation with the power to set authoritative norms is a traditional or formal law; all other norms are informal norms.<sup>20</sup> This is important because authorities other than the legislature issue norms also (eg ESTV, FINMA and WEKO issue circulars; cf para 143). However, only authorities with legislative power can enact legally binding norms. Norms issued without legislative power do not have a legally binding effect, but do sometimes have a factual binding effect (cf para 292).<sup>21</sup>

In addition, differentiations in transnational and international norms are rejected.<sup>22</sup> Terms such as ‘standards’ could be defined differently to ‘guidelines’, ‘principles’, ‘recommendations’, ‘codes of conduct’, and ‘codes of best practice’. All of these terms basically mean the same thing.<sup>23</sup> The differences are only elaborated in specific cases in which it is necessary. For example, the distinction between international and global is redundant for this work.

The term Generally Accepted Accounting Principles (GAAP) is often used synonymously with recognised standards. Below, the term ‘recognised standards’ is used in the sense of Art 1 VASR<sup>24</sup> (IFRS; IFRS for SMEs; Swiss GAAP FER; US GAAP; and IPSAS; cf para 143).<sup>25</sup> The term ‘recognised financial reporting principles’ (*Grundsätze ordnungsmässiger Rechnungslegung*) is applied in the sense of Art 958c CO, consisting of the Swiss financial reporting principles (cf para 353 et seq).

<sup>20</sup> Pauwelyn, Informal International Lawmaking, p 16; cf SGHB Finanzmarktrecht I-Brändli, § 2 para 8; Keller, Runde Tische, p 159; differing Schreiber, International Standards, p 87 et seq.

<sup>21</sup> In general SGHB Finanzmarktrecht I-Bartholet, § 5 para 38; for the FINMA-RS cf BankG Komm-Handschin, Art 6 para 11; Weber, Informationsmissbrauch, p 27 et seq; cf also the verdict from the BVGer from 26. November 2009, B-7764/2008, Consideration 8.4.1. For the circulars issued by the WEKO cf David/Jacobs, para 646; cf Troxler, Jusletter 16<sup>th</sup> November 2015, para 4; cf also SGHB Finanzmarktrecht I-Brändli, § 2 para 13.

<sup>22</sup> Cf also Pauwelyn, Informal International Lawmaking, p 20.

<sup>23</sup> For differentiations cf Schreiber, International Standards, p 59 et seq.

<sup>24</sup> Verordnung über die anerkannten Standards zur Rechnungslegung vom 21. November (SR 221.432).

<sup>25</sup> The FINMA RS are equal to the recognised standards (Art 2 VASR); Botschaft 2007, p 1743; Erläuternder Bericht VASR, p 9; HWP 2014, p 104; BankG Komm-Handschin, Art 6 para 16; CHK-Lipp, Art 962a para 20.



# § 1 Financial Reporting

In this chapter, financial reporting is explained, as well as the meaning of its standardisation. Emphasis is on the development of financial reporting regulation in Switzerland. These thoughts help to understand the system of regulation we experience today. 13

## A. Financial Reporting

Bermann and Knight give the following answer to the question, What is financial reporting for?: ‘The art of accounting and finance is the art of using limited data to come as close as possible to an accurate description of how well a company is performing’.<sup>26</sup> The immanent function of financial reporting is to provide information.<sup>27</sup> Shareholders are interested in the report because it shows the dividend-paying capacity of an entity.<sup>28</sup> Besides shareholders not represented within management, the interested group consists of stakeholders, namely creditors, the state (tax authorities), employees, suppliers, and customers.<sup>29</sup> The financial report in some states is also the basis for taxation (cf para 54 et seq).<sup>30</sup> In addition, the financial report is the basis for decisions made by the board of directors.<sup>31</sup> Thus, financial reporting serves different purposes. This makes the regulation of financial reporting difficult. In the end, regulations in financial reporting serve the protection of the whole economic system of which the entity is a part.<sup>32</sup> 14

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<sup>26</sup> Berman/Knight, *Financial Intelligence*, p 4 et seq.

<sup>27</sup> HWP 2014, p 104; Hessischer Rechnungshof, *EPSAS Framework*, para 5; IFRS, *Conceptual Framework*, 12; Behr/Leibfried, *Rechnungslegung*, p 27; von der Crone, *Aktienrecht*, § 7 para 16 et seq; ZK-Bossard, *Vorbemerkungen para 475 et seq*; Handschin, *Rechnungslegung*, para 2; Kleibold, *Ausschüttungsregulierung*, p 2; Stoffel, *Grundriss des Aktienrechts*, para 1016.

<sup>28</sup> Tracey, *Conservatism*, p 540.

<sup>29</sup> Keuschnigg, *Festschrift Behr*, p 226; Kleibold, *Ausschüttungsregulierung*, p 13; cf CHK-Lipp, *Art 958 para 4, Art 962 para 2*.

<sup>30</sup> Gee/Haller/Nobes, p 97 et seq; Wehrfritz/Haller, *National Influence*, p 199.

<sup>31</sup> Cf HWP 2014, p 3.

<sup>32</sup> Böckli, *Aktienrecht*, § 8 para 14 et seq; Böckli, *Rechnungslegung*, para 12; Handschin, *Rechnungslegung*, para 22.

## B. Financial Reporting Standard

- 15 The next step deals with the regulation or standardisation of financial reporting. Regulation means setting, enforcing and supervising a set of rules.<sup>33</sup> ‘Standard’ was originally the term for a flag.<sup>34</sup> This has not changed with our current use. It is still a point of orientation and can be classified best as practice in a specific sector.<sup>35</sup> In financial reporting, a standard tries to unify the ways in which preparers report their numbers. This process creates better comparability in capital markets.<sup>36</sup> Capital markets have an interest in the essential information from entities.<sup>37</sup>
- 16 A financial reporting standard can also be explained as follows: The purpose of a financial report is to display the entity in numbers.<sup>38</sup> This report shall not be misleading and should show the underlying economic circumstances of an enterprise.<sup>39</sup> Even so, numbers will not show the reality, but rather show it through a lens.<sup>40</sup> Thus, different versions of the truth can exist next to each other.<sup>41</sup> The lens is the set of rules norming the process of financial reporting. In Swiss financial reporting, the following lenses are common: CO, HRM2 (Harmonisiertes Rechnungsmodell 2; cf para 217 et seq), IFRS, IPSAS (cf para 215 et seq), Swiss GAAP FER (cf para 190 et seq), and US GAAP (cf para 105 et seq). These sets of rules can show differences due to the culture of their origin (cf paras 46 et seq, 484 et seq). Depending on the lens one is using, the same reality can appear differently. This also holds up for a financial report according to the CO or IFRS. The same entity can thus display its numbers differently depending on the standard it uses.<sup>42</sup> In other words, is the report according to the CO generally different from that in line with IFRS?
- 17 Hence, a standard unifies the way in which the financial situation of an entity is displayed. However, this unification is only possible to a certain degree. As soon as a standard is applied, it is interpreted, and interpretations can vary. The possibility of interpreting a standard in different ways is therefore

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<sup>33</sup> SGHB Finanzmarktrecht I-Winzeler, § 7 para 1.

<sup>34</sup> SGHB Finanzmarktrecht I-Brändli, § 2 para 1; Nobel, SZW 2015, p 556.

<sup>35</sup> Troxler, Jusletter 16. November 2015, para 1.

<sup>36</sup> Cf IFRS, QC19.

<sup>37</sup> Cf Wehrfritz/Haller, National Influence, p 198.

<sup>38</sup> Cf Böckli, Rechnungslegung, para 102; Handschin, Rechnungslegung, para 2.

<sup>39</sup> Alexander/Jermakowicz, Debate, p 132; ZK-Bossard, Vorbemerkungen para 475 et seq.

<sup>40</sup> Cf also Berman/Knight, Financial Intelligence, p 5.

<sup>41</sup> Jutzi, Unternehmenspublizität, para 97.

<sup>42</sup> There may be the possibility of creating one financial report that fulfils both standards; cf INTERN; cf Schmid’s project description, available at: <https://ifrs.ius.unibas.ch/en/23-2/dual-standard-accounting/> (accessed on 16.10.2018).



the limit of unification. The standard unifies or standardises the preparation of a financial report. Thus, fewer differences occur between the preparer's and the user's view. Both used the same lens to capture reality. Therefore, a financial reporting standard is a lens that captures reality in a specific way. Even if the same standard is used, differences in its interpretation can occur (cf para 484 et seq). Two experts can interpret the same norm in more than one way. This means that, although both use the same lens (using one standard), they see the reality in different shades. The difference depends on the cultural background (cf para 484 et seq) of the expert, meaning the preparer and the user.<sup>43</sup> Both are marked by distinct circumstances. The more the backgrounds of the two differ, the greater the divergences in the evaluation of the entity's financial situation.

## C. Development of Financial Reporting Regulations in Switzerland

The lenses have changed in the last centuries, becoming more and more complex. 18  
Until 1848, when the Swiss Federal State was born, the Confederation consisted of the cantons as sovereign states. Each canton had total authority to issue rules regulating financial reporting. The oldest norms regulating bookkeeping in Switzerland were issued by the city Lugano in 1408.<sup>44</sup> Later appeared the Court Rules of St. Gallen (1780), the *Code du Commerce Français* of Geneva (1808), and the Civil Code of Berne (1830).<sup>45</sup> A great influence on Swiss accounting regulation was the Napoleonic Code (1804).<sup>46</sup>

The evolution of financial reporting was strongly influenced by the 19  
commercial ties to other states. Not all of the cantons had the same trading partners, and each was influenced by its neighbouring states. For this reason, the influences came from different directions, leading to different regulations. One group of cantons was influenced by the French *Code de Commerce*. This group consisted of the French-speaking cantons<sup>47</sup> and Basel-Stadt. A second group, including the cantons of Zurich, Lucerne, Schaffhausen, and Graubünden, considered the laws of Germany. The third group, including Berne and Solothurn, based its laws on Austrian law.<sup>48</sup> The fourth group, the canton Ticino, was influenced by Italian law.<sup>49</sup>

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<sup>43</sup> Druey/Druey Just/Glanzmann, *Gesellschafts- und Handelsrecht*, § 25 para 12.

<sup>44</sup> BK-Käfer, Art 957 para 3.27.

<sup>45</sup> Achleitner/Eberle, p 218; BK-Käfer, Art 957 para 3.27 et seq.

<sup>46</sup> Madörin/Bertschinger, *Accounting and Auditing in Switzerland*, p 24.

<sup>47</sup> Geneva, Vaud, Fribourg, Valais, Neuchâtel.

<sup>48</sup> Achleitner/Eberle, p 218.

<sup>49</sup> BK-Käfer, Art 957 para 3.28.

- 20 With the birth of Switzerland as a state, regulation started to change. In 1864, Munzinger presented his draft for a federal accounting law.<sup>50</sup> The draft was inspired by the Prussian AHGB, which was issued in 1861. At the same time, Munzinger took the *Code de commerce français*<sup>51</sup> as a blueprint for his draft. The vast majority of the Federal Council spoke for a regulation, which should concern not only accounting but also contractual obligations as well. Munzinger published a second draft, which was based on the *Dresdner Entwurf eines allgemeinen deutschen Gesetzes über Schuldverhältnisse*, following these instructions.<sup>52</sup>
- 21 Later, many states began to specify their accounting laws. Switzerland used the knowledge of other countries to do the same. The sources contained the German DHGB (*Deutsches Handelsgesetzbuch*) from 1897, the Austrian ÖHGB (*Österreichisches Handelsgesetzbuch*) from 1897, the revised French *Code de Commerce*, the Italian *Codice di Commercio* from 1882, the British Companies Acts, and the American Accounting Acts.<sup>53</sup> The influence of other countries can also be seen in the technical terms used in the law. In 1930, many Italian accounting terms were adopted and translated into French and German (examples: *conto*, *inventario*, *bilancio*, *attivo*). These terms also found their way into Swiss law.<sup>54</sup> A few decades later, a new trend was observed. In 1984, Bossard commented on Swiss commercial accounting rules. He predicted a growing interconnectedness between financial reporting standards on an international level and, with it, private standards influencing Swiss financial reporting.<sup>55</sup> Thus, not only foreign formal norms influenced Swiss financial reporting but also a trend of informal norms (cf para 264 et seq) became apparent.

## D. Interim Conclusion

- 22 The result of financial reporting is the numerical reflection of the financial reality of an entity. Financial reporting standards try to unify the ways in which entities report their numbers. These standards developed over time. However, they did not evolve independently. Swiss legislature often considered foreign

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<sup>50</sup> ZK-Bossard, Art 959 para 2.

<sup>51</sup> Issued on 28. August 1807.

<sup>52</sup> BK-Käfer, Art 957 para 3.33 et seq; cf Achleitner/Eberle, p 219.

<sup>53</sup> BK-Käfer, Art 957 para 4.4 et seq; the development of the commercial accounting rules since 1881 can be read in Kessler, veb.ch Praxiskommentar, Geschichte des Rechnungslegungsrechts im OR, para 5 et seq.

<sup>54</sup> BK-Käfer, Art 957 para 4.91.

<sup>55</sup> ZK-Bossard, Vorbemerkungen para 276 et seq.

law in the legislation process. Before Switzerland was founded as a federal state in 1848, the cantons had the authority to regulate financial reporting. They used mainly the laws of their trading partners as sources of inspiration. Depending on the trading partners, the financial reporting laws showed similarities to their French, German, Italian, or Prussian counterparts. Then, in 1864, Munzinger created the first draft for a federal accounting law, which considered the Prussian AHGB. Hence, we can see that Swiss financial reporting has always experienced foreign influences.<sup>56</sup>

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<sup>56</sup> For a more general comment on the reception cf Kunz, LeGes 2012, p 267 et seq; Kunz, recht 2006, p 40; Kunz, recht 2012, p 38.



## § 2 International Accounting Harmonisation and Differences

In this chapter, financial reporting regulation is set in its global context. The last 23 century was characterised by globalisation and, with it, harmonisation.<sup>57</sup> Globalisation is marked by the mobility of individuals, workforce, goods, capital, and information.<sup>58</sup> ‘Globalization is simply defined as the process of increasing interconnectedness between societies such that events in one part of the world increasingly have effects on peoples and societies far away.’<sup>59</sup> Globalisation also involves solving problems affecting people all over the world. This leads to deterritorialisation or transnationalisation of regulatory areas.<sup>60</sup> It is the result of economic interdependence, which gives an approximation of the states, thus resulting in a closer macroeconomic coordination.<sup>61</sup> The state collaborates with other states or non-state actors to keep up with global developments in regulation<sup>62</sup> and also in supervision.<sup>63</sup> Hence, globalisation helps to spread international private standards such as Basel III and IFRS.<sup>64</sup> The increasing interconnectedness also creates good acceptance of the comparative approach (cf para 183 et seq).<sup>65</sup>

Since the Second World War, the opening of international markets has 24 been driven forward. In this way, entities have become more and more interconnected. Thus, according to Paul A. Volcker,<sup>66</sup> ‘it can’t make sense to have different accounting rules and practices for companies and investors operating across national borders. That is why we need global standards’.<sup>67</sup>

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<sup>57</sup> McGrew, Globalization, p 16 et seq; cf Jutzi, Unternehmenspublizität, para 970; Thürer, Grundidee Gerechtigkeit, Band 1, p 396; Delbrück, FS Thürer, p 103; for the history of the internationalisation cf Delbrück, SZIER 2001, p 1 et seq.

<sup>58</sup> Warning, Legitimacy, p 1; cf Nobel, International Standards and the Law, p 46 et seq; Schreiber, International Standards, p 189 et seq; Thürer, Grundidee Gerechtigkeit, Band 2, p 100; Weber, SJZ 2016, p 294; Wiegand, Jusletter 25. Februar 2002, para 1.

<sup>59</sup> Smith/Owens/Baylis, Introduction, p 8; Delbrück, SZIER 2001, p 13 et seq differentiates between internationalisation and globalisation.

<sup>60</sup> Warning, Legitimacy, p 3; cf Teubner, Constitutional Fragments, p 101.

<sup>61</sup> Reinicke/Witte, Commitment and Compliance, p 75 et seq.

<sup>62</sup> Hohl, Private Standardsetzung, p 21; Warning, Legitimacy, p 4.

<sup>63</sup> Arqunt, GesKR 2014, p 131 et seq.

<sup>64</sup> Cf Müller/Staub, SZW 2011, p 23; Schreiber, International Standards, p 15; Nobel, SZW 2015, p 560.

<sup>65</sup> Kunz, recht 2006, p 38; SGHB Finanzmarktrecht I-Winzeler, § 7 para 4.

<sup>66</sup> American economist and former chairman of the Federal Reserve and the IFRS’ trustees.

<sup>67</sup> Cit after Pacter, Pocket Guide; cf Vallender/Hettich/Lehne, § 3 para 1.

These interconnections not only appear in large companies with holding structures that have multiple subsidiaries but also with shareholders and stakeholders distributed throughout the world. SMEs also have connections to partners (outside capital, suppliers, employees, etc) in foreign jurisdictions; although, they operate mostly within the national borders.

- 25 Globalisation challenges the state's legality of formal sovereignty. To be more precise: 'Globalization instead challenges the *operational* sovereignty of a government, that is, its ability to exercise sovereignty in its conduct of public policy'.<sup>68</sup> Globalisation does not weaken the domestic law, but adds new sources of inspiration.<sup>69</sup>
- 26 This chapter enumerates the different influences on financial reporting. Emphasis is on cultural differences and how they affect domestic accounting rules (cf paras 46 et seq, 484 et seq). Seeing these influences will enable the reader to understand that domestic accounting rules cannot be seen independently, but rather they are imbedded in the international setting of financial reporting.

## A. Globalisation and Regionalisation

- 27 Globalisation leads to a counter-effect: regionalisation. Sovereignty enables states to adapt laws to their circumstances. These differ from jurisdiction to jurisdiction. Thus, distinctions occur between the requirements of financial reporting in different jurisdictions. For this reason, various financial reports cannot be compared.<sup>70</sup> International standards aim to unify the different sets of norms, creating comparability and stopping this pursuit for individuality. In accounting, the most internationally recognised standards are the IFRS.<sup>71</sup>
- 28 This difference between the international and national levels also explains why the interaction of domestic law with international law is a current topic. Conservative politicians have criticised the growing influence of international law on domestic law in recent years. There is a tendency to move the focus from globalisation to regionalisation.<sup>72</sup> Thürer<sup>73</sup> highlights the issue between

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<sup>68</sup> Reinicke/Witte, Commitment and Compliance, p 81; for the sovereignty of states cf also Thürer, Grundidee Gerechtigkeit, Band 2, p 149 et seq; also Schreiber, International Standards, p 138.

<sup>69</sup> Schreiber, International Standards, p 139 et seq.

<sup>70</sup> Burger/Vial, p 501; cf Handschin, Rechnungslegung, para 334.

<sup>71</sup> Burger/Vial, p 501.

<sup>72</sup> Best/Christiansen, The Globalization of World Politics, p 428 et seq; Thürer, Grundidee Gerechtigkeit, Band 1, p 396; also concerning languages cf Wiegand, Jusletter 25. Februar 2002, para 17 et seq.

<sup>73</sup> Thürer, Grundidee Gerechtigkeit, Band 2, p 221 et seq.

national and international law perfectly: it is not about what comes first, national or international law; the important thing is that they are mutually dependent. It becomes more and more difficult to distinguish between external and internal relationships. In Swiss financial reporting, the criticism of international law is manifested in the creation of Swiss GAAP FER (cf para 190 et seq).<sup>74</sup>

Globalisation does not only lead to a shift of setting norms on an international level, rather than a national level; it also leads to a shift in power within the state.<sup>75</sup> While the legislature is responsible for setting law, the executive oversees foreign affairs. 'By opting for soft law as a non-binding instrument of international relations, governments have a means to avoid parliamentary or other democratic influence on, or interference with, the elaboration of international agreements.'<sup>76</sup> Therefore, the use of informal norms expands the power of the executive. In Switzerland, the executive power belongs to the Federal Council.

## **I. Reasons for an International Accounting Harmonisation**

Today, corporations and investors are active on a global level. Hence, both are exposed to different sets of norms on the international, national, and private levels. With globalisation comes the need for harmonisation. Harmonisation of financial reporting standards aims to increase comparability and transparency.<sup>77</sup> The harmonisation of international accounting standards can be seen in either a positive or negative light (cf para 36 et seq). The term 'harmonising' is used to unify different sets of norms regarding financial reporting. In this context in particular, it comes down to the harmonisation of the CO with IFRS. In Switzerland, the tendency towards harmonisation led to an approximation of international standards.<sup>78</sup> In general, where are the opportunities and where are the drawbacks of harmonising financial reporting regulation?

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<sup>74</sup> Cf Müller/Wyss, p 54.

<sup>75</sup> Cf also Rhinow/Schefer/Uebersax, Schweizerisches Verfassungsrecht, para 2716 et seq; Troxler, Jusletter 16. November 2015, para 20.

<sup>76</sup> Thürer, Grundidee Gerechtigkeit, Band 2, p 173 et seq; for further criteria for lawmaking from the three different powers cf Müller, FS Richli, p 753 et seq; cf also Cottier, FS Rhinow, p 81 et seq; Rhinow, FS Rhinow, p 101 et seq.

<sup>77</sup> Mächler, ZfR Band 5, p 117.

<sup>78</sup> Cf Behr/Leibfried, Rechnungslegung, p 117 et seq.

## 1. Better for Investors

- 31 Not only have the capital-needing entities become increasingly international but also the investors pursue their activities on a global level. They want their investees to report according to a global standard.<sup>79</sup> Until now, different standards have been used for financial reporting.<sup>80</sup> However, for investors, comparability is important.<sup>81</sup> IFRS improve the transparency of financial reports and the comparability of accounting information.<sup>82</sup> The more jurisdictions endorse IFRS, the more comparable the information becomes (for the limitations of cultural differences cf paras 484 et seq).<sup>83</sup> With the harmonisation of the standards in financial reporting, a country becomes more competitive in terms of attracting foreign money. This is because the investor knows the principle applied in the financial report.<sup>84</sup>
- 32 The rapid developments in the financial markets have led to a significant interconnection between different entities, banks, and states. This interconnection has empowered the role of the financial markets. They rely on information and are only efficient if information is disclosed.<sup>85</sup> Their perception is influenced by the used standard. If all entities report according to the same standards, the information generated will be better due to the understandability and comparability for investors.<sup>86</sup> Investors can compare different reports more easily when they know the applied standard from other investments around the globe. As a result, resources will be better allocated.
- 33 Western donors or investors often tie their money on condition of implementing democracy or certain standards.<sup>87</sup> The IMF provides foreign aid if a state endorses IFRS.<sup>88</sup> The same tendencies can be observed in Switzerland. Here, charities must report according to a recognised standard to receive and

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<sup>79</sup> Ding/Jeanjean/Stolowy, *Culture*, p 326; in Switzerland, even the use of the Swiss GAAP FER can make it easier to acquire money, Jutzi, *Unternehmenspublizität*, para 470.

<sup>80</sup> Burger/Vial, p 501.

<sup>81</sup> Behr/Leibfried, *Rechnungslegung*, p 116.

<sup>82</sup> Judge/Li/Pinsker, p 162; Jutzi, *Unternehmenspublizität*, para 982; Semba Hu/Yao, p 3; Suzuki, *History*, p 570; cf HWP 2014, p 105.

<sup>83</sup> HWP 2014, p 4.

<sup>84</sup> Hohl, *Private Standardsetzung*, p 131; Larsson-Olaison, *The Translation of Transplanted Rules*, pp 327, 349.

<sup>85</sup> Ding/Jeanjean/Stolowy, *Culture*, p 326; Judge/Li/Pinsker, p 162; cf also Schachtner, *Internationalisierung*, p 68.

<sup>86</sup> Ding/Hope/Jeanjean/Stolowy, *Differences*, p 2; Keuschnigg, *Festschrift Behr*, p 229.

<sup>87</sup> Cf van Reybrouck, *Against Elections*, p 39 et seq.

<sup>88</sup> Judge/Li/Pinsker, p 163; Troxler, *Jusletter* 16<sup>th</sup> November 2015, para 5.



keep a certificate.<sup>89</sup> This gives the report-user the opportunity to base his decision to donate towards the supported activities on a report according to a recognised standard and, with this, he can monitor the charities' spending.<sup>90</sup>

## 2. Lower Expenses in Preparation

Another reason for the need for harmonisation is the number of cross-listing entities that have increased. Harmonisation will lead to fewer costs in producing a unified message, rather than different sets of information among investors.<sup>91</sup> In addition, groups often have subsidiaries in different countries. The group, therefore, operates on an international (transnational) level.<sup>92</sup> Harmonisation can eliminate the obligation for entities to adjust their consolidated financial statement.<sup>93</sup> Consolidating a group of entities is much easier if every member uses the same reporting standard.<sup>94</sup> Coexisting standards lead to difficulties when they differ from each other.<sup>95</sup> A uniform standard can thus lead to fewer expenses in the process of raising money.<sup>96</sup> Banks reward the application of an informative standard with a smaller risk premium.<sup>97</sup> Thus, the entity also saves money in raising capital.<sup>98</sup>

## 3. Better Mobility of the Registered Office

In a globalised world, an entity can change its registered office quickly. To enable this fast transition, national law should harmonise with international law. In this way, a competitive environment can be created. With harmonised standards, entities can move their headquarters to other jurisdictions, providing a better environment without the burden of having to change the financial reporting system. However, making it easier for entities to move their registered offices or plants does have a downside. The state not only makes it easier to

<sup>89</sup> Mandatory for the zewo-certificat for charities, cf Zewo, Anforderungen an die Revision von Organisationen mit Zewo-Gütesiegel, p 2 et seq; cf <http://disclose.pwc.ch/21/article-update-04/> (accessed on 28.09.17).

<sup>90</sup> Cf Achleitner/Bassen, Festschrift Behr, p 193.

<sup>91</sup> Botschaft 2007, p 1719; Ding/Jeanjean/Stolowy, Culture, p 326; Heinemann, p 241; Judge/Li/Pinsker, p 162; Kaymaz/Karaibrahimoglu, p 30; CHK-Lipp, Art 962 para 7.

<sup>92</sup> Abbott/Snidal, International Standards and the Law, p 117.

<sup>93</sup> Kaymaz/Karaibrahimoglu, p 30.

<sup>94</sup> Wehrfritz/Haller, National Influence, p 197; cf also Haller/Wehrfritz, Impact, p 40.

<sup>95</sup> Hohl, Private Standardsetzung, p 131.

<sup>96</sup> Kaymaz/Karaibrahimoglu, p 30.

<sup>97</sup> Behr/Leibfried, Rechnungslegung, p 117.

<sup>98</sup> Behr/Leibfried, Rechnungslegung, p 117.

move to its jurisdiction but also makes it easier to move away from it.<sup>99</sup> In effect, national borders are losing meaning for individuals and entities.<sup>100</sup>

## II. Arguments against Harmonisation

### 1. Competition between the Standards

- 36 From the state's view, the national regulation is used to attract entities. Each jurisdiction wants to be as attractive as possible. This view can be expressed in the belief that competition between the standard setters will lead to better standards.<sup>101</sup> Competition can also lead to an allocation of power from the standard setter to the users.<sup>102</sup> The standard setters will look for norms that best promote the values of the clientele from a market perspective.<sup>103</sup> The entities will choose the standard the best solves their specific problems concerning information.<sup>104</sup> This process comes with the risk of a race to the bottom.<sup>105</sup> Such a race can have negative and positive effects. The effect is negative if a certain topic needs to be regulated because competition leads to a dilution of normative power. In topics in which regulation is not needed, this dilution has a positive effect on the party concerned. Competition can also be helpful to find the best norm. The worse norms will not survive. In the long run, this process leads to uniformity. However, the problem lies in the way this is done. Competition between standard setters leads inevitably to the publish-or-perish-dilemma, in which the issuer must publish new rules regularly or risk perishing.<sup>106</sup> If the bigger financial players adopt regulations such as Basel III, it is difficult for market participants to avoid regulation.<sup>107</sup> This can lead to the strictest-rule principle, meaning that the strictest rule is adopted and, through harmonisation, becomes enforceable law for every state.<sup>108</sup>

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<sup>99</sup> Crouch, *Post-Democracy*, p 31 et seq.

<sup>100</sup> Weber, *SJZ* 2016, p 294 et seq.

<sup>101</sup> *Barbou des Places, Self-Regulation in Europe*, p 223; Eberle, *ST* 2010, p 125; Weber, *SJZ* 2016, p 297 et seq; Weber, *SZW* 2015, p 579 et seq.

<sup>102</sup> Eberle, *ST* 2010, p 125.

<sup>103</sup> Schildbach, *ST* 2004, p 166.

<sup>104</sup> Schildbach, *ST* 2004, p 166; cf also *Barbou des Places, Self-Regulation in Europe*, p 223.

<sup>105</sup> *SGHB Finanzmarktrecht I-Bartholet*, § 5 para 20; Crouch, *Post-Democracy*, p 34 et seq; Kunz, *recht* 2006, p 46; Müller/Staub, *SZW* 2011, p 26; Schildbach, *ST* 2004, p 167; Weber, *SZW* 2015, p 580.

<sup>106</sup> Schildbach, *ST* 2004, p 168.

<sup>107</sup> Müller/Staub, *SZW* 2011, p 26 et seq.

<sup>108</sup> *SGHB Finanzmarktrecht I-Bartholet*, § 5 paras 27, 32.

## 2. Adaptability to Domestic Circumstances

In Switzerland, a few entities changed from IFRS to Swiss GAAP FER (cf para 190 et seq). One reason for this is because IFRS are complex and require substantial effort in the preparation of a financial report (cf para 198 et seq).<sup>109</sup> In addition, neither Swiss authorities nor entities have a significant influence on the IASB.<sup>110</sup> This possibility exists only in theory. Thus, the preparers do not feel IFRS suit their circumstances. Another reason is the fear of IFRS converging with US GAAP (cf para 191). Behr<sup>111</sup> construes from this tendency the justification for our standard pluralism because entities always choose the best available option. With harmonisation, the state loses some of its power to adapt the law specifically to domestic circumstances. Additionally, democracy experiences restrictions because democratic legitimate legislature is limited on its behalf to set norms.

## 3. Providing more Information

The coexistence of multiple standards can also be useful for the report user to gain a more informed view of the entity's financial status in cases in which the entity should report according to two or more different standards.<sup>112</sup> However, this point is only viable if the entity discloses both reports. Therefore, the entity must report and disclose both reports to provide more information.

## B. Forms of Differences

Above, arguments for and against the unification of multiple sets of norms are analysed. However, with multiple sets of norms existing side by side problems arise. Differences between domestic accounting standards and IFRS still occur. A national accounting norm can differ in two ways from IFRS: first, both cover the same topic, but prescribe different methods (divergence; cf para 40 et seq); second, IFRS cover a topic that the national norm does not (absence; cf para 42 et seq).<sup>113</sup> The reverse scenario can also occur when national norms cover a topic that IFRS do not. This is, for example, the case for equity requirements (cf para 361 et seq).

<sup>109</sup> Cf Leibfried, EF 2016, p 120 et seq; Migros Bilanz-Medienkonferenz 31. März 2015, p 39; Teitler-Feinberg, ST 2009, p 812.

<sup>110</sup> Cf Müller/Wyss, p 54.

<sup>111</sup> Behr, ST 2012, p 805.

<sup>112</sup> Ding/Hope/Jeanjean/Stolowy, Differences, p 4.

<sup>113</sup> Ding/Jeanjean/Stolowy, p 325.

## I. Divergences (*Abweichungen*)

- 40 The same topic can be approached using different methods. Divergences from Swiss private law are only allowed if the applicable norms are concessionary (*dispositives Recht*; cf Art 1 para 1 CC<sup>114</sup>). Thus, it is forbidden to report only according to a standard contradicting Swiss commercial accounting law. However, if a possibility can be found to report according to a recognised standard without violating the CO, the preparer is required to prepare only one report.<sup>115</sup>
- 41 Different kinds of divergence are possible: conceptual and concrete. The true and fair view approach is conceptually different from the prudence principle. How the two can be aligned will be explained later (cf para 303 et seq). Due to the limited space in this thesis, only one example of a concrete divergence between the CO and IFRS can be presented. Under the CO, it is possible to keep a provision in the report, although the risk did not occur (Art 960e para 4 CO<sup>116</sup>). In the recognised standards however, provisions must be dissolved when the risk did not occur.<sup>117</sup> This difference can be surpassed by choosing to dissolve the provision under the CO as soon as the risk does not occur.

## II. Absences (*Fehlen*)

- 42 If the DAS (Domestic Accounting Standard) does not cover a topic that IFRS do, we consider this an absence. These absences are often referred to as lacunae, and they must be filled. There are two types of lacunae: the open lacunae and exceptional lacunae.<sup>118</sup> An open lacuna (or proper lacuna) occurs through a missing norm regulating a certain case.<sup>119</sup> The other lacuna appears when the strict application of a rule leads to an unreasonable result. The doctrine calls these cases improper or exceptional lacunae.<sup>120</sup> Both lacunae must be resolved

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<sup>114</sup> English wording: ‘The law applies according to its wording or interpretation to all legal questions for which it contains a provision’; authoritative German version: ‘*Das Gesetz findet auf alle Rechtsfragen Anwendung, für die es nach Wortlaut oder Auslegung eine Bestimmung enthält*’.

<sup>115</sup> The thesis of François Schmid will contribute to this topic as part of the same project this work was written in, cf Schmid’s project description, available at: <https://ifrs.ius.unibas.ch/en/23-2/dual-standard-accounting/> (accessed on 16.10.2018).

<sup>116</sup> English wording: ‘Provisions that are no longer required need not be cancelled’; authoritative German version: ‘*Nicht mehr begründete Rückstellungen müssen nicht aufgelöst werden*’.

<sup>117</sup> IAS 37.59; Swiss GAAP FER 23.8.

<sup>118</sup> Kramer, Methodenlehre, p 196 et seq.

<sup>119</sup> Kramer, Methodenlehre, p 196 et seq; Wojcik, IFRS als europäisches Recht, p 282.

<sup>120</sup> Kramer, Methodenlehre, p 196 et seq; Wojcik, IFRS als europäisches Recht, p 282.

by interpretation (cf also para 417 et seq). Buchmann et al<sup>121</sup> state that lacunae should be filled by applying the recognised financial reporting principles.<sup>122</sup> The content of these principles and how norms in financial reporting should be interpreted will be explained later (cf para 353 et seq).

An example of an absent norm in Swiss law is the capitalisation of leased assets. The CO does not regulate this specific case. Thus, the doctrine considers the recognised standards and allows the capitalisation of leased assets to the same degree as the recognised standards (cf para 395). 43

## C. Differences between Norms

Divergences and absences are only one set of differences between norms. There are further differences concerning the underlying concept of norms. This leads me to a common misconception in accounting, which Morgan describes as follows: ‘Accountants often see themselves as objective appraisers of reality, representing reality ‘as is’’.<sup>123</sup> In my view, this is not the case. Everyone, including experts,<sup>124</sup> is influenced by circumstances from the past and the present. These circumstances can be referred to as ‘culture’. Culture can be described as programming the mind of a group differently to another group, thus distinguishing the two from each other.<sup>125</sup> Culture influences our thinking and, therefore, our deeds. Even more so, accounting reflects a society’s culture: ‘In society, accounting performs a services function. This function is put in jeopardy unless accounting remains above all technically and socially useful. Thus, it must respond to ever changing needs of society and must reflect the cultural, economic, legal, social and political conditions within which it operates. Its technical and social usefulness depends on its ability to mirror these conditions’.<sup>126</sup> Thus, there are different possibilities to reflect the entity’s financial reality through a financial report. The example below (cf paras 449, 455 et seq, 465, 473, 474) shows different possibilities to report a provision. Therefore, the correct way of reporting lays in the discretion of the preparer and depends on his perspective. 44

Culture shapes how people behave in the absence of a norm. As a result, culture can be an obstacle.<sup>127</sup> Cultural differences in financial reporting stem 45

<sup>121</sup> Buchmann/Duss/Handschin, p 832.

<sup>122</sup> Cf also Handschin, Rechnungslegung, para 27 et seq.

<sup>123</sup> Morgan, Reality Construction, p 477.

<sup>124</sup> Gornitzka/Holst, Politics and Governance, p 5 et seq.

<sup>125</sup> Wehrfritz/Haller, National Influence, p 197; cf also Haller/Wehrfritz, Impact, p 40.

<sup>126</sup> Choi/Mueller, International Accounting, p 26 cit after Leibfried, Festschrift Behr, p 189.

<sup>127</sup> Kahn-Freund, Comparative law, p 3 et seq.

from the different approaches of legal understanding and its system. The most striking systemic difference is between civil and common law (cf para 46 et seq). In the norm-setting process, the underlying concept can differ from principle- to rule-based norms (cf para 49 et seq). Moving to financial reporting regulation, two different approaches can be followed: static and dynamic accounting (cf para 52 et seq). It is also possible that the financial report is the taxation base; thus, the tax implications are considered in the preparation of the financial report (cf para 54 et seq). While the cultural influence on the interpretation of a norm will be explained later (cf para 484 et seq), the focus here is on the norms' differences.

## **I. Differences between Continental Europe and Anglo-Saxon Accounting Systems**

- 46 In essence, there are two major legal traditions that are followed by most nations today: civil law and common law.<sup>128</sup> In civil law, the basis of law is legislation, while in common law, the basis is case law.<sup>129</sup> Civil law descends from Roman law.<sup>130</sup> Common law dates back to the development of law in England.<sup>131</sup> Civil law is practised in central Europe and in many other countries.<sup>132</sup> Common law is the systematic approach in the UK, the USA, and former English colonies.
- 47 The differences between these two traditions have an impact on regulating financial reporting. The institutional factors are the legal system, the financing system, and the tax system.<sup>133</sup> In the Central European accounting system, there is a close connection between financial and tax accounting, which has codified rules and also avoids uncertainty.<sup>134</sup> The statutory report serves as accountability for how the resources have been used.<sup>135</sup> The targeted readers are primarily the stakeholders.<sup>136</sup> This stakeholder orientation leads to a more prudent display of the entity's numbers.<sup>137</sup> The Anglo-Saxon system relies on

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<sup>128</sup> There is also tribal law.

<sup>129</sup> Dainow, Comparison, p 424 et seq.

<sup>130</sup> Dainow, Comparison, p 420.

<sup>131</sup> Dainow, Comparison, p 421.

<sup>132</sup> For an overview of the different legal systems cf <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html> (accessed on 16.10.2018).

<sup>133</sup> Schachtner, Internationalisierung, p 65; Wehrfritz/Haller, National Influence, p 197; cf also Haller/Wehrfritz, Impact, p 40.

<sup>134</sup> Schildbach, ST 2004, p 160; Wehrfritz/Haller, National Influence, p 197.

<sup>135</sup> Cf Böckli, Rechnungslegung, para 10; Schildbach, ST 2004, p 160.

<sup>136</sup> Schachtner, Internationalisierung, p 65.

<sup>137</sup> Cf Behr/Leibfried, Rechnungslegung, p 57 et seq; Schachtner, Internationalisierung, p 65.

the capital market to finance companies; it knows a separation between financial and tax accounting, and it demonstrates a lower degree of uncertainty avoidance.<sup>138</sup> The standard setters are also different. In Continental Europe, the standard-setting bodies consist of lawyers and politicians with the council of economists. In Anglo-Saxon areas, they trust in the elite in financial reporting (accountants).<sup>139</sup>

The IASB (International Accounting Standards Board) issues IFRS and consists of experts from civil- and common-law countries. This composition is intended to ensure diversity and representation.<sup>140</sup> However, IFRS tend to be more in line with the common-law concept of relying on the capital market and the separation between financial and tax accounting than on the civil-law concept.

## II. Rule vs Principle Based

The standards can be further classified as rule based or principle based. Principle-based standards are used to outline guidelines but not prescribe details.<sup>141</sup> Principle-based standards give the preparer and auditor values with which to keep up.<sup>142</sup> Rule-based standards, on the other hand, demand a specific accounting action based on detailed criteria.<sup>143</sup> Rule-based standards are referred to as ‘the cookbook approach’, because they tell the operator when and what to do.<sup>144</sup> While a rule-based approach might prohibit driving in excess of 50 kilometres an hour, the principle-based standard might prohibit driving at an excessive speed.<sup>145</sup>

The preparation of a rule-based norm takes up more resources than the preparation of a principle-based norm, due to the time-consuming process of figuring out every case and how to norm it.<sup>146</sup> For the interpreter, the application of a principle-based norm is costlier than that of a rule-based norm. This is because the party concerned must consult a specialist for advice on how the norm is enforced.<sup>147</sup> However, if the rules in a segment are

<sup>138</sup> Schachtner, *Internationalisierung*, p 65; Schildbach, ST 2004, p 160; Wehrfritz/Haller, *National Influence*, p 197.

<sup>139</sup> Schildbach, ST 2004, p 160.

<sup>140</sup> Cf Link: <https://www.iasplus.com/en/resources/ifrsf/iasb-ifrs-ic/iasb-board> (accessed on 16.10.2018).

<sup>141</sup> Evans/Baskerville/Nara, *Language*, p 22.

<sup>142</sup> Alexander/Jermakowicz, *Debate*, p 134.

<sup>143</sup> Evans/Baskerville/Nara, *Language*, p 22.

<sup>144</sup> Alexander/Jermakowicz, *Debate*, p 133; Leibfried, ST 5/2014, p 380.

<sup>145</sup> Kaplow, *Rules versus Standards*, p 560.

<sup>146</sup> Kaplow, *Rules versus Standards*, pp 562, 573.

<sup>147</sup> Kaplow, *Rules versus Standards*, p 564, cf also p 571 et seq; p 597 et seq.

unmanageable, the same costs arise regardless of the norm being rule or principle based. Auditors tend to prefer rule-based standards, because these give them clear and reliable rules to evaluate the risks.<sup>148</sup> The preparers, on the other hand, prefer principle-based approaches in the standards, because they are interested in interpretable principles rather than precisely defined bounds.<sup>149</sup>

- 51 At first glance, IFRS are a principle-based accounting system,<sup>150</sup> along with Swiss GAAP FER,<sup>151</sup> and the CO.<sup>152</sup> US GAAP, on the other hand, follows a rule-based approach.<sup>153</sup> On closer inspection, one can see a mixture of rule- and principle-based standards within IFRS and Swiss GAAP FER, whereby IFRS use more rule-based norms than Swiss GAAP FER.<sup>154</sup> Swiss GAAP FER's mixture is at the same point as IFRS' mixture 15 years ago.<sup>155</sup> This means that IFRS become increasingly rule based, mainly because of the convergence process with US GAAP.

### III. Static and Dynamic Accounting Theory

- 52 There are two different accounting theories: static and dynamic accounting theory.<sup>156</sup> The static theory reads the duty to account properly as an obligation to report the net assets reliably.<sup>157</sup> The dynamic theory lays emphasis on

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<sup>148</sup> Schildbach, ST 2004, p 163 et seq.

<sup>149</sup> Schildbach, ST 2004, p 164.

<sup>150</sup> Bergmann, Vergleich, p 577; Bierstaker/Kopp/Lombardi, IFRS, p 1; Böckli, Aktienrecht, § 8 para 60, § 10 para 34; von der Crone, Aktienrecht, § 7 para 32; Evans/Baskerville/Nara, Language, p 22; Glanz, ST 2007, p 529; Glanz, SZW 2007, p 360; Jutzi, Unternehmenspublizität, para 972 n 3843; Schildbach, ST 2004, p 164; Tweedie, Principle-based, p 4; Wells, Principle-based, p 303 et seq; Wojcik, IFRS als europäisches Recht, p 257 et seq.

<sup>151</sup> Cf Bertschinger, SZW 2015, p 631; Kelterborn/Bachofen, ST 2009, p 434; Leibfried/Mitterlechner, rechnungswesen & controlling 2017, p 12; Teitler-Feinberg, ST 2009, p 812.

<sup>152</sup> Cf Leibfried, ST 5/2014, p 378 et seq.

<sup>153</sup> Bierstaker/Kopp/Lombardi, IFRS, p 1; Böckli, Aktienrecht, § 8 para 60; von der Crone, Aktienrecht, § 7 para 32; Glanz/Hermann/Pfaff/Zihler, veb.ch Praxiskommentar, Art 962a para VASR 11; Koch, Handbuch, para 64.13; Schildbach, ST 2004, p 164; Wojcik, IFRS als europäisches Recht, p 258; dissenting Bermann/Knight, Financial Intelligence, p 26 et seq.

<sup>154</sup> Boemle, ST 2006, p 13; Leibfried, ST 5/2014, p 378 et seq; cf Wojcik, IFRS als europäisches Recht, p 258.

<sup>155</sup> Leibfried, ST 5/2014, p 382.

<sup>156</sup> Cf Wirz, para 192 et seq.

<sup>157</sup> Forstmoser/Meier-Hayoz/Nobel, § 50 para 230 et seq; Känzig, p 120 et seq; Riederer, Rückstellungen, para 132; Wirz, para 192 et seq.



accrual accounting (*periodengemässe Erfolgsermittlung*).<sup>158</sup> In this way, more emphasis can be placed on the calculation of the dividend.<sup>159</sup> ‘The purpose of accruals is to match costs to revenues in a given time period as accurately as possible.’<sup>160</sup> This is also called the ‘matching principle’, whereby the costs and the profits in one period shall match.<sup>161</sup>

The accrual principle is valid under the CO,<sup>162</sup> the IFRS,<sup>163</sup> and Swiss GAAP FER.<sup>164</sup> This is also the case for the matching of revenue<sup>165</sup> and cost.<sup>166</sup> Under the premise of going concern, the CO, as well as IFRS and Swiss GAAP FER, follows the dynamic theory.<sup>167</sup> As soon as there are signs of overindebtedness, management must draw up an interim balance sheet with the assets valued at the going concern and realisable values (or liquidation values; Art 725 para 2 CO<sup>168</sup>).<sup>169</sup> This report is more static than dynamic because the

<sup>158</sup> IAS 37.10; cf also Swiss GAAP FER 23.14; Behr/Leibfried, Rechnungslegung, pp 74, 315, 323; Böckli, Aktienrecht, § 8 para 180 et seq; Böckli, Rechnungslegung, para 135; Boemle/Lutz, Jahresabschluss, p 371; Benz, Grundsätze, p 124; OFK-Dekker, Art 958b para 4; Handschin, Rechnungslegung, para 771 et seq; Locher, Art 29 para 14 and Art 63 para 10; Richner/Frei/Kaufmann/Meuter, Art 29 para 8; Simoniello, SJZ 2017, p 544; Stoll, p 58 et seq; Riederer, Rückstellungen, para 132; Wirz, para 196 et seq; for English law cf FER 12.17.

<sup>159</sup> Wirz, para 196.

<sup>160</sup> Berman/Knight, Financial Intelligence, p 11.

<sup>161</sup> Behr/Leibfried, Rechnungslegung, p 175; OFK-Dekker, Art 958b para 6 et seq; HWP 2014, p 7.

<sup>162</sup> Art 958b para 1 CO; HWP 2014, p 7; Behr/Leibfried, Rechnungslegung, p 73, 323; Böckli, Rechnungslegung, para 135; CHK-Lipp, Art 962 para 3; Müller/Henry/Barnettler, veb.ch Praxiskommentar, Art 958b para 10 et seq.

<sup>163</sup> IAS 1.27.

<sup>164</sup> Swiss GAAP FER, Conceptual Framework 11.

<sup>165</sup> Definition: ‘Revenue or sales refers to the value of what a company sold to its customers during a given period’. Berman/Knight, Financial Intelligence, p 6.

<sup>166</sup> Swiss GAAP FER, Conceptual Framework 12; Böckli, Aktienrecht, § 8 para 182; Böckli, Rechnungslegung, para 136 et seq.

<sup>167</sup> Art 958 para 1 icw Art 957a para 1 CO, Art 958b para 1 CO; IAS 37.10; Swiss GAAP FER, Conceptual Framework, 11 et seq, Swiss GAAP FER 23.14; Behr/Leibfried, Rechnungslegung, p 73; Böckli, Aktienrecht, § 8 para 180 et seq; Handschin, Rechnungslegung, para 317 et seq; Kleibold, Ausschüttungsregulierung, p 67; CHK-Lipp, Art 962 para 3; cf Wirz, para 201 et seq.

<sup>168</sup> English wording: ‘Where there is good cause to suspect overindebtedness, an interim balance sheet must be drawn up and submitted to a licensed auditor for examination. If the interim balance sheet shows that the claims of the company’s creditors are not covered, whether the assets are appraised at going concern or liquidation values, the board of directors must notify the court unless certain company creditors subordinate their claims to those of all other company creditors to the extent of the capital deficit’; authoritative German version: ‘Wenn begründete Besorgnis einer Überschuldung besteht, muss eine Zwischenbilanz erstellt und diese einem zugelassenen Revisor zur

attention shifts from the time-compliant allocation of revenues of an expense to the proper presentation of assets and liabilities.<sup>170</sup>

#### **IV. The Influence of the ‘Authoritative Principle’ (*Massgeblichkeitsprinzip*)**

- 54 Different purposes influence financial reporting. If the financial report, for example, is also the basis for taxation, entities will try to minimise their tax obligation by reporting very prudently, thus exercising downward pressure on the profit. Under this condition, items will be reported lower than their actual value, creating lower book values and higher expenses for impairment and depreciation. However, investors are keen to have a reliable base for their decision to invest in a company. This is also the case for shareholders and other stakeholders. The result is a conflict of different purposes.

##### **1. In General**

- 55 The tax base is different in each jurisdiction. The ‘authoritative principle’ (*Massgeblichkeitsprinzip*) can be understood as the influence of the domestic accounting standard on taxation.<sup>171</sup> This depends on the jurisdiction and whether the financial report is connected to tax accounting. Germany,<sup>172</sup> like Switzerland,<sup>173</sup> has this connection, unlike the UK.<sup>174</sup> In jurisdictions where the statutory report is also the tax base, entities are saved the trouble of preparing an additional report. This concept is also known as ‘dual use’ and is generally not applied in the Anglo-Saxon world.<sup>175</sup>
- 56 In Germany, as well as in Switzerland, tax law supplements commercial accounting law. While commercial accounting law builds the basis, tax law can

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*Prüfung vorgelegt werden. Ergibt sich aus der Zwischenbilanz, dass die Forderungen der Gesellschaftsgläubiger weder zu Fortführungs- noch zu Veräusserungswerten gedeckt sind, so hat der Verwaltungsrat den Richter zu benachrichtigen, sofern nicht Gesellschaftsgläubiger im Ausmass dieser Unterdeckung im Rang hinter alle anderen Gesellschaftsgläubiger zurücktreten’.*

<sup>169</sup> Cf Handschin, Rechnungslegung, para 304 et seq.

<sup>170</sup> Cf Kleibold, Ausschüttungsregulierung, p 61.

<sup>171</sup> For the principle of congruency’s influence cf Böckli, Rechnungslegung, para 228 et seq; Brülisauer/Mühlemann, Art 58 para 12; Gee/Haller/Nobes, p 97 et seq; Koch, Handbuch, para 65.3; Wehrfritz/Haller, National influence, p 199.

<sup>172</sup> With further references Wehrfritz/Haller, National Influence, p 199.

<sup>173</sup> Art 58 para 1 lit b DBG.

<sup>174</sup> Wehrfritz/Haller, National Influence, p 199.

<sup>175</sup> Behr/Leibfried, Rechnungslegung, p 106; Böckli, Rechnungslegung, para 229.

foresee deductibles or increases.<sup>176</sup> These changes create differences between the statutory and the tax report and increase the taxable income,<sup>177</sup> but the application of tax regulation is also accepted in the preparation of the statutory report. In the preparation of a statutory report, the preparer not only considers commercial regulation but also tax regulation. Thus, divergences between the statutory report and the tax report can be avoided. Studies have found that, in such countries, accounting information is less valuable than in others.<sup>178</sup>

According to Swiss GAAP FER,<sup>179</sup> taxation should not play a role in 57 determining the extent of impairment.<sup>180</sup> The authoritative principle is alien to IFRS.<sup>181</sup> Since the entity is taxed, the taxation system does not have a direct impact on IFRS consolidated reporting.<sup>182</sup> However, IFRS are also used to prepare individual financial statements. In Swiss practice, IFRS are applied mainly in consolidated reporting. However, because the taxation relies on individual companies rather than on groups, IFRS do not have a direct influence on taxation.<sup>183</sup> IFRS generally have no direct influence on national taxation, because jurisdictions foresee a separate tax report or a report according to domestic law. The Swiss Federal Council tried to allow entities to report only according to a recognised standard, which would have been the tax base. However, this possibility was not passed by Parliament (cf para 257 et seq). An indirect influence of IFRS on national taxation law can occur through the fact that tax officials compare IFRS with the statutory report.<sup>184</sup> The entity must explain discrepancies. It could be difficult for the entity to argue, for example, that an impairment loss is higher under national law than under IFRS (for impairment cf also para 402 et seq).<sup>185</sup> As a result, national tax rules are also applied in the IFRS report wherever possible.

## 2. In Switzerland

The statutory report according, to the CO in Switzerland, is the basis for 58 taxation, social security contributions, profit distribution, and the assessment of

<sup>176</sup> Germany: Art 6 EStG; Switzerland: Art 58 et seq DBG.

<sup>177</sup> Gee/Haller/Nobes, p 101.

<sup>178</sup> Hung, p 410 et seq.

<sup>179</sup> Swiss GAAP FER 2.22, 2.28.

<sup>180</sup> Kleibold, Ausschüttungsregulierung, p 71.

<sup>181</sup> Böckli, Aktienrecht, § 10 para 39.

<sup>182</sup> Wehrfritz/Haller, National Influence, p 198.

<sup>183</sup> Wehrfritz/Haller, National Influence, p 198.

<sup>184</sup> Handschin, Rechnungslegung, para 20; Riederer, Rückstellungen, para 120 et seq.

<sup>185</sup> Gee/Haller/Nobes, p 105 et seq.

indebtedness (cf also para 250 et seq).<sup>186</sup> In addition, the statutory report serves as stewardship accounting, so that shareholders can assess the performance of management.<sup>187</sup> The balance of the income statement builds the basis for the taxation of an entity (Art 58 para 1 lit a DBG). Thus, the taxation is tied to the commercial accounting.<sup>188</sup> Tax law can deviate from the commercial accounting rules.<sup>189</sup> All deviating tax norms, therefore, have a reflexive impact on the financial report (reverse authoritative principle, *‘umgekehrte Massgeblichkeit’*), because the preparer considers the effects of taxation while reporting the items.<sup>190</sup> The reverse authoritative principle exists, therefore, only in the heads of the preparers. The tax authority could reduce the super-elevated expenses (*überhöhte Kosten*) with the help of these reports.<sup>191</sup>

## V. Language

- 59 Cultural differences can also originate in the language used. A major part of any culture is its language.<sup>192</sup> Standards rely on language to communicate their rules. Language is a form of communicating one thought from one person to another, and the speaker converts his thoughts into words. The listener then transforms the words back into thoughts. In both processes, divergences can occur, making language indeterminate and ambiguous.<sup>193</sup> With a translation, the conversion is even bigger due to the cultural colouring of a language. Translation is an

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<sup>186</sup> Zihler, ST 2011b, p 809 et seq.

<sup>187</sup> Taipaleenmäki/Ikäheimo, International Journal of Accounting Information Systems 14 (2013), p 324; I want to thank Daniele Simoniello for this reference.

<sup>188</sup> BGE 137 II 353 Consideration 6.2; 136 II 88 Consideration 3.1; 132 I 175 Consideration 2.2; 119 Ib 111 Consideration 2c; Botschaft 2007, p 1714; HWP 2014, p 31; Altorfer/Duss/Felber, veb.ch Praxiskommentar, Massgeblichkeit für die Steuerbilanz, para 5; Behr/Leibfried, Rechnungslegung, p 105; Böckli, Aktienrecht, § 8 paras 16 et seq, 169 et seq; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 61 et seq; Giger, ST 2009, p 324 et seq; Handschin, Rechnungslegung, para 18 et seq; CHK-Lipp, Art 962 para 1; Madörin/Bertschinger, Accounting and Auditing in Switzerland, p 24; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 11 et seq; Reich, § 15 para 61 et seq; Spadin, FS Forstmoser, p 337 et seq.

<sup>189</sup> One example is the reporting of provisions in Art 63 DBG; cf Riederer, Rückstellungen, para 109 et seq.

<sup>190</sup> Altorfer/Duss/Felber, veb.ch Praxiskommentar, Massgeblichkeit für die Steuerbilanz, para 53 et seq; Böckli, Rechnungslegung, para 239 et seq; Giger, ST 2009, p 324; for the effects of IFRS on taxation cf para 257 et seq.

<sup>191</sup> Handschin, Rechnungslegung, para 20.

<sup>192</sup> Cf Evans/Baskerville/Nara, Language, p 1 et seq; for the development of language and its meaning cf Taylor, The Language Animal, p 4 et seq.

<sup>193</sup> Evans/Baskerville/Nara, Language, p 2.

exchange between different mindsets.<sup>194</sup> The original text, and even less, the original thought, cannot be completely reproduced in the translation, as some changes will always occur.<sup>195</sup>

Language is important for the citizens of a state. Every citizen has the right to access the law of his home country.<sup>196</sup> Thus, a law should be available in the mother tongue of the citizens concerned. However, not every state creates its own original law, but rather copies already existing ones. The copying process often goes hand in hand with the translation of the original standard, and translating a standard can lead to differences to the original text.<sup>197</sup> Due to these occurring differences, not every translation fulfils the criteria of an authoritative one. ‘Authoritative translation’ is a label only given by the responsible board after examining the translation.

A standard can also be issued in several official languages. As all official languages are equal,<sup>198</sup> the use of several equal languages comes with opportunities and challenges. The opportunities are set forth in the different ways in which one can formulate the same idea. The purpose of a norm can, therefore, be more easily extracted. However, challenges occur if norms written in various languages do not have exactly the same meaning. It is up to the interpreter to determine the true sense of a norm.

Another difficulty that language poses is the fact that each technical sector has developed different ‘jargons’. Legal English uses Latin and French terminology.<sup>199</sup> There are also instances in which a term from a different field is used, such as *Wettbewerb* (competition) in competition law.<sup>200</sup> With its adoption, the legislature refers to the scientific insights in the field of economics.<sup>201</sup> It can also be said that, for the adoption of a true and fair view, even if the translation is correct, the understanding of the concept may vary.<sup>202</sup> The differences due to the language go even further. One’s experience of social reality is unique to one’s own language, meaning that people who speak a different language also perceive the world in another way.<sup>203</sup>

<sup>194</sup> Evans/Baskerville/Nara, *Language*, p 6 et seq.

<sup>195</sup> Evans/Baskerville/Nara, *Language*, p 6 et seq; cf also Jung, *Kodifikation*, p 13.

<sup>196</sup> The EU has 24 official and working languages, available at: [http://ec.europa.eu/languages/policy/linguistic-diversity/official-languages-eu\\_en.htm](http://ec.europa.eu/languages/policy/linguistic-diversity/official-languages-eu_en.htm) (accessed on 16.10.2018).

<sup>197</sup> Cf van Nes/Abma/Jonsson/Deeg, *Language Differences*, p 314.

<sup>198</sup> Evans/Baskerville/Nara, *Language*, p 3.

<sup>199</sup> Evans/Baskerville/Nara, *Language*, p 6.

<sup>200</sup> Cf Art 1 UWG (SR 241).

<sup>201</sup> Kramer, *Methodenlehre*, p 68.

<sup>202</sup> Bischof/Daske, p 12; cf Kleibold, *Ausschüttungsregulierung*, p 158.

<sup>203</sup> Van Nes/Abma/Jonsson/Deeg, *Language Differences*, p 314.

- 63 The possibility that, through language, a thought experiences change is also true for accounting standards. Here, different traditions and disciplines influence the method of accounting.<sup>204</sup> Accounting standards demonstrate the following problems concerning language.<sup>205</sup> Even between subjects who use the same language, misunderstandings occur. There is no transnational register that defines accounting terms; thus, the terminology and underlying concepts differ internationally, and the translation of alien concepts often leads to a shift in meaning. Differences can also occur from interpretations of near-equivalent translations.
- 64 For IFRS' endorsement, one obstacle is the language.<sup>206</sup> Because the IFRS Foundation's working language is English, IFRS are only understandable to the wider public after they have been translated into the local language. The IASB has recognised this difficulty and is keen to translate its standards for use by everyone in the world.<sup>207</sup> Since translations can lead to divergences from the original text, the IASB has worked on retaining control over the IFRS translations. The IASB missed this target in the EU, which led to the creation of two official versions because the EU issued its own translations in German, French, and Spanish.<sup>208</sup>
- 65 An example of the occurring divergences through translation can be found in IFRS 15.95. In English, the used expression is 'an entity shall', which the German version<sup>209</sup> translates to '*darf das Unternehmen*'. The German version can be translated back into English as 'an entity should', which leaves leeway for the entity to choose freely in terms of whether it wants to follow IFRS 15.95.

#### D. IASB's Role in the Harmonisation Process

- 66 The IASB plays an important role in harmonising financial reporting regulation. In 2000, the IASB's goal was to 'develop, in the public interest, a single set of high quality, understandable and enforceable global accounting standards that require high quality, transparent and comparable information in financial statements and other financial reporting to help participants in the world's capital markets and other users make economic decisions'.<sup>210</sup> Since then, the vision has not changed.

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<sup>204</sup> Evans/Baskerville/Nara, Language, p 2.

<sup>205</sup> Evans/Baskerville/Nara, Language, p 5.

<sup>206</sup> Evans/Baskerville/Nara, Language, p 1; Nobes, Accounting and Business Research 43 (2013), Issue 2, p 83 et seq; Zeff, British Accounting Review 2007, p 290 et seq.

<sup>207</sup> Link: <https://www.ifrs.org/issued-standards/ifrs-translations/> (accessed on 16.10.2018).

<sup>208</sup> Evans/Baskerville/Nara, Language, p 17.

<sup>209</sup> Wiley text with the EU approved version of IFRS.

<sup>210</sup> Pacter, Pocket Guide, p 9.

The IASB cannot force any entity to use IFRS. Therefore, the IASB relies 67  
 on states to enforce the standard, or the free will of an entity to choose IFRS as  
 an accounting standard. A few countries have adopted IFRS and many have  
 converged to them for listed entities. Convergence, however, is not equal to  
 adoption.<sup>211</sup> Convergence only means that there are similarities between IFRS  
 and a domestic norm. Adoption, on the other hand, is an implementation of  
 IFRS by direct or indirect reference (cf paras 112 et seq, 157 et seq). For the  
 short term, convergence may be appropriate, but it is not ideal for the long  
 term.<sup>212</sup> IFRS represent a whole system; if standards are only partly applied,  
 they can appear to be wrong in the overall context.<sup>213</sup>

## E. Interim Conclusion

Globalisation influences financial reporting regulations and leads to harmonised 68  
 standards. However, there are issues associated with this tendency, because  
 commercial accounting law should reflect the society in which it is applied.<sup>214</sup>  
 Different factors influence the development of financial reporting standards.  
 Such differences are manifold. Most of the differences stem from the style of  
 setting rules and, in the end, civil or common law.

Commercial accounting rules, like the law in general, are the result of 69  
 compromises in the past and are, therefore, the sum of different influences.  
 However, with globalisation comes unification. The unification of these  
 standards only leaves room in the application of the standards to adapt them for  
 the local circumstances. This gives the application of harmonised rules a local  
 colouring, which will be encoded in another chapter (cf para 484 et seq).

This development can also be observed in terms of IFRS. Before the IFRS 70  
 were created, the use of foreign wording or systems caused differences,  
 meaning that, although a country adopted the true and fair view, the applicants  
 did not fully understand this foreign system, which generated differences on an  
 international level in accounting practice. It is likely that these will continue,  
 even under IFRS.<sup>215</sup> To improve the comparability, national standard setters  
 should improve their norms so that the reports by different entities from  
 different jurisdictions using the same standard become more comparable.<sup>216</sup>

<sup>211</sup> Pacter, Pocket Guide, p 10.

<sup>212</sup> Pacter, Pocket Guide, p 10.

<sup>213</sup> IAS 1.7; cf Art 962a para 2 CO; CHK-Lipp, Art 962a para 3 et seq.

<sup>214</sup> Choi/Mueller, International Accounting, p 26 cit after Leibfried, Festschrift Behr, p 189.

<sup>215</sup> Wehrfritz/Haller, National Influence, p 198.

<sup>216</sup> Haller/Wehrfritz, Impact, p 55.

The improvement should also originate within IFRS themselves, with a reduction of the options the standard applier can use.<sup>217</sup>

- 71 Globalisation's benefits are harmonising norms. However, there are drawbacks associated with globalisation. In the process of globalisation, states are losing their freedom to regulate independently.<sup>218</sup> This is because, on an international level, supranational or private organisations take over regulation. There are tools available to reap the benefits while limiting the downside. One solution could be to harmonise standards at a minimum level to maintain the advantages of competition (ensuring quality), and to minimise the drawbacks (race to the bottom), yet still ensure some form of freedom for a state.<sup>219</sup> Sovereignty is sometimes misused to create locational advantages, but it is also utilised as an opportunity to improve the norm. In Switzerland, the latter process is sometimes referred to as 'Swiss finish'.<sup>220</sup>

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<sup>217</sup> Haller/Wehrfritz, Impact, p 55.

<sup>218</sup> Peters, International Law Research 2014, p 59.

<sup>219</sup> Cf Peters, International Law Research 2014, p 64; SGHB Finanzmarktrecht I-Sester, § 3 para 10.

<sup>220</sup> SGHB Finanzmarktrecht I-Bartholet, § 5 para 39 et seq; SGHB Finanzmarktrecht I-Brändli, § 2 para 48; Kunz, LeGes 2012, p 271; Kunz, recht 2012, p 37; SGHB Finanzmarktrecht I-Sester, § 3 para 26; Weber, SZW 2015, p 580.



### § 3 IFRS Basics

IFRS stands for International Financial Reporting Standards. These are the 72 result of the harmonisation of different financial reporting standards. It is their self-prescribed purpose to build the basis for a fair presentation of the financial report.<sup>221</sup> This is not surprising, with current and future investors as target readers in mind. First, IFRS will be explained (cf para 74 et seq), followed by the different ways in which they can be adapted (cf para 112 et seq).

IFRS deserve a separate chapter because it is important for their relevance to 73 be understood in this thesis. Their importance can also be made clear in numbers. The IASB analysed 150 jurisdictions, representing 98.6 per cent of the world's GDP.<sup>222</sup> 'The GDP of profiled jurisdictions that require or permit the use of IFRS Standards for domestic publicly accountable entities (listed companies and financial institutions) constitutes 55 per cent of the GDP of all profiled jurisdictions.'<sup>223</sup> This chapter explains IFRS (cf para 74 et seq), how they are created (cf para 92 et seq), structured (cf para 90 et seq), and interpreted (cf para 99 et seq).

#### A. About IFRS

The IFRS are regulations concerning financial reporting. Most often, they are 74 used in a broader sense, including IAS (International Accounting Standards), IFRS in a narrower sense, the IFRIC (International Financial Reporting Interpretations Committee), and the SIC (Standard Interpretations Committee) Interpretations.<sup>224</sup> It is their purpose to harmonise financial reporting and to give the report user a true and fair view.<sup>225</sup> No IFRS body has the authority to force the adoption of IFRS. Each jurisdiction must choose its own method of endorsement and enforcement (cf para 112 et seq).<sup>226</sup>

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<sup>221</sup> IAS 1.15.

<sup>222</sup> Link: <http://www.ifrs.org/use-around-the-world/use-of-ifrs-standards-by-jurisdiction/#analysis> (accessed on 16.10.2018).

<sup>223</sup> Link: <http://www.ifrs.org/use-around-the-world/use-of-ifrs-standards-by-jurisdiction/#analysis> (accessed on 16.10.2018).

<sup>224</sup> IAS 1.7; cf Kartscher/Rossi/Suter, Finanzberichterstattung, p 20.

<sup>225</sup> Kartscher/Rossi/Suter, Finanzberichterstattung, p 18; Kirchner/Schmidt, International Standards and the Law, p 71 et seq; Schreiber, International Standards, p 25.

<sup>226</sup> Pacter, pocket guide, p 10.

- 75 The distinction of IFRS in the broader and narrower senses goes back to a change of names. IFRS followed the term ‘IAS’ after a resolution was passed in Edinburgh on 24<sup>th</sup> May 2000.<sup>227</sup> Since then, the IAS have been part of IFRS. Every new standard is issued as an IFRS.<sup>228</sup> The IAS are still in force, although a few have been dropped where necessary.<sup>229</sup> Thus, the term ‘IFRS’ is used in a broader sense as the sum of all IFRS in the narrower sense, such as the IAS, the IFRIC, and the SIC Interpretations.
- 76 IFRS’ influence has grown in the last couple of decades. Now, the financial information of over half of the world’s GDP is reported according to IFRS.<sup>230</sup> Of 150 jurisdictions, 140 have made a commitment to support IFRS for all or most domestic public accountable entities, while most of the rest permit their use.<sup>231</sup> These states fund the IASB,<sup>232</sup> which also depends on donations. This funding endangers the impartiality of the IASB and makes the board vulnerable because donors can withdraw or hold up the donations that are needed.<sup>233</sup>

## B. Evolution of the IFRS Foundation

- 77 IFRS are a child of the late 20<sup>th</sup> century. The IFRS Foundation was established in 2001. However, the IASC (International Accounting Standards Committee) had already started to develop the IAS in 1973.<sup>234</sup> In 2002, the EU agreed to adopt IFRS from 2005 (cf para 121 et seq).<sup>235</sup> This occurred in the form of ‘Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards’, and was a rejection of US GAAP.<sup>236</sup>
- 78 One year later, Australia, Hong Kong, New Zealand, and South Africa adopted IFRS. In 2004, Japan agreed to converge IFRS into the Japanese GAAP. In 2005, almost 7,000 entities in Europe switched from their DAS to

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<sup>227</sup> Böckli, Aktienrecht, § 10 para 3; Böckli, IFRS, para 1 n 4; cf also Handschin, Rechnungslegung, Glossar: IFRS, p LXXVI.

<sup>228</sup> Recently with IFRS 14, 15 and 16.

<sup>229</sup> The following standards have been cancelled or superseded in recent years: IAS 3,4,5,6,9,11,13,14,15,18,22,25,30,31,35.

<sup>230</sup> Link: <http://www.ifrs.org/use-around-the-world/use-of-ifrs-standards-by-jurisdiction/#analysis> (accessed on 16.10.2018).

<sup>231</sup> Pacter, Snapshot, p 4.

<sup>232</sup> Link: <http://www.ifrs.org/about-us/who-we-are/#funding> (accessed on 16.10.2018).

<sup>233</sup> Schildbach, ST 2004, p 163.

<sup>234</sup> Link: <http://www.ifrs.org/about-us/who-we-are/#history> (accessed on 16.10.2018); Jutzi, Unternehmenspublizität, para 972.

<sup>235</sup> Jutzi, Unternehmenspublizität, para 972; Kemper-Scharpegge, p 21.

<sup>236</sup> Cf Kemper-Scharpegge, p 21.

IFRS. The following year, China jumped aboard the train and adopted IFRS. With Brazil, Canada, Chile, Israel, and Korea adding to the IFRS adoption list, the number of countries requiring or permitting the use of IFRS hit the 100 mark in 2007. Due to the growing recognition of IFRS, the US allowed non-US companies to report using IFRS. Another important step came in 2009, with the release of IFRS for SMEs.<sup>237</sup> In 2012, Argentina, Mexico, and Russia adopted IFRS. IFRS progressed towards becoming internationally recognised as accounting standards.<sup>238</sup>

## C. The IASB

### I. In general

The IFRS are issued by the IASB,<sup>239</sup> which is a private organisation.<sup>240</sup> 79 Discussion relating to the private standard setter being a subject of international law is still ongoing.<sup>241</sup> The stakeholders within the IASB are states and entities.<sup>242</sup> The IASB's purpose is to improve the quality of financial reporting.<sup>243</sup>

As a result of globalisation and its denationalisation effect,<sup>244</sup> the IASB 80 increased in importance as a financial reporting standard. International rules compensate the state's loss of power; however, this does not mean that states are no longer important. States overcame the financial crises with their given tools;<sup>245</sup> they are still powerful, but there are now different levels of power. Today, we experience multi-level governance (*Mehrebenensystem*), in which tasks are not only fulfilled by states but also by intergovernmental, international, and supranational organisations. NGOs (non-governmental organisations) also play an ever-increasing role in this development.<sup>246</sup>

The need to stay present leads to a tendency to create more and more 81 regulations on an international level, and the jurisdictions orientate themselves towards regulations. To keep up with this process, internationally active entities

<sup>237</sup> Jutzi, Unternehmenspublizität, para 975.

<sup>238</sup> IFRS, Who we are, <http://www.ifrs.org/about-us/who-we-are/#history> (accessed on 16.10.2018); cf Bergmann, Jahrbuch 2009, p 193; cf Böckli, Aktienrecht, § 10 para 1.

<sup>239</sup> IFRS 2013, Introduction, A7.

<sup>240</sup> Pacter, pocket guide, p 15; cf also Böckli, IFRS, para 10 et seq.

<sup>241</sup> For further reference cf Berman/Wessel, Informal International Law, p 55 et seq.

<sup>242</sup> Raymond/DeNardis, International Theory, p 603.

<sup>243</sup> Böckli, Aktienrecht, § 8 para 42.

<sup>244</sup> Delbrück, FS Thürer, p 103.

<sup>245</sup> For further reference Delbrück, FS Thürer, p 103 et seq.

<sup>246</sup> Delbrück, FS Thürer, p 104.

try to adapt themselves to the new regulations and also try to influence new regulations on an international level. This effect can also be observed in the IASB. Since domestic legislatures consider IFRS in the legislative process, these norms have an influence on national legislation as well.

## II. Composition

82 The IASB aims to improve the quality of financial reporting.<sup>247</sup> This is achieved through a board of experts who represent different stances concerning IFRS: the IFRS Foundation considers a fair representation when choosing members of the IASB, including preparers, auditors, users, and academics.<sup>248</sup> Furthermore, the IFRS Foundation is a non-profit corporation, constituted under the laws of the State of Delaware on 8<sup>th</sup> March 2001.<sup>249</sup>

83 The IASB consists of 14 members. The trustees select these members with the goal of staffing the IASB with technical expertise and experience from international business and financial markets. The Chair and Vice Chair represent no specific region. 'To ensure a broad international diversity, the constitution requires four members from the Asia/Oceania region; four from Europe; four from the Americas; one from Africa; and one appointed from any area, subject to maintaining overall geographical balance.'<sup>250</sup> However, the members are not left alone in their task. The IASB has a technical staff, representing nearly 30 countries from around the world.<sup>251</sup>

84 Nine out of 14 votes are required to issue a draft.<sup>252</sup> The prompted diversities result in a higher legitimacy of the different interested groups (for legitimacy cf para 264 et seq). At the same time, however, votes are less likely to result in a consensus.<sup>253</sup>

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<sup>247</sup> Böckli, Aktienrecht, § 8 para 42.

<sup>248</sup> Hohl, Private Standardsetzung, p 145.

<sup>249</sup> Link: <https://www.iasplus.com/en/resources/ifrsf> (accessed on 16.10.2018); cf Hohl, Private Standardsetzung, p 145.

<sup>250</sup> Link: <https://www.iasplus.com/en/resources/ifrsf/iasb-ifrs-ic/iasb-board> (accessed on 16.10.2018); cf Hohl, Private Standardsetzung, p 145.

<sup>251</sup> IFRS Foundation, Due Process Handbook, 3.14 et seq; IFRS 2013, Introduction, A9.

<sup>252</sup> IFRS 2013, Introduction, A8.

<sup>253</sup> Bischof/Daske, Endorsement, p 37 et seq.

### III. IASB and the UNO Criteria for NGOs

The IASB is an NGO.<sup>254</sup> Therefore, the UN's principles concerning NGOs are applicable:<sup>255</sup> an NGO shall support the UN's work. NGOs shall be representative bodies and have identifiable headquarters, and the officers are responsible to a democratic policy-making conference. NGOs cannot be profit-making bodies. Individual companies are excluded from a consultative status. NGOs cannot use or advocate violence, and they must not interfere in the internal affairs of states. Thus, a political party cannot be an NGO.

The IASB has its headquarters in London.<sup>256</sup> It is an independent standard-setting board and is 'overseen by a geographically and professionally diverse body of Trustees of the IFRS Foundation, which is publicly accountable to a Monitoring Board of public capital market authorities'.<sup>257</sup> The IASB consists of 16 full-time members, appointed by and accountable to the Trustees of the IFRS Foundation.<sup>258</sup> The board is financed indirectly by the IASB Foundation through the sales of copyrights and other products.<sup>259</sup> Profits are used to develop new standards.<sup>260</sup> The problem with financing projects in general is that the financiers can influence the behaviour of the beneficiaries.<sup>261</sup>

The standard-setting process (*Vernehmlassungsverfahren*; cf para 92 et seq) is characterised by its thoroughness, openness, transparency, and the possibility for every interested party to participate.<sup>262</sup> The IFRS Foundation's mission statement mentions the intention to develop IFRS, which bring transparency, accountability, and efficiency to the global economy. The IFRS shall also serve the public interest.<sup>263</sup>

Each IASB member is named on the IFRS' website.<sup>264</sup> Therefore, how the IASB is constituted is transparent. Opening each meeting of the Trustees, the IASB, the Advisory Council, and the Interpretations Committee to the public

<sup>254</sup> Kaya/Kirsch/Henselmann, *Accounting Historians Journal*: December 2016, Vol.43, No. 2, p 59.

<sup>255</sup> ECOSOC statute cit according to Willetts, *Transnational actors*, p 335 et seq.

<sup>256</sup> IFRS 2013, Introduction, A7.

<sup>257</sup> Pacter, pocket guide, p 15.

<sup>258</sup> IFRS 2013, Introduction, A8; Pacter, pocket guide, p 15.

<sup>259</sup> IFRS 2013, Introduction, A7; Wojcik, *IFRS als europäisches Recht*, p 203.

<sup>260</sup> Cf IFRS Foundation, Report of the Trustees' Strategy Review 2011, *passim*.

<sup>261</sup> Wojcik, *IFRS als europäisches Recht*, p 203.

<sup>262</sup> Pacter, Pocket Guide, p 15.

<sup>263</sup> IFRS Foundation, Mission Statement, available at: <http://www.ifrs.org/About-us/Pages/IFRS-Foundation-and-IASB.aspx> (accessed on 16.10.2018); cf also Bischof/Daske, *Endorsement*, p 35 n 42.

<sup>264</sup> Link: <https://www.ifrs.org/groups/international-accounting-standards-board/#members> (accessed on 01.11.2018).

ensures transparency in the standard-setting process.<sup>265</sup> Additionally, the development of new standards allows for an open, public process for debating technical issues.<sup>266</sup> Interested parties can take part in this process in different ways by participating in a working group or submitting a comment letter.<sup>267</sup> After IFRS' publication, it is possible to verify the result of the standard-setting process.<sup>268</sup>

89 The problematic criteria are the funding and the consultative status. The IASB only sells copyrights to fund its activities, not to pay out dividends.<sup>269</sup> This self-funding should not fall under the condition of profit making. The consultative status is only a problem in cases in which a single entity or a single sector tries to gain influence over the action of the NGO. However, the IASB opens its doors for everyone to participate in the standard-setting process. Hence, no single actor can over-influence the IASB, in theory (cf for influences on the IASB para 121 et seq).

#### D. IFRS' Structure

90 IFRS consist mainly of standards that are topic related. Each year, new standards (IFRS) are created, which replace older ones (mainly IAS). IFRS are separated into three books: Part A, B and C. Part A deals with the conceptual framework and the required standards. Part B includes the accompanying guidance and IFRS practice statements and Part C contains the bases for conclusions.<sup>270</sup> IFRS, in a general sense, comprise IFRS in a strict sense, the IAS, the IFRIC Interpretations, and the SIC Interpretations.<sup>271</sup>

91 The Conceptual Framework ensures a consistent and logical basis for the formulation of IFRS,<sup>272</sup> even though the Conceptual Framework does not overwrite the standards.<sup>273</sup> The standards have priority over the Conceptual Framework (IFRS, Introduction, A10). The Conceptual Framework can only be used as a guide for reporting if no standard regulates the event in question and no analogy can be made to the requirements for similar items (cf para 178 et seq).<sup>274</sup>

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<sup>265</sup> IFRS 2013, Introduction, A9.

<sup>266</sup> IFRS 2013, Introduction, A9.

<sup>267</sup> IFRS 2013, Introduction, A9 et seq

<sup>268</sup> IFRS 2013, Introduction, A11.

<sup>269</sup> Cf IFRS Foundation, Report of the Trustees' Strategy Review 2011, pp 8, 22 et seq.

<sup>270</sup> Cf Link: <https://www.ifrs.org/news-and-events/2018/01/new-required-ifrs-standards-books/> (accessed on 01.11.2018).

<sup>271</sup> IAS 1.7.

<sup>272</sup> IFRS Preface 8; Wells, Principle-based, p 305.

<sup>273</sup> Wells, Principle-based, p 305.

<sup>274</sup> For further reference Wells, Principle-based, p 305.

## E. Development of Standards

The IASB issues a draft. This is followed by a procedure, which includes 92 different elements:<sup>275</sup> one element includes a consultation process for the public to interact with the standard setters through comments.<sup>276</sup> The openness of the IASB's meetings and the public availability of all its agenda papers ensures transparency. The IASB also has the task of collaborating with the worldwide standard-setting community.<sup>277</sup>

With the growing impact of IFRS, national legislatures are beginning to 93 have an influence on the standard-setting process in the IASB.<sup>278</sup> Legislatures have realised the opportunity to shape the IFRS in ways that benefit their own jurisdictions. The IASB also has a self-interest in enabling the national legislatures to collaborate; if national legislatures do not consider IFRS to be adequate for their purposes, they will not adopt the proposed changes into their domestic legal order (cf also para 123 et seq).

## F. IFRS' Legal Form

Two perspectives can be utilised when qualifying the legal nature of a norm. A 94 norm can be qualified from its own perspective, or from the perspective of another norm. IFRS can be classified from the perspective of international law, but also from the point of view of domestic law. Only the former will be shown in this chapter, and the latter, under Swiss law, follows in a later chapter (cf para 137 et seq). The IASB views IFRS as a set of informal norms,<sup>279</sup> and informal norms are not legally binding.<sup>280</sup>

However, the nature of the legal norm can change. According to Kirchner 95 and Schmidt,<sup>281</sup> IFRS become substitutes for legally binding mandatory norms, as soon as they are required to gain access to a market. In my view, the nature of

<sup>275</sup> Pacter, pocket guide, p 15.

<sup>276</sup> HWP 2014, p 111; Bischof/Daske, Endorsement, p 40; Pacter, pocket guide, p 15.

<sup>277</sup> Pacter, pocket guide, p 15.

<sup>278</sup> Bergmann, Jahrbuch 2009, p 200; Zeff, British Accounting Review 2007, p 299.

<sup>279</sup> IFRS, Vorwort zur deutschen Übersetzung der IFRS 2013; cf Böckli, Aktienrecht, § 10 para 10; Böckli, IFRS, para 44 et seq; Boemle/Lutz, Jahresabschluss, p 83; Glanz, ST 2007, p 529; Glanz, SZW 2007, p 360; Hohl, Private Standardsetzung, pp 130, 146; Kemper-Scharpegge, p 17 et seq; Kleibold, Ausschüttungsregulierung, p 55 n 239; CHK-Lipp, Art 962a para 18.

<sup>280</sup> Flückiger, Informal International Lawmaking, p 409; Flückiger, Tribute to Peter Koepfel, p 45; Hohl, Private Standardsetzung, p 130.

<sup>281</sup> Kirchner/Schmidt, International Standards and the Law, p 68.

the legal norm changes and becomes formal law with the recognition of the state (cf para 137 et seq).<sup>282</sup>

## G. IFRS' Underlying Principle

- 96 Usually, when the IFRS are mentioned, one connects them automatically with fair presentation or true and fair view. Fair presentation has its own standard (IFRS 13; cf also para 303 et seq). In addition, this view is an underlying principle on which every standard is built.<sup>283</sup>
- 97 The term 'true and fair view' is unclear (for the influence of culture cf para 484 et seq; for further explanations of true and fair view cf also para 303 et seq).<sup>284</sup> In essence, it means that the financial report is transparent and the assets and liabilities are estimated accurately.<sup>285</sup> If the numbers alone do not depict a situation in an accurate and satisfactory way, additional information should be provided in the notes of the financial statements.<sup>286</sup> Divergences from single norms are possible, in order to preserve the purpose of a fair presentation.

## H. IFRS for SMEs

- 98 First introduced in 2009, IFRS for SMEs were created for small and medium-sized entities. Together, they account for 95 per cent of all entities worldwide.<sup>287</sup> They are based conceptionally on IFRS, but build their own units.<sup>288</sup> In Switzerland, IFRS for SMEs are a recognised set of standards in the sense of Art 962a para 5 CO<sup>289</sup>.<sup>290</sup>

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<sup>282</sup> Hohl, Private Standardsetzung, p 130; Teubner, Constitutional Fragments, p 47.

<sup>283</sup> IFRS, Preface to the IFRSs, para 6.

<sup>284</sup> Bischof/Daske, Endorsement, p 11; cf Evans, Accounting and Business Research 2003, Vol 33, No 4, p 311 et seq.

<sup>285</sup> Cf IFRS, Preface to the IFRSs, para 6; IFRS 1.1.

<sup>286</sup> Article 4 (3) Directive 2013/34/EU; Bischof/Daske, Endorsement, p 21; cf IFRS 13.91 et seq.

<sup>287</sup> HWP 2014, p 114.

<sup>288</sup> HWP 2014, p 114.

<sup>289</sup> English wording: 'The Federal Council shall specify the recognised standards. It may stipulate requirements that must be met when choosing a standard or when changing from one standard to another'; authoritative German version: '*Der Bundesrat bezeichnet die anerkannten Standards. Er kann die Voraussetzungen festlegen, die für die Wahl eines Standards oder den Wechsel von einem Standard zum andern erfüllt sein müssen*'.  
<sup>290</sup> Art 1 VASR; HWP 2014, p 114.



## I. IFRS' Interpretation

### I. Basics

If an IFRS can be applied to a specific case, the specific standard should be followed.<sup>291</sup> In cases in which no IFRS applies specifically to the situation, the 'management shall use its judgement in the developing and applying an accounting policy that results in information'.<sup>292</sup> The information must be relevant and reliable. Reliable means that the financial statements shall 'represent faithfully the financial position, financial performance and cash flows of the entity; reflect the economic substance of transactions, other events and conditions, and not merely the legal form; are neutral, ie free from bias; are prudent; and are complete in all material respects'.<sup>293</sup> In the terminology explained above (cf para 90 et seq), IFRS places the most emphasis on the systematic interpretation.<sup>294</sup> 99

### II. IFRS' Interpretation Principle

IFRS' regulations are numerous, especially in comparison with the commercial accounting rules that can be found in the CO. Therefore, many questions are answered by the standards themselves. IFRS cannot regulate every single case, so interpretation is needed. They define the primary sources for the finding of a regulation. IFRS comprise the IFRS, the IAS, the IFRIC Interpretations, and the SIC Interpretations.<sup>295</sup> The IFRIC and SIC Interpretations can be qualified as authoritative interpretations. They are, in other words, interpretations, whose application the standard setter deems as mandatory. 100

### III. Process of Interpretation

The interpretation can be divided in two processes: first, the interpreter shall search for a suitable norm; second, he shall test the result of his interpretation. 101

#### 1. Searching for a Suitable Norm

Beginning with the interpretation process, the interpreter must proceed as follows. In step one, he needs to search for answers in a particular standard 102

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<sup>291</sup> IAS 8.7.

<sup>292</sup> IAS 8.10; cf Wojcik, IFRS als europäisches Recht, p 286.

<sup>293</sup> IAS 8.10.

<sup>294</sup> Wojcik, IFRS als europäisches Recht, p 262.

<sup>295</sup> IAS 1.7, 8.5.

(IAS or IFRS).<sup>296</sup> If he is unable to find an answer, he must proceed to step two. In this step, the interpreter will consider the authoritative SIC or IFRIC Interpretations.<sup>297</sup> In the third step, the interpreter will form an analogy to a similar standard within IFRS.<sup>298</sup> Fourth, he uses the definitions, reporting criteria, and measurement concepts of the conceptual framework.<sup>299</sup> In the fifth step, the interpreter can apply other standards similar to IFRS and the doctrine.<sup>300</sup> In other words, the interpreter can use *inter alia* US GAAP for the interpretation of IFRS.<sup>301</sup>

## 2. Verification of the Result

- 103 The second step in the interpretation process is important. It consists of verifying the result (cf para 507 et seq). If compliance with IFRS does not lead to a fair presentation of a situation, it is possible to diverge from these standards.<sup>302</sup> Thus, the general norm of fair presentation is an overriding principle.<sup>303</sup> This is different under the CO, because legislature<sup>304</sup> diverged from the true and fair view principle intentionally, fair presentation is not an overriding principle.<sup>305</sup> As a result, the information should be relevant, reliable, and provide a fair presentation, as well as an economic view.<sup>306</sup> In addition, the financial statements should be neutral, prudent, and complete in all material respects.<sup>307</sup>
- 104 Therefore, if management concludes that compliance with IFRS will lead to conflicts with the conceptual framework, it shall depart from that requirement.<sup>308</sup> Additionally, even if the application of the requirements set out in the conceptual framework lead to a fair presentation, the preparer shall diverge from them as well.<sup>309</sup> This process is the IASB's equivalent to the

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<sup>296</sup> IAS 8.7; Handschin, Rechnungslegung, para 57; cf HWP 2014, p 112.

<sup>297</sup> HWP 2014, p 112; Kleibold, Ausschüttungsregulierung, p 60 n 261; cf Wojcik, IFRS als europäisches Recht, p 251.

<sup>298</sup> IAS 8.11(a).

<sup>299</sup> IAS 8.11(b); cf also IFRS, Conceptual Framework, 2; Handschin, Rechnungslegung, para 58.

<sup>300</sup> IAS 8.12; cf HWP 2014, p 112; Kleibold, Ausschüttungsregulierung, p 157 et seq.

<sup>301</sup> Grote/Hold/Pilhofer, IRZ 2014, p 341.

<sup>302</sup> IAS 8.14(b).

<sup>303</sup> IAS 1.17; Behr/Leibfried, Rechnungslegung, p 61; Jutzi, Unternehmenspublizität, para 980; Kleibold, Ausschüttungsregulierung, p 157 et seq; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 107, Art 958c para 11.

<sup>304</sup> Botschaft 2007, p 1626, 1699.

<sup>305</sup> Gutsche, veb.ch Praxiskommentar, Art 959a para 14.

<sup>306</sup> IAS 8.10.

<sup>307</sup> IAS 8.10.

<sup>308</sup> IAS 1.19.

<sup>309</sup> IAS 1.23.

improper lacuna under Swiss law (cf paras 42 et seq, 507 et seq). Although IFRS provide more detail than the CO and, therefore, regulate more cases in detail, the IASB anticipated the possibility of obtaining improper results in the application of IFRS. Thus, the IASB does not raise the claim of having regulated every imaginable case properly; instead, it created IAS 8 as a guideline to interpret IFRS.

## J. IFRS vs US GAAP

This section explains the relationship between the two accounting standards: IFRS 105 and US GAAP. US GAAP are the sum of all accounting and financial reporting regulations in the US.<sup>310</sup> The FASB (Financial Accounting Standards Board) can be seen as US GAAP's issuer.<sup>311</sup> The GAAP in the US are the Financial Reporting Standards (FRS) and the statements of the Governmental Accounting Standards Board.<sup>312</sup> Their purpose is to make reliable information about the financial situations of entities available for current and future investors.<sup>313</sup> Unfortunately, US GAAP are not easily accessible or understandable.<sup>314</sup>

Nevertheless, the question here is how IFRS and US GAAP interact with each 106 other. Although IFRS have expanded their influence increasingly, worldwide acceptance of IFRS will only be achieved when the US admits that IFRS are equivalent to US GAAP.<sup>315</sup> As of today, there are still differences between the two standards.<sup>316</sup> In 2002, an important step towards harmonisation was made (Norwalk Agreement).<sup>317</sup> Since then, the common project of the IASB and the FASB has led to an influence of US GAAP on IFRS,<sup>318</sup> and they have begun to converge. The American SEC (United States Securities and Exchange) permitted the use of IFRS in 2007 for foreign listed entities on the US stock exchanges.<sup>319</sup> The two boards are working off different items to find a common

<sup>310</sup> Cf <http://www.fasb.org/home> (accessed on 01.09.2017); HWP 2014, p 117; cf Böckli, Aktienrecht, § 8 para 56 et seq; Handschin, Rechnungslegung, para 61 et seq.

<sup>311</sup> Link: <http://www.fasb.org/home> (accessed on 16.10.2018).

<sup>312</sup> Bergmann, Jahrbuch 2009, p 193.

<sup>313</sup> HWP 2014, p 117.

<sup>314</sup> Böckli, Aktienrecht, § 8 para 81.

<sup>315</sup> Böckli, Aktienrecht, § 10 para 22; Burger/Vial, p 501.

<sup>316</sup> Burger/Vial, p 501.

<sup>317</sup> IASB and FASB, Update 2013, p 1; cf Behr/Leibfried, Rechnungslegung, p 119; Jutzi, Unternehmenspublizität, para 976.

<sup>318</sup> Behr/Leibfried, Rechnungslegung, p 119; Böckli, Aktienrecht, § 10 para 22; Jutzi, Unternehmenspublizität, para 977.

<sup>319</sup> SGHB Finanzmarktrecht I-Bartholet, § 5 para 93; Behr/Leibfried, Rechnungslegung, p 119; Bierstaker/Kopp/Lombardi, IFRS, p 1.

ground.<sup>320</sup> However, in the reporting of financial instruments, the IASB and the FASB have been unable to reach an agreement.<sup>321</sup> The latest updates on the harmonisation project can be found online.<sup>322</sup> The TTIP (Transatlantic Trade and Investment Partnership) could accelerate the harmonisation process.<sup>323</sup> It is difficult to make a prognosis as to how the convergence will proceed.

107 This harmonisation project has effects on financial reporting in Switzerland. If harmonisation is realised in the future, one standard will cease to exist. Thus, entities will have one less option from which to choose. The growing complexity of harmonisation must lead to higher requirements in the education and training of human resources.<sup>324</sup> Entities in Switzerland with strong connections to the US use US GAAP.<sup>325</sup> One example of this is Credit Suisse.<sup>326</sup> It will change to IFRS if US GAAP is replaced. Predictions for the development of the distribution between IFRS and Swiss GAAP FER are not easy to make. In my opinion, entities applying Swiss GAAP FER will continue to use them (cf para 198 et seq). Depending on the growing complexity of IFRS due to harmonisation with US GAAP, entities are likely to change from IFRS to Swiss GAAP FER.<sup>327</sup>

108 The growing compliance between IFRS and US GAAP could lead to a decrease in IFRS acceptance. The reason for this is that no country other than the US has an influence on US GAAP.<sup>328</sup> European entities are concerned that IFRS will become increasingly similar to US GAAP; they chose IFRS because they disliked US GAAP.<sup>329</sup>

109 As in other cases, US authorities declare themselves responsible for auditing every financial report created in accordance with US GAAP, regardless of the preparer's registered office.<sup>330</sup> In other words, US authorities audit financial reports according to US GAAP despite the fact that local authorities have already audited these reports. US authorities base their legitimacy on the

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<sup>320</sup> Cf IASB and FASB, Update 2013, p 1.

<sup>321</sup> For further reference Jutzi, Unternehmenspublizität, para 977.

<sup>322</sup> Link: <http://www.ifrs.org/use-around-the-world/global-convergence/convergence-with-us-gaap/Pages/convergence-with-us-gaap.aspx> (accessed on 25.10.16); cf <https://www.ifrs.org/use-around-the-world/use-of-ifrs-standards-by-jurisdiction/united-states/> (accessed on 16.10.2018).

<sup>323</sup> Thijssen/Iatridis, Conditional conservatism, p 1.

<sup>324</sup> HWP 2014, p 111.

<sup>325</sup> Cf KPMG, available at <https://home.kpmg.com/ch/de/home/dienstleistungen/audit/us-gaap.html> (accessed on 16.10.2018).

<sup>326</sup> Link: <https://www.credit-suisse.com/corporate/en/articles/media-releases/4q16-press-release-201702.html> (accessed on 16.10.2018).

<sup>327</sup> For Swiss GAAP FER's future cf Leibfried, EF 2016, p 120 et seq.

<sup>328</sup> Bohr, Bilanzierung von Kundenbeziehungen, p 85 et seq.

<sup>329</sup> Schildbach, ST 2004, p 165.

<sup>330</sup> Erläuternder Bericht VASR, p 8.

argument that local authorities do not have the expertise to audit.<sup>331</sup> For this reason, US GAAP have become less important in Switzerland and the EU.<sup>332</sup> There is a general fear of ‘Americanisation’,<sup>333</sup> or, as Wiegand<sup>334</sup> puts it, the vision of a ‘total McDonalds’ worries Europe.

## K. Interim Conclusion

The IASB is a private organisation (cf para 80 et seq) and issues IFRS. In order 110 to qualify the legal form of the IFRS, different points of views can be taken. From the stand of the IASB, IFRS are a set of informal norms; in other words, private norms (cf para 79 et seq). The IFRS’ legal nature can however change, if a domestic accounting standard refers to them (cf para 137 et seq). This chapter further shows, that the IASB fulfils the UN criteria for an acceptable NGO (cf para 85 et seq). Being issued by a private organisation, the IFRS come with their own method of interpretation (cf para 99 et seq), which consists of the following cascade: the first place to look for the answer of the question how a specific item has to be reported, is in the standards themselves. In step two, the SIC or IFRIC Interpretations must be considered. Third, an analogy can be made to a similar standard. Only in the fourth step can the framework be of use. Fifth, standards such as IFRS are permitted as an interpretation tool, or the doctrine’s explanations regarding the use of IFRS. In the last step, the result must be verified for compatibility with the underlying principles of IFRS.

Despite this cascade, differences in interpretations still occur as a result of 111 cultural differences (cf 484 et seq). The same case will be reported differently depending on the preparer of the report, especially regarding risk avoidance. Differences are also an important factor in the relationship between IFRS and US GAAP. The FASB and the IASB are in the process of harmonising US GAAP and IFRS, which could have a small impact on the distribution of the applied standard in Switzerland (cf para 105 et seq). This convergence of IFRS and US GAAP may result in Swiss entities changing from IFRS to Swiss GAAP FER.

<sup>331</sup> Erläuternder Bericht VASR, p 9.

<sup>332</sup> Erläuternder Bericht VASR, p 9.

<sup>333</sup> Cf Spadin, FS Forstmoser, p 340.

<sup>334</sup> Wiegand, Jusletter 25<sup>th</sup> February 2002, para 16.



## § 4 IFRS Adoption

Jurisdictions have found different ways of adopting IFRS (cf paras 113 et seq, 112 137 et seq). For example, the EU created an endorsement process in which the IASB's novelties are examined based on their understandability, relevance, reliability, comparability, and compatibility with the European public good (cf para 121). This chapter analyses firstly why IFRS are adopted and secondly displays the different forms of how IFRS are adopted.

### A. Reasons for the Adoption of IFRS

With the global popularity of IFRS, several lesser-developed states have 113 endorsed IFRS to improve their low-quality domestic accounting standards. This adoption gives these states more common ground with their more-developed counterparts.<sup>335</sup> More-developed jurisdictions considered IFRS to gain better comparability between the financial reports of entities domiciled in their jurisdictions.<sup>336</sup> This inter-corporate-comparability is important for investors. Tweedie<sup>337</sup> confirms this: 'The life blood of capital markets is financial information that is: comparable from company to company; relevant to investment financing decisions; a faithful depiction of economic reality; and neutral, favouring neither supplier nor user of capital, neither buyer nor seller of securities'.

Entities rely on outside capital. These resources are only provided if the 114 investor trusts in the entity's ability to pay back the money loaned or equity, meaning that the entity's value increases. Therefore, the investor tests the financial structure of the entity by consulting the financial report. The more information he can gather, the better. Nevertheless, information on its own is not enough. In addition to the quantity of information, it should be comparable. The more entities use a certain standard, the better the comparability between them. This leads to the conclusion that the more high-grade the financial report, the cheaper the costs to acquire outside capital.<sup>338</sup> Further reasons for the harmonisation of financial reporting standards are presented in para 30 et seq.

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<sup>335</sup> Judge/Li/Pinsker, p 162.

<sup>336</sup> Judge/Li/Pinsker, p 162; Tweedie, Principle-based, p 4.

<sup>337</sup> Tweedie, Principle-based, p 4.

<sup>338</sup> Kemper-Scharpegge, p 14.

- 115 A study<sup>339</sup> has shown that emerging countries use IFRS as a reference point for their accounting systems. First-world countries on the other hand are more confident in developing independent accounting options. The results are divergences from national accounting systems to IFRS.<sup>340</sup> In states with highly developed equity markets, national standards with many similarities to IFRS can be observed.<sup>341</sup>

## B. Forms

- 116 Bergmann<sup>342</sup> distinguishes between two methods of IFRS' adoption: direct and indirect endorsement (cf also para 122 et seq). In direct adoption, the legislature creates a direct reference to IFRS, either as a dynamic or static direct reference (cf also para 152 et seq). With indirect endorsement, the legislature sets a new national law based on IFRS. Usually, only IFRS are incorporated and, for this reason, translated.
- 117 There are different reasons for distinctions in the adoption of IFRS, such as different grades of endorsement, different translations, gaps within IFRS, the liberty to choose certain types of valuation, and imperfect enforcement of IFRS.<sup>343</sup> International standards can be implemented in formal domestic law in different ways. The least problematic method is implementation word for word into national law by the means of an ordinary legislative process (= reception).<sup>344</sup> More dynamic methods of implementation are also available, such as dynamic references (cf paras 157 et seq, 160 et seq) or general clauses (cf para 165 et seq). Although the dynamic methods are more effective, they enjoy less legitimacy (cf para 264 et seq).<sup>345</sup>
- 118 There are different players, who can encourage the use of recognised standards: stock exchanges can limit access to the financial markets by declaring the use of certain standards as obligatory.<sup>346</sup> Investors or financial institutes can also tie their investments to the adoption of financial reporting

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<sup>339</sup> Ding/Hope/Jeanjean/Stolowy, Differences, p 3.

<sup>340</sup> Ding/Hope/Jeanjean/Stolowy, Differences, p 3.

<sup>341</sup> Ding/Hope/Jeanjean/Stolowy, Differences, p 3.

<sup>342</sup> Bergmann, Jahrbuch 2009, p 194.

<sup>343</sup> Wehrfritz/Haller, National influence, p 198.

<sup>344</sup> Troxler, Jusletter 16<sup>th</sup> November 2015, para 14; cf Brunner, Technische Normen, p 87; Hohl, Private Standardsetzung, p 140 et seq; Wojcik, IFRS als europäisches Recht, p 109.

<sup>345</sup> Cf Troxler, Jusletter 16<sup>th</sup> November 2015, para 14.

<sup>346</sup> For the SIX Swiss Exchange cf <https://www.six-exchange-regulation.com/de/home/issuer/admission/listing.html> (accessed on 22.08.17).



standards.<sup>347</sup> Jurisdictions can permit or require the use of a recognised standard in certain cases.<sup>348</sup>

The following table analyses the use of IFRS in the 150 profiled 119 jurisdictions by world region:<sup>349</sup>

Region	Number of Jurisdictions				
	Jurisdictions in the region	Jurisdictions that require IFRS Standards for all or most domestic publicly accountable entities	Jurisdictions that require IFRS Standards as % of total jurisdictions in the region	Jurisdictions that permit or require IFRS Standards for at least some (but not all or most) domestic publicly accountable entities	Jurisdictions that neither require nor permit IFRS Standards for any domestic publicly accountable entities
Europe	44	43	98%	1	0
Africa	38	36	95%	1	1
Middle East	13	13	100%	0	0
Asia-Oceania	34	25	74%	3	6
Americas	37	27	73%	8	2
<b>Totals</b>	<b>166</b>	<b>144</b>	<b>87%</b>	<b>13</b>	<b>9</b>
<b>As % of 166</b>	<b>100%</b>	<b>87%</b>		<b>8%</b>	<b>5%</b>

*Figure 1: IASB's profile of 166 jurisdictions*

<sup>347</sup> Mächler, ZfR Band 5, p 117; cf for tying financial aid to IFRS Judge/Li/Pinsker, p 163; Troxler, Jusletter 16. November 2015, para 5; mandatory for the zewo-certificat for charities, cf Zewo, Anforderungen an die Revision von Organisationen mit Zewo-Gütesiegel, p 2 et seq.

<sup>348</sup> For Swiss law cf Art 962 para 1 CO.

<sup>349</sup> IFRS, Analysis of the IFRS jurisdictional profiles, <http://www.ifrs.org/use-around-the-world/use-of-ifrs-standards-by-jurisdiction/#analysis> (accessed on 16.10.18).

120 The IASB analyses the different methods of adopting IFRS as follows:<sup>350</sup> ‘144 jurisdictions (87 per cent of the profiles) require IFRS Standards for all or most domestic publicly accountable entities (listed companies and financial institutions) in their capital markets. All but one of those have already begun using IFRS Standards. Bhutan will begin using IFRS Standards in 2021. Some comments on the remaining 22 jurisdictions that have not adopted: 12 jurisdictions permit, rather than require, IFRS Standards: Bermuda, Cayman Islands, Guatemala, Honduras, Japan, Madagascar, Nicaragua, Panama, Paraguay, Suriname, Switzerland, Timor-Leste; one jurisdiction requires IFRS Standards for financial institutions but not listed companies: Uzbekistan; one jurisdiction is in process of adopting IFRS Standards in full: Thailand; one jurisdiction is in process of converging its national standards substantially (but not entirely) with IFRS Standards: Indonesia; and seven jurisdictions use national or regional standards: Bolivia, China, Egypt, India, Macao SAR, United States, Vietnam.’

The most important supervisory bodies at the international level are members of IOSCO (International Organization of Securities Commissions).<sup>351</sup> This organisation played an important part in the harmonisation of the most important concepts in financial reporting, the new formulation of the tasks, and the operation of the IASB.<sup>352</sup> The European counterweight to IOSCO is EFRAG (European Financial Reporting Advisory Group).<sup>353</sup> EFRAG consists of the European network of auditors, the FEE,<sup>354</sup> the ICC (International Chamber of Commerce), and national standard setters.<sup>355</sup>

### C. Example: European Union

121 The EU played an important role in the promotion of IFRS, when it decided to declare the application of IFRS mandatory in certain cases, after 2005; as a result, IFRS gained in importance.<sup>356</sup> The EU endorsed IFRS through incorporation in the directive (Regulation (EC) No 1606/2002). The same result can be achieved with a static reference (cf para 160).

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<sup>350</sup> Link: <http://www.ifrs.org/use-around-the-world/use-of-ifrs-standards-by-jurisdiction/#analysis> (accessed on 16.10.18).

<sup>351</sup> International Organisation of Securities Commissions.

<sup>352</sup> Behr/Leibfried, Rechnungslegung, p 115.

<sup>353</sup> Behr/Leibfried, Rechnungslegung, p 115.

<sup>354</sup> Fédération Européenne des Experts Comptables.

<sup>355</sup> Behr/Leibfried, Rechnungslegung, p 115.

<sup>356</sup> Burger/Vial, p 501; cf Bergmann, Jahrbuch 2009, p 193; Nobel, International Standards and the Law, p 62 et seq; Schepel, Informal International Lawmaking, p 358; Schneider, ST 2002, p 795.

## I. Endorsement

A self-regulatory organisation (SRO),<sup>357</sup> the IASB, issues IFRS. For that matter 122 the EU did not use a dynamic reference. This way the IFRS do not unfold legal validity on their own. For this step, an endorsement process is needed.<sup>358</sup> With the decision of the responsible body, norms set by privates (IFRS) become formal law.<sup>359</sup> Thus, the EU uses a static method in the implementation of IFRS.<sup>360</sup> The purpose of this is to create an efficient and cost-effective European financial market.<sup>361</sup>

## II. Process

This process ensures the EU's power over the IASB, which enables the EU to 123 push its opinions.<sup>362</sup> At the same time, the EU avoids complications by having a dynamic reference to a private standard.<sup>363</sup> This process also has a downside; until the standard is enacted and published, it is not applicable law.<sup>364</sup> After the implementation of IFRS into European law, they become secondary community law for EU member states.<sup>365</sup> The following explanations show the process a novelty must go through to count as EU law.<sup>366</sup>

The EU's interaction with IFRS begins early. EFRAG consults the EU on 124 questions concerning the application of IFRS in the EU and is involved in the standard-setting process of the IASB.<sup>367</sup> The EFRAG gives an overview over the already endorsed standards.<sup>368</sup> 'The international accounting standards can only be adopted if: they are not contrary to the principle set out in Article 2(3) of Directive 78/660/EEC and in Article 16(3) of Directive 83/349/EEC and are

<sup>357</sup> SGHB Finanzmarktrecht I-Werlen/Hertner, § 4 para 17.

<sup>358</sup> Cf Art 3 EU IAS Regulation (EC) No 1606/2002.

<sup>359</sup> Kirchner/Schmidt, *International Standards and the Law*, p 70; Schildbach, ST 2004, p 159; Wojcik, *IFRS als europäisches Recht*, p 44 et seq.

<sup>360</sup> SGHB Finanzmarktrecht I-Brändli, § 2 para 27.

<sup>361</sup> Wojcik, *IFRS als europäisches Recht*, p 63.

<sup>362</sup> Bischof/Daske, *Endorsement*, p 4.

<sup>363</sup> Bischof/Daske, *Endorsement*, p 4.

<sup>364</sup> Regulation (EC) No 1606/2002, Art 4.

<sup>365</sup> Hohl, *Private Standardsetzung*, p 146.

<sup>366</sup> EU, endorsement process, link: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/578988/IPOL\\_BRI\(2016\)578988\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/578988/IPOL_BRI(2016)578988_EN.pdf) (accessed on 16.10.18).

<sup>367</sup> Bischof/Daske, *Endorsement*, p 4; Hohl, *Private Standardsetzung*, p 141; Schepel, *Informal International Lawmaking*, p 358; Schneider, ST 2002, p 795.

<sup>368</sup> Link: <http://www.efrag.org/Endorsement> (accessed on 16.10.18); cf also [https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting\\_en](https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting_en) (accessed on 16.10.18).

conducive to the European public good and, they meet the criteria of understandability, relevance, reliability and comparability required of the financial information needed for making economic decisions and assessing the stewardship of management' (Article 3 Para 2 Regulation [EC] No 1606/2002). The 'IAS Regulation' does not supersede the fourth and seventh directives, as they are still applicable law.<sup>369</sup> The EU must implement each novelty, and publishes the total of its accounting standards on its website EUR-lex.<sup>370</sup>

125 Most standards and interpretations pronounced by the IASB have been endorsed and become binding EU accounting law. In the early 21<sup>st</sup> century however, EFRAG advised against the adoption of certain standards<sup>371</sup> and interpretations<sup>372, 373</sup>. This had multiple effect. Most importantly, it led to greater influence by the EU on the standard-setting process of the IASB<sup>374</sup> because the IASB is always uncertain as to whether the EU will endorse an interpretation or standard; as a result, the EU has more leverage in negotiations.<sup>375</sup> Therefore, the IASB already consolidates with the EU in the norm-setting process to avoid discrepancies between IFRS and EU-IFRS. If the EU dispensed with EFRAG and used a dynamic reference, it would lose its political power over the IASB.<sup>376</sup> Because of this leverage, the IASB considers opinions from the EU.

126 According to Hohl, this creates a mild form of democratic legitimacy.<sup>377</sup> The legitimacy chain (cf para 293 et seq) is only broken when the standard setter does not follow the EU's wishes.<sup>378</sup> In such cases, the EU can still deviate from IFRS in the endorsement process and uphold the legitimacy chain.<sup>379</sup> However, this process leads to discrepancies between IFRS and EU-IFRS. Authorities have responsibilities toward their own citizens. Subsequently, by 'not

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<sup>369</sup> Kemper-Scharpegge, p 23; cf also Besselink, *Informal International Lawmaking: Case Studies*, p 131.

<sup>370</sup> Commission Regulation (EC) No 1126/2008 of 3<sup>rd</sup> November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council (Text with EEA relevance), link: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008R1126> (accessed on 16.10.18).

<sup>371</sup> IAS 32, 39; cf also Schreiber, *International Standards*, p 177 et seq.

<sup>372</sup> IFRIC 3; SIC 5, 16 and 17.

<sup>373</sup> Bischof/Daske, *Endorsement*, p 5; Schildbach, *ST 2004*, p 159; Schreiber, *International Standards*, p 175 et seq.

<sup>374</sup> Bischof/Daske, *Endorsement*, p 5.

<sup>375</sup> Bischof/Daske, *Endorsement*, p 9; even with the EU's choice of IFRS as the recognised standard, the EU wished to gain influence in the IASB, cf Hohl, *Private Standardsetzung*, p 134.

<sup>376</sup> Bischof/Daske, *Endorsement*, p 8.

<sup>377</sup> Cf Hohl, *Private Standardsetzung*, p 187.

<sup>378</sup> Hohl, *Private Standardsetzung*, p 206 et seq.

<sup>379</sup> Cf Hohl, *Private Standardsetzung*, p 213.

intervening in the setting of standards by private actors, governments may be evading their responsibilities toward their own citizens under domestic constitutional law and they may also infringe their obligations under international law toward foreign stakeholders’.<sup>380</sup>

The carve-outs also come with a downside. They should be avoided because 127 they lead to difficulties for cross-listed entities. Carve-outs as used here are certain parts carved out of one set of norms. The SEC only admits IFRS reports without carve-outs.<sup>381</sup> The question is how this divergence can be solved. Cross-listed entities use the footnotes to ensure the report holds up under EU law and IFRS.<sup>382</sup> They also show the differences in the footnotes. This method could also be a possible solution for Switzerland (cf para 137 et seq). Incompatibilities between the statutory report according to the CO and the IFRS report can be explained in the footnotes. Hence, compulsory incompatibilities (*zwingende Unvereinbarkeiten*) of the CO with IFRS could be solved by reporting according to the CO and disclosing the differences to IFRS in the notes.<sup>383</sup>

### III. Criteria

The EU foresees certain criteria which the IFRS have to meet for becoming 128 European Law. IFRS can only be adopted by the EU if: ‘they are not contrary to the principle set out in Article 2(3) of Directive 78/660/EEC and in Article 16(3) of Directive 83/349/EEC and are conducive to the European public good and, they meet the criteria of understandability, relevance, reliability and comparability required of the financial information needed for making economic decisions and assessing the stewardship of management’.<sup>384</sup>

The guideline for the criterion of understandability is a knowledgeable user, 129 meaning someone who has reasonable knowledge of entities and their financial reporting.<sup>385</sup> The information must also not be unduly complex.<sup>386</sup> The harmonisation of IFRS with US GAAP could lead to greater complexity of

<sup>380</sup> Benvenuti, *Informal International Lawmaking*, p 302; for further reference cf also Casini, *Informal International Lawmaking*, p 397 et seq.

<sup>381</sup> Bischof/Daske, *Endorsement*, p 7.

<sup>382</sup> Bischof/Daske, *Endorsement*, p 7.

<sup>383</sup> Cf Schmid’s project description available at: <https://ifrs.ius.unibas.ch/en/23-2/dual-standard-accounting/> (accessed on 16.10.2018).

<sup>384</sup> Art 3 para 2 EU, IAS Regulation 1606/2002; Bischof/Daske, *Endorsement*, Abstract; Schepel, *Informal International Lawmaking*, p 358.

<sup>385</sup> Bischof/Daske, *Endorsement*, p 23.

<sup>386</sup> Bischof/Daske, *Endorsement*, p 23.

IFRS and, therefore, a lower understandability not only of IFRS themselves but also of the information their application generates.

130 The criteria for relevance requests that all relevant information shall be considered in the financial report. This information will help the users to evaluate the past and make prognoses for the future.<sup>387</sup> For the financial report to be reliable, the accounting information shall be complete, free from error and bias, and must show a faithful representation (cf para 353 et seq).<sup>388</sup>

131 The definition of comparability is similar to the definition of the principle of equality.<sup>389</sup> Thus, similar economic transactions will be accounted for in the same way and different transactions will be accounted for differently.<sup>390</sup> This is also referred to as consistency, which is regarded as a part of comparability. The goal of comparability's is to enable the users 'to identify similarities and differences between two sets of economic phenomena'.<sup>391</sup> The comparability is limited because (as already shown) the same standard is applied in different states differently, and, even in the same jurisdiction, differences occur (cf para 484 et seq).

132 Every novelty relating to IFRS is tested on its compatibility with the European public good.<sup>392</sup> One component of the European public good is the public interest (*öffentliches Interesse*).<sup>393</sup> The protective goods are financial stability and the economic development of the Union.<sup>394</sup> It is difficult to define what constitutes the European public good. The Expert Group on the IAS Regulation created guidelines. This group created the following factors to determine the European public good:<sup>395</sup> 'Is the standard consistent with EU competition law? Has the standard converged with US GAAP to "level the playing field"? Have the needs of different types of investors been considered? Have the needs of a broad range of users, including regulators, other stakeholder and creditors, been considered? What are the broad economic effects of

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<sup>387</sup> Bischof/Daske, Endorsement, p 24.

<sup>388</sup> Bischof/Daske, Endorsement, p 25 et seq.

<sup>389</sup> You shall treat equal equally and unequal unequally; cf also Sieckmann, *Recht als normatives System*, p 221 et seq; cf Dederer, *Korporative Staatsgewalt*, p 278 et seq; Müller, *FS Richli*, p 758.

<sup>390</sup> Bischof/Daske, Endorsement, p 27.

<sup>391</sup> Bischof/Daske, Endorsement, p 27.

<sup>392</sup> Bischof/Daske, Endorsement, p 32; Schildbach, *ST 2004*, p 165; Wojcik, *IFRS als europäisches Recht*, p 143.

<sup>393</sup> Bischof/Daske, Endorsement, p 33.

<sup>394</sup> Bischof/Daske, Endorsement, p 43.

<sup>395</sup> Bischof/Daske, Endorsement, p 34 citing Expert Group on the IAS Regulation, 2014; the ICAEW (Institute of Chartered Accountants in England and Wales) also issued a framework link: <http://www.icaew.com/> (accessed on 16.10.18).

standards on employment or public policy? Do standards improve financial reporting? Is there a reference to the cost-benefit analysis?'.<sup>396</sup>

For Bischof and Daske, the only reasonable way to understand the European public good is as a call for a 'comprehensive cost-benefit analysis that considers the reactions of different stakeholders to the proposed standard'.<sup>397</sup> 'Ultimately, it is a political decision of how to weigh the different costs and benefits of different parties.'<sup>398</sup> The task of determining the European public good falls to EFRAG.<sup>399</sup>

## D. Interim Conclusion

This chapter has dealt with the question of how states adopt IFRS on a formal level, referring to the ways in which states officially deal with these standards. However, on another more informal level, IFRS influence formal law as well. This will be the topic of the next two chapters.

IFRS' global influence on financial reporting is undisputed. Jurisdictions have found different ways of interacting with IFRS. While some jurisdictions, such as the EU, have adopted IFRS as their standard for consolidated statements (cf para 121 et seq), others have made them the basis for the statutory report. For the implementation of IFRS, there are different possibilities: incorporation, meaning recepted norms (cf para 157 et seq), references, meaning links to other norms (cf para 160 et seq), or general clauses, meaning broad terms (cf para 165 et seq). To ensure influence on the standard-setting process of the IASB, many jurisdictions have opted to endorse each IFRS novelty rather than setting a dynamic reference (cf para 160 et seq). The EU took the same path, being involved from the early stages of the standard-setting process until the standards are enacted in the IASB, making it unlikely that the EU would not endorse a proposed change by the IASB.

Switzerland, as we also will see later (cf para 137 et seq), chose a different path to that of the EU. The EU operates through an endorsement process, which enables the EU to control every change the IASB makes and either adopt it or not. Thus, the EU decides what becomes European law and what does not, so that each change to EU law remains in the hands of the EU. This mechanism gives the EU power over the IASB. The IASB is keen to consult the EU before making any amendments. If the EU is not happy with a change, it simply will

<sup>396</sup> Bischof/Daske, Endorsement, p 43.

<sup>397</sup> Bischof/Daske, Endorsement, p 3.

<sup>398</sup> Bischof/Daske, Endorsement, p 47.

<sup>399</sup> Bischof/Daske question whether EFRAG is ideally staffed to examine this condition, for further reference Bischof/Daske, Endorsement, p 42.

not adopt it, which leads to the creation of different variants of IFRS. This way, the strength of uniformity would be lost. Because of its chosen method, Switzerland does not have the same kind of influence over the IASB. With the dynamic reference of recognised standards in the CO, the IASB can change Swiss law by changing IFRS. This will be discussed further in the next chapter (cf para 137 et seq).



## § 5 IFRS' Legal Nature and Forms of Influence

This chapter will explain the different forms of IFRS influence on Swiss law on a conceptual basis; the manifestation of IFRS' impact on Swiss law will be explained later (cf para 351 et seq). There are different ways in which IFRS can influence domestic financial reporting. Influences can be the result of references (cf para 152), recognised financial reporting principles (cf para 165 et seq), analogies (cf para 178 et seq), and comparative law (cf para 183 et seq). A reverse influence is also possible. Domestic accounting standards, on the other hand, can also have an influence when dealing with IFRS = reverse influence (cf para 484 et seq). 137

### A. History of IFRS' Influences on Swiss Commercial Accounting Law

In 1992, Switzerland refused to join the EEA (European Economic Area). Thus, the '*Groupe de réflexion Gesellschaftsrecht*' proposed that Switzerland should converge its national commercial accounting law with the European Directive.<sup>400</sup> The draft that was drawn up in 1998<sup>401</sup> already foresaw a change of direction with what was called a 'Mini-IFRS'.<sup>402</sup> However, Parliament did not follow the draft and left the norms concerning commercial accounting in the CO without considering IFRS as broadly as the expert commission that issued the draft. Then, in 2007, the Federal Council proposed changes in the direction of IFRS,<sup>403</sup> but with no effects on taxation (cf para 54 et seq). 138

IFRS gained popularity until its peak in 2008; since then, the tendency toward globalisation reverted back to nationalisation,<sup>404</sup> which manifested itself in the creation of Swiss GAAP FER as a competitor to IFRS (cf para 197 et seq). Swiss GAAP FER expanded due to the entities' choice to opt for them instead of for IFRS. 139

It is unclear whether the legislature intended to create a Helvetism or whether it wanted to refer indirectly to IFRS.<sup>405</sup> Böckli<sup>406</sup> would like the CO to 140

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<sup>400</sup> Böckli, Aktienrecht, § 8 para 62.

<sup>401</sup> Begleitbericht 1998.

<sup>402</sup> Böckli, Aktienrecht, § 8 para 63 et seq.

<sup>403</sup> Böckli, Aktienrecht, § 8 para 74.

<sup>404</sup> Müller/Wyss, p 54.

<sup>405</sup> Böckli, Rechnungslegung, para 39; Jutzi, Unternehmenspublizität, para 981.

<sup>406</sup> Böckli, Rechnungslegung, para 40.

be interpreted autonomously, meaning free from IFRS' influences. However, he cuts back a little by stating that it is permitted to consult the original source, in the process of interpretation, when the CO's principles are still being considered. Handschin<sup>407</sup> propagates the view of only one set of standards, in which the CO comes together with Swiss GAAP FER or IFRS.

## B. IFRS' Legal Nature under Swiss Law

### I. Qualification

- 141 From an independent point of view, IFRS have an informal legal nature (cf para 94 et seq); in other words, they are not legally binding. The question is whether their nature changes with their use in a specific context. IFRS incorporations into Swiss law represent the easiest case. Incorporations change their legal nature into that in which they are incorporated. If Swiss legislature implements the IFRS' definition of liabilities into Swiss law, the implemented text becomes Swiss law (cf para 396 et seq). References, however, are more difficult to qualify. Swiss law refers to IFRS numerous times in a dynamic<sup>408</sup> way. Article 962 CO references the recognised standards, which are listed in the VASR. There are two different views: either references do not lead to changes to the legal nature, or they do.
- 142 For the jurisdiction<sup>409</sup> and a part of the doctrine, the legal nature of the source referred to does not change with a reference in a narrower sense.<sup>410</sup> In my view, the legal nature changes when a reference in a narrower sense is

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<sup>407</sup> Handschin, Rechnungslegung, para 30 et seq, 291.

<sup>408</sup> Art 1 VASR; Art 3oquater para 4 EnV (SR 730.01); Art 8 para 2 Verordnung über die Gewährung von Steuererleichterungen im Rahmen der Regionalpolitik (SR 901.022); Art 74 para 2 lit b VSBG (SR 935.521); Art 14 para 3 FDV (SR 784.101.1).

<sup>409</sup> BGE 132 III 285, Consideration 1.3: '*Nach der Praxis des Bundesgerichts kommt Regelwerken privater Organisationen auch dann nicht die Qualität von Rechtsnormen zu, wenn sie sehr detailliert und ausführlich sind wie beispielsweise die SIA-Normen (BGE 126 III 388 E. 9d S. 391 mit Hinweisen) oder die Verhaltensregeln des internationalen Skiverbandes (BGE 122 IV 17 E. 2b/aa S. 20; 106 IV 350 E. 3a S. 352, je mit Hinweisen). Von privaten Verbänden aufgestellte Bestimmungen stehen vielmehr grundsätzlich zu den staatlichen Gesetzen in einem Subordinationsverhältnis und können nur Beachtung finden, BGE 132 III 285, 289 soweit das staatliche Recht für eine autonome Regelung Raum lässt.*' also in newer decisions BGer verdict from 06.07.2017 4A\_582/2016, Consideration 4.4, verdict from 29.06.2017 4A\_600/2016, Consideration 3.2.2.

<sup>410</sup> Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 901; Brunner, Technische Normen, p 93; Schreiber, p 80; with further references Hettich, Kooperative Risikoversorge, para 551 et seq.

used.<sup>411</sup> With incorporation or references in a narrower sense, the quality of the referred-to source changes. This is the case for informal norms, but also for formal norms. Informal norms become therefore formal norms.<sup>412</sup> The same line of thought can be applied to incorporations and references, but not to indirect references through general clauses. In such cases, the sources do not change their legal nature and do not transform from an informal set of norms to a formal one.<sup>413</sup> When public formal law refers to private formal law, the quality of the latter changes also and becomes public formal law.<sup>414</sup>

Furthermore, the Swiss legislature chose to comply with informal 143 norms.<sup>415</sup> Neither the CO nor the VASR set a date for the reference, qualifying the reference as a dynamic one.<sup>416</sup> The legislature intentionally waived the possibility of endorsing each novelty of the recognised standards.<sup>417</sup> It is important to note, however, that the power of removing a standard from the list as a recognised standard remains in the hands of the Federal Council,<sup>418</sup> which gives the Federal Council political control over the standards.<sup>419</sup> In the legislation process, Parliament wanted to transfer this right to the SIX Exchange. This step would have been problematic because, although the SIX Exchange is a private organisation,<sup>420</sup> it is supervised by

<sup>411</sup> BGE 133 III 221, Consideration 5.3: *'In quest'ottica, la borsa svizzera – organizzata nella forma di una società anonima, la SWX Swiss Exchange – ha elaborato statuti, condizioni generali, regolamenti e direttive (cfr. [www.swx.com](http://www.swx.com); Peter Nobel, op. cit., § 10 para 41–42 pag. 748) che, quand'anche fondati sul diritto contrattuale, hanno una funzione normativa.'* cf BGE 123 I 124 et seq, 136 I 316, Consideration 2.4, 140 V 420 Consideration 4.2; Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 902; SGHB Finanzmarktrecht I-Bartholet, § 5 para 43; Bühler, Regulierung, para 246; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 26; ZK-Jung, Vor Art 620–625 para 72; Kiener/Rütsche/Kuhn, Öffentliches Verfahrensrecht, para 1543, 1546, 1552; CHK-Lipp, Art 963a para 16; Müller/Uhlmann, Rechtssetzungslehre, para 501; Rhinow/Schefer/Uebersax, Schweizerisches Verfassungsrecht, para 2743; Uhlmann, LeGes 2013, p 92; SGHB Finanzmarktrecht I-Winzeler, § 7 paras 23, 26 et seq; Wirz, para 261; cf also Kirchner/Schmidt, International Standards and the Law, p 68; Wiegand/Wichtermann, p 36; for further reference cf Hettich, Kooperative Risikoversorge, para 551.

<sup>412</sup> Müller/Uhlmann, Rechtssetzungslehre, para 501; cf SGHB Finanzmarktrecht I-Brändli, § 2 para 13.

<sup>413</sup> Cf Müller/Uhlmann, Rechtssetzungslehre, para 501 et seq.

<sup>414</sup> Häfelin/Müller/Uhlmann, Allgemeines Verwaltungsrecht, para 251; Tschannen, Verwaltungsrecht, § 18 para 8.

<sup>415</sup> Cf Haas, Commitment and Compliance, p 43 et seq.

<sup>416</sup> HWP 2014, p 25.

<sup>417</sup> AB 2011 S 722; Glanz/Hermann/Pfaff/Zihler, veb.ch Praxiskommentar, Art 962a para VASR 14.

<sup>418</sup> CHK-Lipp, Art 962a para 18.

<sup>419</sup> CHK-Lipp, Art 962a para 18.

<sup>420</sup> Zihler, ST 2011a, p 46.

FINMA.<sup>421</sup> Now, this power belongs rightfully to the Federal Council, which collaborates with FINMA,<sup>422</sup> the RAB,<sup>423</sup> the ESTV,<sup>424</sup> and the SIX Exchange<sup>425</sup> to determine which standard should be considered as recognised.<sup>426</sup> IFRS are only one of the available standards qualifying as recognised. Entities can choose IFRS. In this choice lays the wish to comply with informal norms.<sup>427</sup> IFRS are thus a compulsory voting (*Wahlpflicht*) set of standards next to the other recognised standards (cf Art 962 para 1 CO<sup>428</sup> icw Art 1 VASR). The entity must report according to a recognised standard, but can choose which to apply. For the SIX Swiss Exchange, IFRS and US GAAP are the only permitted international standards (Art 6 RLR SIX<sup>429</sup>).<sup>430</sup>

144 Another argument is that references to norms issued by private entities are outside references, because the reference goes outside of the legal system.<sup>431</sup> With such a reference, the referred-to source is implemented into the

<sup>421</sup> Zihler, ST 2011a, p 46.

<sup>422</sup> Eidgenössische Finanzmarktaufsicht (Swiss Financial Market Supervisory Authority).

<sup>423</sup> Revisionsausichtsbehörde (federal audit supervisory authority).

<sup>424</sup> Eidgenössische Steuerverwaltung (federal tax authority).

<sup>425</sup> Sock Exchange in Zurich.

<sup>426</sup> Zihler, ST 2011a, p 46.

<sup>427</sup> For the concept of approval Bachmann, Private Ordnung, p 172 et seq.

<sup>428</sup> English version: 'In addition to annual accounts under this Title, the following must prepare financial statements in accordance with a recognised financial reporting standard: 1. companies whose equity securities are listed on a stock market, if the stock market so requires; 2. cooperatives with a minimum of 2000 members; 3. foundations that are required by law to have an ordinary audit'; authoritative German version: '*Es müssen zusätzlich zur Jahresrechnung nach diesem Titel einen Abschluss nach einem anerkannten Standard zur Rechnungslegung erstellen: 1. Gesellschaften, deren Beteiligungspapiere an einer Börse kotiert sind, wenn die Börse dies verlangt; 2. Genossenschaften mit mindestens 2000 Genossenschaftern; 3. Stiftungen, die von Gesetzes wegen zu einer ordentlichen Revision verpflichtet sind*'.

<sup>429</sup> English version: 'Depending on the regulatory standard, issuers of equity securities must apply one of the following recognized accounting standards: 1. International Reporting Standard: IFRS1, US GAAP; 2. Swiss Reporting Standard: Swiss GAAP FER, the financial reporting; standard under the Swiss Banking Act; 3. Standard for Investment Companies: IFRS, US GAAP; 4. Standard for Real Estate Companies: IFRS, Swiss GAAP FER; 5. Standard for Depository Receipts: IFRS, US GAAP; 6. Standard for Collective Investment Schemes: Collective investment schemes are subject to the rules laid down in the special law provisions applicable to them'.

<sup>430</sup> Behr/Leibfried, Rechnungslegung, p 117; Handschin, Rechnungslegung, para 32c n 77; ZK-Jung, Vor Art 620–625 para 72; Kleibold, Ausschüttungsregulierung, p 56 et seq; Leu/Erdt/Kiefer, ST 85 (2011), p 567 et seq; Müller/Staub, SZW 2011, p 26; for German law cf § 315 a para 1 HGB.

<sup>431</sup> Mächler, ZfR Band 5, p 108; Müller/Uhlmann, Rechtssetzungslehre, para 364 et seq; Uhlmann, LeGes 2013, p 93.

referencing set of norms. This changes its legal nature and adopts the quality of the norm referencing the source.<sup>432</sup> The legal nature changes from the legislature's point of view. In particular, dynamic references permit the private entities to set indirectly formal norms by changing the source, which is the reference point of the law. The legislature only holds the power to dismiss the reference. Changes in the norms issued by private entities automatically lead to changes in the law. Instead of regulating a certain issue, the legislature refers to informal norms instead of incorporating them. As a result, the amount of regulation coming from authorities can be reduced.<sup>433</sup> Therefore, informal norms contribute to relieving the national legislature.<sup>434</sup>

Two issues are controversial: first, whether a reference in a narrower sense is a delegation of regulatory powers to private entities; second, the legal quality of the referred-to norm is controversial. According to one part of the doctrine<sup>435</sup> and the Swiss Department of Justice,<sup>436</sup> references to private norms are not a delegation of legislative power, but merely a form of limiting the norms issued by the state. In my view, another part of the doctrine<sup>437</sup> is right, stating that the references in a narrower sense are a delegation of regulatory powers to private entities. The legislature could have regulated the issue itself; instead, it referred to another norm. 145

A part of the doctrine states that only in cases in which the reference to private norms leads to a mandatory application of these standards will they become a part of the national legal system.<sup>438</sup> In my opinion, mandatory application of the private standards is no condition for them to become 'a part of Swiss law'.<sup>439</sup> The legislature demands the application of a recognised standard, if certain conditions are met (Art 962 CO). Thus, its application is mandatory. The entity can only choose with which recognised standard it wants to report. 146

<sup>432</sup> BGE 136 I 316, Consideration 2.4; Brunner, *Technische Normen*, p 87; Köbrich, *LeGes* 2014, p 61; Mächler, *ZfR* Band 5, p 114; Schreiber, *International Standards*, pp 99, 151; Uhlmann, *LeGes* 2013, p 94.

<sup>433</sup> Bundesamt für Justiz, *Gesetzgebungsleitfaden* 2007, para 894; Mächler, *ZfR* Band 5, p 116.

<sup>434</sup> Mächler, *ZfR* Band 5, p 116.

<sup>435</sup> Mächler, *ZfR* Band 5, p 112 et seq; Uhlmann, *LeGes* 2013, p 92 et seq.

<sup>436</sup> Bundesamt für Justiz, *Gesetzgebungsleitfaden* 2007, para 892 et seq.

<sup>437</sup> SGHB *Finanzmarktrecht I-Bartholet*, § 5 para 43; Rhinow/Schefer/Uebersax, *Schweizerisches Verfassungsrecht*, para 2741.

<sup>438</sup> Giger, *Corporate Governance*, p 79 et seq; Wiegand/Wichtermann, p 32.

<sup>439</sup> Brunner, *Technische Normen*, p 87; Mächler, *ZfR* Band 5, p 112 et seq; Schreiber, *International Standards*, pp 99, 151; Uhlmann, *LeGes* 2013, p 94.

- 147 Unfortunately, the problem is that the only option remaining for the Swiss authorities to intervene with a change of IFRS is for the Federal Council to remove IFRS as recognised standards in VASR.<sup>440</sup> The Swiss legislature does not allow for the possibility to amend IFRS and still call it IFRS. A change like this would inevitably lead to a similar situation as with EU-IFRS. Switzerland would create its own Swiss IFRS. In my view, this will not happen. Instead, entities will change from IFRS to Swiss GAAP FER (cf para 197 et seq).

## II. Consequences

- 148 One principle concerning legislature causes problems. Each citizen should be able to align his behaviour according to the legal order.<sup>441</sup> He can only succeed in doing so if he is able to gather the relevant information, which is only possible if the relevant information is accessible. However, not every norm has to be published in the national legal database.<sup>442</sup> The exceptions are listed in Art 5 para 1 PublG.<sup>443</sup> Referenced sources do not have to be published in particular if: 'a) they concern only a small group of people; b) they are technical in nature and only intended for specialists; c) they must be published in a format that is not suitable for publication in the AS; or d) a federal act or Federal Assembly ordinance requires publication outside the AS'.
- 149 The referenced source must have a source of supply in the footnotes in the form of an internet address (Art 14 para 3 lit a PublV<sup>444</sup>). The text also must be accessible for free at a defined agency (Art 14 para 3 lit a PublV). In addition, the office in charge must ensure the availability of the referenced source in all

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<sup>440</sup> Cf als Art 962a para 5 CO.

<sup>441</sup> For criminal law cf Art 1 StGB.

<sup>442</sup> Cf <https://www.admin.ch/gov/de/start/bundesrecht/systematische-sammlung.html> (accessed on 06.04.17).

<sup>443</sup> Publications Act, of 18 June 2004 (SR 170.512), authoritative German wording: '*Texte nach den Artikeln 2–4, die sich wegen ihres besonderen Charakters für die Veröffentlichung in der AS nicht eignen, werden nur mit Titel sowie Fundstelle oder Bezugsquelle aufgenommen, namentlich wenn: a. sie nur einen kleinen Kreis von Personen betreffen; b. sie technischer Natur sind und sich nur an Fachleute wenden; c. sie in einem Format veröffentlicht werden müssen, das sich für die Veröffentlichung in der AS nicht eignet; oder d. ein Bundesgesetz oder eine Verordnung der Bundesversammlung die Veröffentlichung ausserhalb der AS anordnet*'.

<sup>444</sup> Publikationsverordnung of 7 October 2015 (SR 170.512.1), authoritative German version: '*Die Bezugsquelle von Texten nach Artikel 5 Absatz 2 PublG wird mit den folgenden Elementen angegeben: a. der Internetadresse, über die der Text eingesehen oder bezogen werden kann*'.

official languages (Art 16 para 1 lit c PublV<sup>445</sup>).<sup>446</sup> For IFRS, the necessary information is printed in the footnotes of the VASR.<sup>447</sup> This means that although the IFRS can be seen as a part of Swiss law, it takes an additional effort to access the IFRS.

Furthermore there are other consequences to be considered. The entity 150 prepares its financial report according to IFRS, and the auditors will control their application. If for any reason a third party perceives damages through false application of IFRS, the judge must decide whether the private norm has been applied correctly.<sup>448</sup> In this context, the technical norms<sup>449</sup> of accountants mutate to legal norms.<sup>450</sup>

It is unclear whether or not the consequences differ when informal norms 151 change into formal norms. In my view, the consequences remain the same. As soon as the legislature creates the possibility of reporting according to a recognised standard in the fulfilment of the law, a breach of this standard is punishable by the same sanctions as the breach of a norm issued by the legislature.<sup>451</sup>

## C. Through References in a Broader Sense

The legislature is free to set laws under the constitution. Occasionally, 152 legislature prefers to use open wording, which provides discretionary powers for the Federal Council to issue a directive, and the interpreter has more room to interpret the law.<sup>452</sup> In this way, the flexibility of the law can be ensured at the expense of legal certainty (*Rechtssicherheit*). The following explanations

<sup>445</sup> Authoritative German version: ‘Bei der Veröffentlichung durch Verweis muss die federführende Behörde: c. dafür sorgen, dass die Texte nach Artikel 5 Absatz 2 PublG ab dem Datum der Veröffentlichung des Verweises in der AS jederzeit in den erforderlichen Amtssprachen verfügbar sind und eine allfällige Online-Version zugänglich ist’.

<sup>446</sup> Cf also to the identical wording of the old law Uhlmann, LeGes 2013, p 90; Uhlmann/Gili, ZfR Band 5, p 12 et seq; also Bock, ZfR Band 5, p 41.

<sup>447</sup> For similar issues in Germany cf Hohl, Private Standardsetzung, p 63.

<sup>448</sup> HWP 2014, p 5.

<sup>449</sup> For technical norms in general cf Brunner, Technische Normen, p 4 et seq; Schreiber, International Standards, p 166; cf also ZK-Bossard, Vorbemerkungen para 441.

<sup>450</sup> Schildbach, ST 2004, p 166.

<sup>451</sup> Cf Merkt, p 35; for the listing of criminal sanctions cf HWP 2014, p 28; for further explanations, cf Handschin, para 259 et seq; Lewisch, p 63 et seq; CHK-Lipp, Art 957a para 28 et seq.

<sup>452</sup> Cf Häfelin/Müller/Uhlmann, Allgemeines Verwaltungsrecht, para 390 et seq; cf Rhinow/Schefer/Uebersax, Schweizerisches Verfassungsrecht, para 2618 et seq; Troxler, Jusletter 16. November 2015, para 20.

capture the different ways in which IFRS influence Swiss law. First, references in a broader sense must be explained.

- 153 References in a broader sense can be distinguished from references in a narrower sense. References in a broader sense capture incorporation or reception (cf para 157 et seq), references in a narrower sense (cf para 160 et seq), and general clauses (cf para 165 et seq). References in a narrower sense include only links in which the referred-to source is mentioned (cf para 160 et seq). References in general combine two norms (or set of norms) and unite them into one.<sup>453</sup> They aim to harmonise (cf also para 30 et seq) the referring norm with the referred-to norm.<sup>454</sup>
- 154 The motivation of applying or considering other standards lays in the possibility of relying on expertise, which is not necessarily available for legislature.<sup>455</sup> In addition, dynamical references and general clauses generate a law, which is updated automatically to the current developments.<sup>456</sup>
- 155 The law can refer to other texts implicitly or explicitly. Implicit or indirect references are cases of incorporations or general clauses, meaning cases in which the referred-to source is not mentioned directly. An explicit or direct reference can be defined as a link to a specific source. In other words, the source to which a norm refers to is named. Both the implicit and explicit reference are approximations to other texts. With references in a narrower sense, the norm setter builds a connection to another norm. These are qualified as direct. This creates the possibility of applying the referenced norm as an interpretation tool.<sup>457</sup> Indirect references come in general clauses (cf para 165 et seq).<sup>458</sup>
- 156 References in a broader sense are not allowed without restrictions. The legislature is only allowed to refer to private standards after it has examined the legal conformity of the referenced passage with the domestic legal concept (mainly compliance with the constitution and the laws).<sup>459</sup> This is important because of the effect of references. As we have seen above, direct references transform informal norms to formal norms (cf para 264 et seq).<sup>460</sup> The same

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<sup>453</sup> Köbrich, LeGes 2014, p 61; cf Müller/Uhlmann, Rechtssetzungslehre, para 360; Brunner, Technische Normen, p 87.

<sup>454</sup> Mächler, ZfR Band 5, p 117.

<sup>455</sup> Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 900; Mächler, ZfR Band 5, p 118; Müller/Uhlmann, Rechtssetzungslehre, para 362.

<sup>456</sup> Mächler, ZfR Band 5, p 118.

<sup>457</sup> Köbrich, LeGes 2014, p 62.

<sup>458</sup> Brunner, Technische Normen, p 87 et seq; Köbrich, LeGes 2014, p 62.

<sup>459</sup> Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 901; cf Uhlmann, LeGes 2013, p 92; Peyer, recht 2004, p 110; Wiegand, Jusletter 25<sup>th</sup> February 2002, para 15 et seq.

<sup>460</sup> Uhlmann, LeGes 2013, p 92; for references in law cf also Kunz, recht 2006, p 43.



holds for incorporations (cf para 157 et seq), but not for general clauses (cf para 165 et seq).

## I. Incorporation

Incorporation or reception means a textual adoption of another norm.<sup>461</sup> The adoption leads to a change in the legal quality of the referred-to norm. The incorporated norm becomes the legal quality of the reciting norm.<sup>462</sup> In other words, the legislature adopts the wording of another foreign norm to make it its own. Two views can be utilised concerning this incorporation: an old norm is recycled, or a new norm comes into existence. Weight can be shifted between these two. Depending on how much emphasis one view receives, either the old or the new character is of relevance.

Concerning Swiss financial reporting, the revision of the CO led to various receptions of the recognised standards (cf para 351 et seq).<sup>463</sup> As one can imagine, this shift has an influence on the interpretation of the new norm. The most commented incorporation is the definition of assets in Swiss accounting law.<sup>464</sup> In the revision, the legislature took the definition from recognised standards (IFRS and Swiss GAAP FER) and incorporated it into Swiss law (cf para 351 et seq).<sup>465</sup>

There are problems associated with an indirect reference, such as copyright protection.<sup>466</sup> Most often, the private entities will not mind because they have an interest in being cited by the legislature.<sup>467</sup> If the private standard setter looks for compensation, he will be disappointed by the protection he will receive as

<sup>461</sup> Brunner, Technische Normen, p 87; Köbrich, LeGes 2014, p 62; Uhlmann, LeGes 2013, p 92 et seq.

<sup>462</sup> Hettich, Kooperative Risikovorsorge, para 547; Köbrich, LeGes 2014, p 62; Uhlmann, LeGes 2013, p 92 et seq.

<sup>463</sup> Cf Böckli, Rechnungslegung, para 347 et seq.

<sup>464</sup> Art 959 para 2 CO.

<sup>465</sup> Behr/Leibfried, Rechnungslegung, p 171; Behr, Stille Reserven, p 599; Böckli, Aktienrecht, § 8 para 340; Böckli, Rechnungslegung, para 321; Brendt, Das neue Rechnungslegungsrecht, p 144; Gutsche, veb.ch Praxiskommentar, Art 959a paras 12, 23; BankG Komm-Handschein, Art 6 para 129 et seq; Handschein, Rechnungslegung, Glossar: Aktiven, p LXIX; Handschein, Rechnungslegung, paras 575a, 602b et seq; Kleibold, Ausschüttungsregulierung, p 22 n 60, pp 50, 65 et seq, 217; CHK-Lipp, Art 959 para 12; Müller, SZW 2008, p 400 et seq; Müller/Lipp/Plüss, Der Verwaltungsrat, p 208; BSK-Neuhaus/Gerber, Art 959a para 15; Nösberger/Boemle, ST 2014, p 14; Stefani, veb.ch Praxiskommentar, Art 959 para 15; cf also HWP 2014, p 57.

<sup>466</sup> Uhlmann, LeGes 2013, p 93.

<sup>467</sup> Uhlmann, LeGes 2013, p 93.

copyright protection cannot be applied to norm texts (Art 5 para 1 lit a URG<sup>468</sup>). Uhlmann<sup>469</sup> proposes a similar treatment as with expropriations.

## II. References in a Narrower Sense

- 160 There are two kinds of reference: dynamic and static. Only the latter refers to a specific norm, most often to a norm set on a specific date.<sup>470</sup> Static references allow the legislature to examine the referred-to source carefully.<sup>471</sup> Dynamic references permit an automatic adaption of the referring norm to the referred-to source.<sup>472</sup> In general, dynamic references are not allowed (cf para 141 et seq). In fast-changing sectors, however, such as technical areas, it is the legislature's purpose to create an adaptable law following the new knowledge of these sectors.<sup>473</sup> In Swiss financial reporting, accounting references to international and national standards are of great importance (cf para 351 et seq).<sup>474</sup> Such references can be found in the law<sup>475</sup> and directives<sup>476, 477</sup>. With references such as these, private standards become enforceable law (cf para 141 et seq).<sup>478</sup> Dynamic references are only allowed if they target a technical issue, which is not important in the sense of Art 164 para 1 BV<sup>479</sup> (cf

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<sup>468</sup> English wording: 'Copyright does not protect: a. acts, ordinances, international treaties and other official enactments'; authoritative German version: '*Durch das Urheberrecht nicht geschützt sind: a. Gesetze, Verordnungen, völkerrechtliche Verträge und andere amtliche Erlasse*'.

<sup>469</sup> Uhlmann, LeGes 2013, p 93.

<sup>470</sup> Hettich, Kooperative Risikovorsorge, para 549; Köbrich, LeGes 2014, p 63; Müller/Uhlmann, Rechtssetzungslehre, para 367.

<sup>471</sup> Köbrich, LeGes 2014, p 64.

<sup>472</sup> SGHB Finanzmarktrecht I-Bartholet, § 5 para 41 et seq; SGHB Finanzmarktrecht I-Brändli, § 2 para 27; Brunner, Technische Normen, p 91; Hettich, Kooperative Risikovorsorge, para 549; Köbrich, LeGes 2014, p 64; Müller/Uhlmann, Rechtssetzungslehre, para 368 et seq.

<sup>473</sup> Brunner, Technische Normen, p 105 et seq; Hettich, Kooperative Risikovorsorge, para 549; Müller/Uhlmann, Rechtssetzungslehre, para 369.

<sup>474</sup> ZK-Jung, Vor Art 620–625 para 72.

<sup>475</sup> Examples: Art 957a para 2, 958c para 3, 962 et seq, 963 para 3, 963b CO; Art 6b para 4 BankG.

<sup>476</sup> Examples: VASR; Anhang 1 E. Anhang lit b fig 1 BankV.

<sup>477</sup> ZK-Jung, Vor Art 620–625 para 72.

<sup>478</sup> BGE 123 I 124 et seq; Hettich, Kooperative Risikovorsorge, para 548; ZK-Jung, Vor Art 620–625 para 72; Müller/Uhlmann, Rechtssetzungslehre, para 501; cf Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 902.

<sup>479</sup> English version: "All significant provisions that establish binding legal rules must be enacted in the form of a federal act"; authoritative German version: '*Alle wichtigen rechtsetzenden Bestimmungen sind in der Form des Bundesgesetzes zu erlassen*'.

para 141 et seq). Standards must consist of recommendations, which are already applied to a wide degree, and the concerned parties must have the ability to contribute in the standard-setting process.<sup>480</sup>

Every important norm must be issued in the form of a law (Art 164 para 1 BV).<sup>481</sup> ‘Provisions shall be regarded as being legislative if they impose obligations or confer rights or responsibilities in general and abstract terms and with directly binding effect’<sup>482</sup> (Art 22 para 4 ParlG<sup>483</sup>). This provides the participation rights and the political legitimacy. In addition, a law must be as precise as possible in such a way that a citizen can adjust his behaviour accordingly. A certain degree of uncertainty is unavoidable because of the general abstract character of a law. However, too much uncertainty leads to legal insecurity. The requirement of certainty necessitates an optimal determination adapted to the relevant factors, particularly foreseeable circumstances.<sup>484</sup>

In financial reporting, the reference points to ‘recognised standards’.<sup>485</sup> These are defined by a directive (VASR) and are, therefore, references in a

<sup>480</sup> Erläuternder Bericht VASR, p 7 n 24; cf Köbrich, LeGes 2014, p 60; Müller/Uhlmann, Rechtssetzungslehre, para 370.

<sup>481</sup> Cf Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 593; cf SGHB Finanzmarktrecht I-Hettich, § 1 para 3; Keller, Runde Tische, p 24 et seq; Schreiber, International Standards, p 154.

<sup>482</sup> Authoritative German version: ‘*Als rechtsetzend gelten Bestimmungen, die in unmittelbar verbindlicher und generell-abstrakter Weise Pflichten auferlegen, Rechte verleihen oder Zuständigkeiten festlegen.*’; cf also Keller, Runde Tische, p 26 et seq.

<sup>483</sup> English version: ‘Provisions shall be regarded as being legislative if they impose obligations or confer rights or responsibilities in general and abstract terms and with directly binding effect’; authoritative German version: ‘*Als rechtsetzend gelten Bestimmungen, die in unmittelbar verbindlicher und generell-abstrakter Weise Pflichten auferlegen, Rechte verleihen oder Zuständigkeiten festlegen.*’

<sup>484</sup> BGE 127 V 431, consideration 2b/aa; 128 I 327, consideration 4.2: ‘*Das Gebot nach Bestimmtheit rechtlicher Normen darf jedoch nicht in absoluter Weise verstanden werden. So kann der Gesetz- und Verordnungsgeber nicht völlig darauf verzichten, allgemeine Begriffe zu verwenden, die formal nicht eindeutig generell umschrieben werden können und die an die Auslegung durch die Behörde besondere Anforderungen stellen. Darüber hinaus sprechen die Komplexität der im Einzelfall erforderlichen Entscheidung, die Notwendigkeit einer erst bei der Konkretisierung möglichen Wahl sowie die nicht abstrakt erfassbare Vielfalt der zu ordnenden Sachverhalte im Einzelfall für eine gewisse Unbestimmtheit der Normen (BGE 109 Ia 284 Erw. 4d mit Hinweisen). Verlangt ist eine den jeweiligen Verhältnissen angemessene optimale Bestimmtheit bzw. eine unter Berücksichtigung aller massgebenden Gesichtspunkte, namentlich auch der Voraussiehbarkeit der Verhältnisse, optimale Determinierung.*’; cf Rhinow/Schefer/Uebersax, Schweizerisches Verfassungsrecht, para 2624 et seq; cf also SGHB Finanzmarktrecht I-Brändli, § 2 para 36.

<sup>485</sup> Art 961d para 1, 962, 962a, 963 para 3, 963b CO.

narrower sense. They are of a dynamic nature.<sup>486</sup> The Federal Council can still dismiss a standard from the VASR. This creates a security mechanism, which enables the state to prevent unreasonable results from influencing Swiss law (cf para 137 et seq for IFRS' legal nature). Swiss law refers to the recognised standards in a dynamic way numerous times (cf para 152 et seq).<sup>487</sup> Often, the references concern financial reporting (cf para 152 et seq).<sup>488</sup> With the legislature's reference to the recognised standards,<sup>489</sup> they referred to the informal norm (cf para 264 et seq).<sup>490</sup>

163 The recognised standards of the VASR are only mandatory for entities with their headquarters in Switzerland. Thus, the SIX<sup>491</sup> permits foreign emitters to report also in certain domestic norms such as EU-IFRS, Japanese accounting standards, and, under certain conditions, other standards as well.<sup>492</sup>

164 Financial reporting is not the only sector in which references to private standards can be found. New economic laws tend to refer more often to recognised international standards than the old standards. For example, the Swiss Financial Market Infrastructure Act (= FinfraG) refers to recognised international standards fourteen times,<sup>493</sup> the draft of the FIDLEG once,<sup>494</sup> and

<sup>486</sup> Erläuternder Bericht VASR, p 7; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 198; Glanz/Hermann/Pfaff/Zihler, veb.ch Praxiskommentar, Art 962a para VASR 13 et seq; Mächler, ZfR Band 5, p 109; Zihler, ST 2011b, p 809.

<sup>487</sup> Referring to recognised standards but not in financial reporting: Art 27 para 2 lit e, 29 para 2 lit a, 40d para 2 LFG (SR 748.0); Art 12b para 3 MinöStG (SR 641.61); Art 15a para 3 lit b FMedV (ST 810.112.2); Art 46 para 4 FiLaV (SR 613.21).

<sup>488</sup> Art 961 para 1, 962 et seq, 963 para 3, 963b CO; Art 2 para 3 GeBüV (SR 221.431); Art 7 para 1, 17 para 1, 30 para 1, 85 para 1, 89 para 2, 91 para 2, 109 para 2 KKV-FINMA (SR 951.312); VASR; Art 30oquater para 4 EnV (SR 730.01); Art 12 para 3 lit c, 16 para 2 lit b, 16a RAG (SR 221.302); Art 6b para 4, 9 para 1, 52 BankG (SR 952.0); Art 40 para 3, 48, 49 para 4 FHG (SR 611.0); Art 65 para 2 UVG (SR 832.20); Art 36 para 1 RTVG (SR 784.40); Art 18 para 2 SAFIG (SR 420.2); Art 42 para 2 KFG (SR 442.1); Art 17 (2) Rahmenabkommen zwischen dem Bundesrat der Schweizerischen Eidgenossenschaft und der Regierung der Republik Südafrika über Entwicklungszusammenarbeit (SR 0.974.211.8); Art 32 NBV (SR 951.131); Art 21 para 2, 23 para 2, 29 para 3, 35 para 2, 46 para 2 et seq, 77 para 2, 78 para 2, 82, 94 para 2 and 4 FinfraG (SR 958.1); Art 14a para 2 VStV (SR 642.211); cf Note 1.

<sup>489</sup> Art 957a para 2, 958c para 1 CO.

<sup>490</sup> Böckli, Aktienrecht, § 8 para 3.

<sup>491</sup> Art 8 RLR icw note 1 RLR and Art 51 KR in addition to the standards in Art 6 et seq RLR.

<sup>492</sup> Erläuternder Bericht VASR, p 7 n 23; Glanz/Hermann/Pfaff/Zihler, veb.ch Praxiskommentar, Art 962a para VASR 19.

<sup>493</sup> Art 21 para 2; 23 para 2; 29 para 3; 35 para 3; 46 para 2; 46 para 3; 77 para 2; 78 para 2; 82; 93 para 2; 93 para 4; 100 para 2; 106 para 3; 112 para 1 E-FinfraG; cf Nobel, SZW 2105, p 559; SGHB Finanzmarktrecht I-Brändli, § 2 para 29 et seq.

<sup>494</sup> Art 55 lit a VE-FIDLEG.

the FINIG's draft five times.<sup>495</sup> However, also, in the StromVV,<sup>496</sup> we find references to private guidelines in nine different articles.<sup>497</sup> The same tendencies appear in the dispatch of the Federal Council for the revision of the commercial law, which refers (although not directly) to recognised international standards.<sup>498</sup> In its Directive on Financial Reporting (DFR), the SIX refers to the recognised standards as well.<sup>499</sup>

### III. General Clause

#### 1. In General

A general clause refers to the state of the art in a specific sector.<sup>500</sup> The legislature 165 uses terms such as 'according to the state of the art' or 'the recognized rules of technology'.<sup>501</sup> References through general clauses ensure greater flexibility of the legal norm.<sup>502</sup> General clauses create an open reference, in which the referred-to source is not defined, leaving room for interpretation.

Regarding financial reporting, the legislature uses 'generally recognised 166 commercial principles' (*anerkannten kaufmännischen Grundsätzen*; Art 960a para 3 sentence 2 CO<sup>503</sup>). The Swiss CO also uses the terms 'recognised accounting principles' (Art 957a para 1 CO<sup>504</sup>) and 'recognised financial reporting principles' (marginal note of Art 958c CO<sup>505</sup>).<sup>506</sup> The listing in the CO is not definitive.<sup>507</sup>

<sup>495</sup> Art 6 para 2; 11 Para 3; 26 para 1; 49 para 1; 62 para 4 VE-FINIG; for an overview cf Dobrauz-Saldapenna, EF 2016, p 212.

<sup>496</sup> Stromversorgungsverordnung from 14. March 2008 (SR 734.71).

<sup>497</sup> Art 3 para 1 and 2, Art 7 para 2, Art 8 para 2, Art 12 para 2, Art 13 para 1, Art 17, Art 23 para 2, Art 24 para 2, Art 27 para 2 StromVV.

<sup>498</sup> Botschaft 2007, p 1598 et seq.

<sup>499</sup> Art 6 DFR.

<sup>500</sup> Brunner, Technische Normen, p 87 et seq; Hettich, Kooperative Risikovorsorge, para 550; SGHB Finanzmarktrecht I-Winzeler, § 7 paras 20 et seq, 40.

<sup>501</sup> Brunner, Technische Normen, p 87 et seq.

<sup>502</sup> SGHB Finanzmarktrecht I-Brändli, § 2 para 27; Hettich, Kooperative Risikovorsorge, para 550.

<sup>503</sup> English version: 'Depreciation and valuation adjustments must be applied in accordance with generally recognised commercial principles'; authoritative German version: '*Abschreibungen und Wertberichtigungen müssen nach den allgemein anerkannten kaufmännischen Grundsätzen vorgenommen werden*'.

<sup>504</sup> Authoritative German version: '*Grundsätze ordnungsmässiger Buchführung*'.

<sup>505</sup> Authoritative German version: '*Grundsätze ordnungsmässiger Rechnungslegung*'.

<sup>506</sup> Cf Bauen/Bernet, para 353; Forstmoser/Meier-Hayoz/Noblel, § 51 paras 27–34; Handschin, Rechnungslegung para 25 et seq; Meier-Hayoz/Forstmoser, Gesellschaftsrecht, § 8 para 56 et seq; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 6; cf Nösberger, Wesentlichkeit, p 48 et seq.

167 The recognised financial reporting principles serve as a guiding light for interpretation and application, but they have to be interpreted themselves due to their high degree of abstractness.<sup>508</sup> Recognised financial reporting principles are neither commercial practice (*Handelsbrauch*) nor customary law; rather, they are defined by merchants, auditors, the doctrine, and case law.<sup>509</sup> It is important to note that practice over a long period does not create commercial practice in the sector.<sup>510</sup> 'The accepted accounting practices at a particular time' are enough.<sup>511</sup> The recognised financial reporting principles are the minimal regulations in financial reporting.<sup>512</sup>

## 2. GAAP

168 GAAP represent the sum of recommendations from the practice and the academics.<sup>513</sup> Hence, the formal law is, therefore, complemented with informal norms.<sup>514</sup> This form of referencing is not a new phenomenon. Prussian law and the AHGB already mention 'proper bookkeeping' (*ordnungsgemäss geführte Handelsbücher*). The same notion can be found in French law<sup>515</sup> (*livres régulièrement tenues*<sup>516</sup>).<sup>517</sup> In Germany, in 1998, a private standard<sup>518</sup> was considered as an incorporation of German recognised financial reporting principles.<sup>519</sup>

169 In English, this term is no different to 'generally accepted accounting principles', otherwise known as GAAP. The problem is that the term GAAP is often associated primarily with Swiss GAAP FER (for the influence of Swiss

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<sup>507</sup> Botschaft 2007, p 1701; Böckli, Aktienrecht, § 8 para 113 et seq; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 23.

<sup>508</sup> Bermann/Knight, Financial Intelligence, p 27; Böckli, Aktienrecht, § 8 para 112 et seq; Kleibold, Ausschüttungsregulierung, p 47.

<sup>509</sup> Botschaft 2007, p 1701 et seq; cf HWP 2014, p 36; HWP 2009, Bd. 1, II.6.2.2, p 57; ZK-Bossard, Vorbemerkungen para 275; Bühlmann, Stille Reserven, p 30; Kleibold, Ausschüttungsregulierung, p 56; CHK-Lipp, Art 958c paras 1, 5; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 23; Handschin, Rechnungslegung, para 302.

<sup>510</sup> Cf Schreiber, p 80.

<sup>511</sup> Alexander/Jermakowicz, Debate, p 142; cf also Handschin, Rechnungslegung, para 25.

<sup>512</sup> Handschin, Rechnungslegung, Glossar: Grundsätze ordnungsmässiger Rechnungslegung, p LXXV.

<sup>513</sup> Berman/Knight, Financial Intelligence, p 26; Bühlmann, Stille Reserven, p 35.

<sup>514</sup> Bühlmann, Stille Reserven, p 35.

<sup>515</sup> *Code de commerce français*.

<sup>516</sup> Translation in Italian '*tenere regolarmente*'.

<sup>517</sup> Cf to the different interpretations BK-Käfer, Art 957 para 3.43.

<sup>518</sup> Deutsches Rechnungslegungs Standards Committee (DRSC).

<sup>519</sup> Hohl, Private Standardsetzung, p 25.

GAAP FER on Swiss Law cf para 190 et seq). Distinct from the term GAAP, the term ‘recognised financial reporting principles’ is used as an umbrella term for Swiss GAAP FER, US GAAP, IFRS, and HWP. This is also in line with the verdict<sup>520</sup> of the Swiss Federal Tribunal (SFT), which stated that HWP is a source of recognition alongside IFRS. Due to similarities between the recognised accounting principles and the recognised financial reporting principles, both are dealt with in this chapter together. To understand the standard, the user should know the underlying rules and the recognised financial reporting principles of the standard.<sup>521</sup>

The CO<sup>522</sup> referred to the recognised financial reporting principles in terms of all the questions for which it did not have a reliable answer. The wording changed from ‘*allgemein anerkannte kaufmännische Grundsätze*’ (GAAP) to ‘*Grundsätze ordnungsmässiger Buchführung*’ (accepted principles of orderly accounting)<sup>523</sup> and ‘*Grundsätze ordnungsmässiger Rechnungslegung*’ (accepted principles of orderly financial reporting)<sup>524</sup> in the new CO. Only in Art 960a para 3 CO<sup>525</sup> was the old wording maintained (cf also para 402 et seq). Even though the wording changed, this does not mean the legislature intended to depart from the principle of interpreting the law using the lens of the current recognised financial reporting principles.<sup>526</sup> The legislature left it to the practice to define the content of the recognised financial reporting

<sup>520</sup> BGE 136 II 88 et seq.

<sup>521</sup> Bühlmann, *Stille Reserven*, p 30; Handschin, *Rechnungslegung*, para 25.

<sup>522</sup> Art 959 oCO.

<sup>523</sup> Art 957a para 2 CO.

<sup>524</sup> Art 958c CO.

<sup>525</sup> English wording: ‘Loss in value due to usage or age must be taken into account through depreciation, while other losses in value must be taken into account through valuation adjustments. Depreciation and valuation adjustments must be applied in accordance with generally recognised commercial principles. They must be deducted directly or indirectly from the relevant assets and charged to the profit and loss account and may not be shown under liabilities’; authoritative German version: ‘*Der nutzungs- und altersbedingte Wertverlust muss durch Abschreibungen, anderweitige Wertverluste müssen durch Wertberichtigungen berücksichtigt werden. Abschreibungen und Wertberichtigungen müssen nach den allgemein anerkannten kaufmännischen Grundsätzen vorgenommen werden. Sie sind direkt oder indirekt bei den betreffenden Aktiven zulasten der Erfolgsrechnung abzusetzen und dürfen nicht unter den Passiven ausgewiesen werden*’.

<sup>526</sup> Botschaft 2007, p 1697; Bauen/Bernet, para 353; Behr/Leibfried, *Rechnungslegung*, p 28 et seq; Böckli, *Aktienrecht*, § 8 paras 3, 86; Boemle/Lutz, *Jahresabschluss*, p 101 et seq; Forstmoser/Meier-Hayoz/Nobel, § 51 para 3 et seq; Glanzmann, SJZ 108/2012, p 208; BSK OR II-Neuhaus/Schärer, Art 957a para 14; BSK OR II-Neuhaus/Suter, Art 958c para 5; Stoffel, *Grundriss des Aktienrechts*, para 1022 et seq; Handschin, *Rechnungslegung*, para 26.

principles.<sup>527</sup> Due to this leeway for dynamic interpretation, neither customary law<sup>528</sup> nor an established doctrine<sup>529</sup> can be developed.<sup>530</sup> This means that the term must be interpreted dynamically, relying on the perception of a specific point in time. In other words, IFRS can be regarded as a part of recognised financial reporting principles of a certain periode. However, this perception can change a few years later.

171 Swiss law refers to recognised financial reporting principles in Art 957a para 2 and Art 958c CO. Although the same terms are not used in both articles,<sup>531</sup> the same is meant as in the old CO in Art 959 oCO.<sup>532</sup> The references to the recognised financial reporting principles are dynamic.<sup>533</sup> The purpose of the dynamic nature lies in the will of the legislature for the law to keep up with the developments of what is understood to be the current dutiful practice.<sup>534</sup>

172 In summary, the CO uses general clauses concerning financial reporting in two ways: first, the CO refers to recognised standards; second, it refers to the state of the art of financial reporting. The next question is where these references point to. The reference point here is what case law, the practice, and the doctrine views as a generally accepted source. Three standards are being discussed: HWP (cf para 176 et seq), Swiss GAAP FER (cf para 173 et seq), and IFRS (cf para 175). In my view, the Swiss recognised financial reporting principles should be an umbrella term containing the doctrine,<sup>535</sup> IFRS, and Swiss GAAP FER. The prevailing doctrine<sup>536</sup> regards the latter as incorporation of the recognised financial reporting principles (cf para 190 et seq).

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<sup>527</sup> BSK OR II-Neuhaus/Schärer, 4<sup>th</sup> ed, Art 957 para 31; Handschin, Rechnungslegung, para 27; Meier-Hayoz/Forstmoser, § 8 para 53.

<sup>528</sup> Art 1 para 2 CC.

<sup>529</sup> Art 1 para 3 CC.

<sup>530</sup> BK-Käfer, Art 959 para 60 et seq; Handschin, Rechnungslegung, para 27; CHK-Lipp, Art 958c para 1; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 19.

<sup>531</sup> Art 957a para 2 CO: '*Grundsätze ordnungsmässiger Buchführung*'; Art 958c CO: '*Grundsätze ordnungsmässiger Rechnungslegung*'.

<sup>532</sup> Art 959 oCO: '*allgemein anerkannten kaufmännischen Grundsätzen*'; Botschaft 2007, p 1697; Handschin, Rechnungslegung, para 26.

<sup>533</sup> Handschin, Rechnungslegung, para 25.

<sup>534</sup> Handschin, Rechnungslegung, para 25; Meier-Hayoz/Forstmoser, § 8 para 53; BSK OR II-Neuhaus/Schärer, Art 957a para 14.

<sup>535</sup> Mainly HWP; BSK; veb.ch Praxiskommentar; Behr/Leibfried; Böckli; Boemle/Lutz; Druey/Druey Just/Glanzmann; Forstmoser/Meier-Hayoz/Nobel; Handschin; CHK-Lipp.

<sup>536</sup> HWP 2009, p 32; Behr, ST 2010, p 26; Behr, Stille Reserven, p 599; Böckli, Aktienrecht, § 8 para 41 also p 878; Böckli, Rechnungslegung, paras 44, 50; Boemle, ST 1–2/2006, p 12; Boemle/Lutz, Jahresabschluss, pp 75, 83; Handschin, IFRS, p 9 et seq; Handschin, Rechnungslegung, para 30; Kleibold, Ausschüttungsregulierung, pp 49, 162; Kunz, FS Böckli, p 479; Müller/Lipp/Plüss, Der Verwaltungsrat, p 208; Stoffel, Grundriss des Aktienrechts, paras 1025 et seq, 1029.



### 3. Which Sources are Part of the Swiss Recognised Financial Reporting Principles?

The question is which sources can currently be regarded as a part of the Swiss recognised financial reporting principles. This section will summarise the opinions regarding Swiss GAAP FER. IFRS and HWP will be inspected more closely. For Swiss GAAP FER, the doctrine has a clear opinion. It regards Swiss GAAP FER as a permitted interpretation tool for the CO (cf also para 190 et seq).<sup>537</sup> The doctrine's view is a little different in terms of IFRS.

Böckli<sup>538</sup> refers to Swiss GAAP FER as a part of Swiss proper financial reporting standards; he also refers to IFRS, but holds that IFRS are not comparable to the CO. Why can Swiss GAAP FER be utilised as an interpretation tool and not IFRS, despite the fact that they follow the same underlying principle of a true and fair view?

The recognised financial reporting principles of different states have aligned increasingly with IFRS.<sup>539</sup> It is only because IFRS enjoy international importance that they do not automatically qualify as a permitted interpretation tool.<sup>540</sup> Buchmann et al<sup>541</sup> state that lacunae have to be filled by applying the recognised financial reporting principles.<sup>542</sup> Seeking assistance from IFRS can help to solve this problem.<sup>543</sup> The adoption of foreign norms must happen carefully, without the creation of any contradictions. In 2005, Böckli wrote that IFRS will soon reach the grade of latest practice.<sup>544</sup> This step has taken place in recent years, mainly with the revision of the CO and its approximation to IFRS.<sup>545</sup> IFRS will reach the next milestone when the US and general acceptance decide that only a preparation in compliance with IFRS is a properly prepared financial report.<sup>546</sup> In

<sup>537</sup> HWP 2009, p 32; Behr, ST 2010, p 26; Behr, Stille Reserven, p 599; Böckli, Aktienrecht, § 8 para 41; Böckli, Rechnungslegung, paras 44, 50; Boemle, ST 1–2/2006, p 12; Boemle/Lutz, Jahresabschluss, pp 75, 83; Handschin, IFRS, p 9 et seq; Handschin, Rechnungslegung, para 30; Kleibold, Ausschüttungsregulierung, pp 49, 162; Kunz, FS Böckli, p 479; Müller/Lipp/Plüss, Der Verwaltungsrat, p 208; BSK-Neuhaus/Sutter, Art 958b para 2; Stoffel, Grundriss des Aktienrechts, paras 1025 et seq, 1029.

<sup>538</sup> Böckli, Rechnungslegung, para 892 n 1534.

<sup>539</sup> MüKoHGB-Reiner HGB, § 264 para 38.

<sup>540</sup> Duss/Duss, p 410.

<sup>541</sup> Buchmann/Duss/Handschin, p 832.

<sup>542</sup> Cf Handschin, Rechnungslegung, para 27 et seq.

<sup>543</sup> Uhlmann/Gili, ZfR Band 5, p 18.

<sup>544</sup> Böckli, IFRS, para 11.

<sup>545</sup> Cf Böckli, Rechnungslegung, para 39.

<sup>546</sup> Böckli, Aktienrecht, § 10 para 11.

addition, under the old Art 8 para BEHG,<sup>547</sup> the doctrine referred to the consideration of IFRS.<sup>548</sup>

176 HWP<sup>549</sup> (*Schweizer Handbuch der Wirtschaftsprüfung*) is a handbook edited by the organisation of Swiss auditors known as *ExpertSuisse*.<sup>550</sup> HWP has been created over the last several decades. Some say it is the Bible of Swiss recognised financial reporting principles.<sup>551</sup> The legislature considered the HWP's<sup>552</sup> recognised financial reporting principles and implemented them into law.<sup>553</sup>

177 The meaning of HWP diminished in a verdict<sup>554</sup> by the Swiss Federal Tribunal.<sup>555</sup> The SFT found that HWP has no normative effect on Swiss law.<sup>556</sup> In addition, the SFT favoured IFRS over HWP.<sup>557</sup> This does not mean that the SFT neglected the importance of HWP, but rather that, in this special case, the SFT preferred IFRS over HWP.<sup>558</sup> Handschin<sup>559</sup> points out that the SFT considered HWP to be a part of the generally accepted principles, but not the only incorporation. In my view, references with general clauses cannot be monopolised to one standard. The SFT considered different options and chose the most reasonable. Judges cannot be forced in only one direction by allowing a private norm setter to promote 'the only solution'. Most often, the 'right solution' presents itself only after different options have been considered. This is also the state of the art concerning methods of interpretation (cf para 417 et seq).

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<sup>547</sup> Cf now Art 23 para 2 FinFraG.

<sup>548</sup> Cf for further reference Schreiber, International Standards, p 171 et seq.

<sup>549</sup> Handschin, Rechnungslegung, Glossar: Handbuch der Wirtschaftsprüfung (HWP), p LXXV.

<sup>550</sup> The old name was Treuhandkammer.

<sup>551</sup> Duss/Duss, p 410; cf also Koch, Handbuch, para 64.6; Oesterhelt/Grüniger, p 50; Matteotti/Felber, p 753 et seq; Simonek, Unternehmenssteuerrecht, p 132 et seq.

<sup>552</sup> HWP 2014, p 6 et seq.

<sup>553</sup> Von Bhicknapahari, veb.ch Praxiskommentar, Art 957a para 16.

<sup>554</sup> BGE 136 II 88 et seq.

<sup>555</sup> Duss/Duss, p 410, regarding BGE 136 II 88 et seq.

<sup>556</sup> BGE 136 II 88 = ASA 78 2009/2010, 495 = StE 2010 B 72.11 Nr. 17 = RDAF 2009 570, E. 4.3; Buchmann/Duss/Handschin, p 832.

<sup>557</sup> BGE 136 II 88 et seq.

<sup>558</sup> Cf other decisions BGer 6B\_684/2010 from 15<sup>th</sup> November 2010 Consideration 3.3.3; 2A.128/2007 from 14. may 2008 Consideration 5.1; 2A.667/2006 vom 16<sup>th</sup> February 2007 Consideration 2; cf also Handschin, Rechnungslegung, para 29.

<sup>559</sup> Handschin, Rechnungslegung, para 29.

## D. Through Analogy

IFRS can also have an impact on Swiss law through the argument from analogy. 178  
 ‘The central idea is that an analogy is an assertion that a relational structure that normally applies in one domain can be applied in another domain.’<sup>560</sup> One way in which to interpret a norm is to apply a rule from the base domain to the target domain.<sup>561</sup> To interpret through analogy, one must recognise the context in which the base and the target norm appear. In other words, the different application areas of the norms should be considered.<sup>562</sup>

### I. In General

Art 1 CC<sup>563</sup> defines the process of a judge finding justice, especially when no 179  
 norm exists to regulate a certain case (cf paras 425, 443, 495). For this reason, the article does not mention the argument from analogy,<sup>564</sup> because a lacuna exists only if the law does not regulate a certain case. An analogy constitutes the case of the legislature having regulated a similar case, but not the specific one.<sup>565</sup> The argument from analogy can only be applied when the set of norms that does not regulate the case in question corresponds with the scale of values (*Wertmuster*) of the regulated case. The argument from analogy follows the succeeding law: similar issues shall be dealt with similarly.<sup>566</sup>

<sup>560</sup> Gentner, Cognitive Science 1983, p 156; cf Kramer, Methodenlehre, p 203 et seq.

<sup>561</sup> BGE 126 III 138, Consideration 4; Gentner, Cognitive Science 1983, p 155; Kunz, recht 2006, p 43; Wojcik, IFRS als europäisches Recht, p 282.

<sup>562</sup> For the difficulties of interpreting accounting norms cf para 417 et seq.

<sup>563</sup> English version: ‘A. Application of the law: 1 The law applies according to its wording or interpretation to all legal questions for which it contains a provision. 2 In the absence of a provision, the court<sup>1</sup> shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator. 3 In doing so, the court shall follow established doctrine and case law’; authoritative German version: ‘A. Anwendung des Rechts 1 Das Gesetz findet auf alle Rechtsfragen Anwendung, für die es nach Wortlaut oder Auslegung eine Bestimmung enthält. 2 Kann dem Gesetz keine Vorschrift entnommen werden, so soll das Gericht<sup>1</sup> nach Gewohnheitsrecht und, wo auch ein solches fehlt, nach der Regel entscheiden, die es als Gesetzgeber aufstellen würde. 3 Es folgt dabei bewährter Lehre und Überlieferung’.

<sup>564</sup> Kramer, Methodenlehre, p 203.

<sup>565</sup> Kramer, Methodenlehre, p 203 et seq.

<sup>566</sup> Kramer, Methodenlehre, p 206.

## II. Applied in Swiss Commercial Accounting Law

- 180 The interpreter can apply the argument from analogy also in financial reporting if the condition of similarity is fulfilled. Both sets of norms must regulate corresponding topics with similar scales of values. If both follow the same underlying principles, the conditions for the applicability of the argument from analogy are satisfied.
- 181 Financial reporting consists not only of commercial (CO) rules but also of public accounting rules (FHG). Both branches show similarities in following the prudence concept (cf para 303 et seq). The difference is the non-profit nature of agencies in comparison to private entities.<sup>567</sup> As we will see later (cf para 213), public accounting law (FHG allows the use of HRM2) is influenced by IPSAS, which is similar to IFRS. Thus, if the interpreter of commercial accounting law is searching for a solution, he can form an analogy to public accounting law, which is influenced by IPSAS and, therefore, indirectly influenced by IFRS. The interpreter starts with his problem in the CO and creates an analogy to HRM2 and, therefore, indirectly (through IPSAS) to IFRS. However, it is important to point out that, if it is obvious that the Swiss legislature did not want to comply with IFRS, this divergence cannot be surpassed by an analogy.<sup>568</sup>

## III. Example for Swiss Commercial Accounting Law

- 182 To explain this method, we will create an analogy to find whether and to what extent a provision shall be reported under the CO. As we will analyse later, the CO's wording is unclear in this case (cf para 449). With the argument of analogy, it is now possible to fall back on the regulation of reporting a provision under public accounting law. Art 49 para 3 FHG reads as follows: 'A provision shall be recognized when: the timing or the amount of a future cash outflow is uncertain'.<sup>569</sup> This definition complies with IFRS.<sup>570</sup> Other examples are Art 53 and 64c *Finanzhaushaltsverordnung* vom 5. April 2006 (FHV, SR 611.01).<sup>571</sup> HRM2<sup>572</sup> states that the preparer shall report a provision if the

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<sup>567</sup> Cf Bergmann, Vergleich, p 578.

<sup>568</sup> Cf Thürer, Grundidee Gerechtigkeit, Band 2, p 172.

<sup>569</sup> Translation by the author; the authoritative German version of Art 49 para 3 FHG: '*Rückstellungen werden gebildet für bestehende Verpflichtungen, bei denen der Zeitpunkt der Erfüllung oder die Höhe des künftigen Mittelabflusses mit Unsicherheiten behaftet sind*'.

<sup>570</sup> IAS 37.10, 37.14.

<sup>571</sup> Erläuternder Bericht VASR, p 7 n 26.

<sup>572</sup> HRM2 FE 09.11.

probability of the occurrence of the risk is higher than 50 per cent. This norm is inspired by IPSAS,<sup>573</sup> and indirectly by IFRS.<sup>574</sup> The analogy presents the solution of reporting a provision also under the CO if the probability of the occurrence of the risk is higher than 50 per cent.

## E. Through Comparative Law

Another way in which IFRS influences Swiss law is through comparative law. 183 The basic idea of comparative law is captured by Goethe: ‘All wise thoughts have already been thought: what is necessary is to try to think them again’.<sup>575</sup>

### I. In General

The comparative approach is based on the idea of considering foreign norms in 184 the legislation or interpretation process.<sup>576</sup> The consensus of an international professional community results in the best available knowledge in a certain field, and this can build the basis for national law making.<sup>577</sup> For the legislature, the foreign norm is a formulation aid (*Formulierungshilfe*).<sup>578</sup> However, the legislature does not delegate the legislation to another non-democratic legitimised norm setter, but merely considers the formulations in the state’s legislature.<sup>579</sup> This requires the state to evaluate the effects of this reception.<sup>580</sup> However, sometimes, the legislature considers a norm that was created with the help of domestic supervisory agencies.<sup>581</sup> In such cases, the legislature acts as an implementation mechanism.<sup>582</sup> Compared to this formal view, the material perspective leads to another result. From a material perception, one could argue that this process leads to a delegation of legislation to a democratically non-

<sup>573</sup> IPSAS 19.

<sup>574</sup> IAS 37.

<sup>575</sup> Johann Wolfgang von Goethe, *Sprüche in Prosa, Maximen und Reflexionen*: ‘*Alles Gescheite ist schon gedacht worden; man muss nur versuchen, es noch einmal zu denken.*’ translated by the author; citation found in Weber, SJZ 2016, p 293.

<sup>576</sup> Cf Kunz, FS Bucher, p 458; Kunz, LeGes 2012, p 265 et seq; Kunz, recht 2006, p 37 et seq; Peyer, recht 2004, p 109 et seq; Schreiber, International Standards, p 148 et seq; cf Wiegand, Jusletter 17<sup>th</sup> June 2002, para 23.

<sup>577</sup> Ruiter/Wessel, *Informal International Lawmaking*, p 184.

<sup>578</sup> Brunner, *Technische Normen*, p 123 et seq; Wojcik, *IFRS als europäisches Recht*, p 120; cf SGHB Finanzmarktrecht I-Brändli, § 2 para 61.

<sup>579</sup> Wojcik, *IFRS als europäisches Recht*, p 120.

<sup>580</sup> Wojcik, *IFRS als europäisches Recht*, p 187.

<sup>581</sup> SGHB Finanzmarktrecht I-Hettich, § 1 para 3.

<sup>582</sup> SGHB Finanzmarktrecht I-Hettich, § 1 para 3.

legitimised norm setter.<sup>583</sup> In my view, it is sufficient that the legislature still has the final saying and can intervene when the effects of the recited norm are unreasonable for the concerned state. This argumentation also leads to the permissibility of the inclusion of experts (cf para 264 et seq) in the legislation process. An automated takeover of foreign rules is generally not allowed.<sup>584</sup> However, this is the case with dynamic references (cf para 152 et seq). Only if certain conditions are fulfilled are dynamic references permitted (cf para 141 et seq).

185 This method of interpretation fades out the vertical perspective and acknowledges the existence of a horizontal point of view.<sup>585</sup> The view is horizontal because the norms of different states exist on the same level. The vertical view, on the other hand, captures only norms within the state in a given order (constitution, laws, directives). The legislature and the norm applier can consider foreign law.<sup>586</sup> In addition, the doctrine<sup>587</sup> uses recognised standards sometimes under the title of comparative law in its explanations of the CO. Comparative law is used as an auxiliary means with which to find justice.<sup>588</sup> There is no question that foreign formal law can be utilised as a reference point. Not only foreign formal law but also a foreign informal norm can be a benchmark as well.<sup>589</sup> Comparative law is based on the thought that what is applied (formal or informal norms) in one state can also be of use in another. The important step is to consider the similarities between the compared legal orders, as well as the differences.<sup>590</sup> This condition also has relevance in the consideration of IFRS as an interpretation tool.

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<sup>583</sup> For further reference Wojcik, IFRS als europäisches Recht, p 122 et seq, 187 et seq.

<sup>584</sup> Wojcik, IFRS als europäisches Recht, p 125 et seq.

<sup>585</sup> Immenhauser, FS Bucher, p 323.

<sup>586</sup> Cf Kunz, recht 2006, p 44 et seq; cf also Rütsche, Rechtsvergleichung, p 121 et seq.

<sup>587</sup> BSK-Neuhaus/Sutter, Art 958a para 18 et seq, Art 958c para 25 et seq; Art 958d para 18 et seq; BSK-Neuhaus/Gerber, Art 959a para 97 et seq, Art 959b para 47 et seq, Art 959c para 79 et seq; BSK-Neuhaus/Haag, Art 960c para 21 et seq; cf SGHB Finanzmarktrecht I-Brändli, § 2 para 61.

<sup>588</sup> BGE 126 III 138, Consideration 4, 141 III 155, Consideration 4.2; Kantonsgericht Zug, decision of 27<sup>th</sup> October 2016, A3 2015 27, Consideration 4.3; Watter/Dubs, ST 2005, p 748; ZK-Dürr, Vorbem. Art 1 und 4 para 254; BK-Emmenegger/Tschentscher, Art 1 para 40 et seq; Kahn-Freund, Comparative Law, p 2; Kramer, Methodenlehre p 265 et seq; Kunz, recht 2006, p 37 et seq; Nösberger/Boemle, ST 2014, p 14.

<sup>589</sup> Cf Böckli, Aktienrecht, § 10 para 3; Böckli, Rechnungslegung, para 53; SGHB Finanzmarktrecht I-Brändli, § 2 para 61; ZK-Dürr, Vorbem. Art 1 und 4 para 279; Giger, Corporate Governance, p 80; Immenhauser, FS Bucher, p 324; Marti, ZBl 2000, p 566 et seq; ZK-Marti, Vorbem Art 5 and 6 para 179 et seq and Art 5 para 215; Schreiber, International Standards, p 148 et seq, p 219 et seq; Thürer, p 429 et seq; Troxler, Jusletter 16. November 2015, para 1.

<sup>590</sup> Kunz, recht 2006, p 37.

## II. Example for Swiss Commercial Accounting Law

Corporation law is especially accessible for the comparative approach.<sup>591</sup> A few 186 jurisdictions replaced their DAS with IFRS, including Australia, Hong Kong, New Zealand, and South Korea. IFRS was implemented in these jurisdictions word for word (cf para 116 et seq). In this process, IFRS have been democratically legitimised in these countries. This gives other states the ability to consider IFRS through the tool of comparative law.<sup>592</sup>

## F. Interim Conclusion

This chapter has dealt with two issues: how IFRS influence Swiss law and what 187 this means with regard to the legal nature of IFRS. IFRS influence Swiss law in different ways: through references in a broader sense (cf para 152), analogy (cf para 178 et seq), and comparative law (cf para 183 et seq). These influences have an effect on the legal nature of IFRS. As soon as the legislature refers to informal norms, their legal nature changes (cf para 141 et seq). In this way, the incorporated parts become formal law. References in a narrower sense also lead to the same change, whereby referred-to parts of the informal norm change their legal character. However, the use of general clauses is different, as these are often used to refer to the latest state of the art in a certain field. Here, the state of the art does not become formal law itself, but rather gives a reference point for the interpretation of a formal norm.

The different IFRS influences show the impact of these standards. Even 188 supporters of a conservative view (cf para 243 et seq) must admit that Swiss commercial accounting rules are influenced by foreign private standards. In addition to the influences already mentioned, IFRS have an impact on Swiss financial reporting through other standards; these will be explained in a later chapter (cf para 189 et seq). Swiss GAAP FER was created following IFRS (cf para 190 et seq). IFRS' influences are not only limited to commercial accounting law; public accounting law also experiences their effects through IPSAS (cf para 215 et seq). This chapter has also enumerated the influence of EU-IFRS on Swiss law, which are of particular concern because the EU is an important trading partner (cf para 226 et seq).

<sup>591</sup> Kunz, recht 2006, p 43.

<sup>592</sup> Matteotti/Felber, p 754.





## § 6 IFRS' Influence on Other Standards

This chapter explains IFRS indirect influence on Swiss law through other standards. IFRS have an impact not only on national formal law; they also influence other standards such as Swiss GAAP FER (cf para 190 et seq) and financial reporting standards in the public sector (cf para 213 et seq). EU-IFRS are similar to IFRS (cf para 226 et seq); there are differences, but only to a small degree. These standards themselves have an influence on Swiss law. The result is an indirect impact on Swiss law from IFRS through another standard. 189

### A. Swiss GAAP FER's Impact on the CO

The following pages are divided into two sections. The first section examines IFRS' impact on Swiss GAAP FER, and the second analyses Swiss GAAP FER's influence on Swiss commercial accounting rules. 190

#### I. Basics

In 1984, André Zünd started the project '*Schweizer Fachempfehlungen zur Rechnungslegung*'.<sup>593</sup> The name was later changed to Swiss GAAP FER. The Conceptual Framework was introduced into Swiss GAAP FER in 2007.<sup>594</sup> Initially, Swiss GAAP FER were not intended to compete with IFRS or US GAAP, but rather were created to modernise Swiss financial reporting.<sup>595</sup> Swiss GAAP FER are accounting standards mainly for SMEs.<sup>596</sup> Their aim is to improve the comparability and the level of financial reports in Switzerland.<sup>597</sup> Like IFRS, Swiss GAAP FER give an economic perspective.<sup>598</sup> Swiss GAAP 191

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<sup>593</sup> Bockli, Aktienrecht, § 8 para 35; Bockli, Rechnungslegung, para 44; Bockli, ST 2010, p 27; Leibfried/Mitterlechner, rechnungswesen & controlling 2017, p 12; Madörin/Bertschinger, Accounting and Auditing in Switzerland, p 25; cf Spadin, FS Forstmoser, p 339.

<sup>594</sup> Behr/Leibfried, Rechnungslegung, p 155.

<sup>595</sup> Bockli, ST 1–2/2010, p 27; Kleibold, Ausschüttungsregulierung, p 53.

<sup>596</sup> Glanz/Hermann/Pfaff/Zihler, veb.ch Praxiskommentar, Art 962a para VASR 10; Handschin, Rechnungslegung, Glossar: Swiss GAAP FER, p LXXXII; Kartscher/Rossi/Suter, Finanzberichterstattung, p 12.

<sup>597</sup> HWP 2014, p 106.

<sup>598</sup> Swiss GAAP FER 1.1; Kleibold, Ausschüttungsregulierung, p 66.

FER are similar to IFRS in terms of the method and the content,<sup>599</sup> but Swiss GAAP FER do not adopt IFRS completely and diverge from them in fundamental aspects.<sup>600</sup> However, the FER considers IFRS before amending their standards.<sup>601</sup> Similar to IFRS, the FER also permit a prudent approach (cf para 303 et seq), but demand a true and fair view, where this is necessary for the investors.<sup>602</sup> Swiss GAAP FER belong to the Swiss recognised standards (Art 1 VASR) as well. For listed entities, Swiss GAAP FER do not enjoy the same rank as IFRS. Since 2005, listed entities have only been allowed to use Swiss GAAP FER in the local caps segments (*Nebensegmente*), not in the main segment.<sup>603</sup> At this time, the SIX Exchange qualified Swiss GAAP FER as the Swiss Reporting Standard, but not an International Reporting Standard, like IFRS or US GAAP.<sup>604</sup> In 2005, the FER decided to no longer follow IFRS, but to create an independent standard.<sup>605</sup> The restriction led to the Conzzeta Group, as an example, changing from the main segment to the local caps segment.<sup>606</sup>

192 The FER is the board that issues Swiss GAAP FER.<sup>607</sup> It consists of 30 board members from different backgrounds, such as specialists from the primary and secondary sector, finance sector, auditors, economic media, and listed entities.<sup>608</sup> The standard-setting process is supervised by the interested federal departments, the SIX Swiss Exchange, and the cantonal supervisory body of the trusts.<sup>609</sup>

193 Swiss GAAP FER have a modular structure. They consist of a conceptual framework, core-FER, and additional standards.<sup>610</sup> Smaller entities have the ability to apply only core-FER.<sup>611</sup> The conceptual framework builds the

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<sup>599</sup> Cf Behr/Leibfried, Rechnungslegung, p 170; Böckli, Aktienrecht, § 8 para 37; Böckli, Rechnungslegung, paras 46, 50, 54; Gurtner, ST 2010, p 394; Jutzi, Unternehmenspublizität, para 469; Kleibold, Ausschüttungsregulierung, p 54 et seq; Mächler, ZfR Band 5, p 110; cf Madörin/Bertschinger, Accounting and Auditing in Switzerland, p 25.

<sup>600</sup> Bergmann, Jahrbuch 2009, p 199.

<sup>601</sup> Madörin/Bertschinger, Accounting and Auditing in Switzerland, p 31.

<sup>602</sup> Swiss GAAP FER, Conceptual Framework, 5; Behr, Stille Reserven, p 618; Kleibold, Ausschüttungsregulierung, p 53.

<sup>603</sup> Art 6 RLR SIX; cf Leibfried/Mitterlechner, rechnungswesen & controlling 2017, p 12.

<sup>604</sup> Art 6 RLR SIX; Böckli, Rechnungslegung, para 65 n 108; Glanz, SZW 2007, p 360; Niess/Strasser, Jahrbuch 2009, p 167.

<sup>605</sup> Thanks to Prof. Dr. Reto Eberle for this information.

<sup>606</sup> Kelterborn/Bachofen, ST 2009, p 431.

<sup>607</sup> Link: <https://www.fer.ch/> (accessed on 16.10.18).

<sup>608</sup> HWP 2014, p 106; Behr/Leibfried, Rechnungslegung, p 65.

<sup>609</sup> Behr/Leibfried, Rechnungslegung, p 65.

<sup>610</sup> Link: <https://www.fer.ch/> (accessed on 16.10.18); HWP 2014, p 107; Kleibold, Ausschüttungsregulierung, p 58.

<sup>611</sup> Link: [https://www.fer.ch/standards/?standard\\_tag\\_1=kern-fer](https://www.fer.ch/standards/?standard_tag_1=kern-fer) (accessed on 16.10.18); HWP 2014, p 107.

foundation for all the standards.<sup>612</sup> It also lists important definitions and the recognised principles of financial reporting, similar to the structure of the CO.

Swiss GAAP FER has six different application scenarios:<sup>613</sup> the core-FER 194 for small organisations; the core-FER plus Swiss GAAP FER 30 for small groups; the whole FER for medium to large organisations; the whole FER plus Swiss GAAP FER 30 for medium to large groups; the whole FER plus Swiss GAAP FER 31 for listed entities; and the whole FER plus Swiss GAAP FER 30 and 31 for listed groups.

## II. Similarities to and Differences from IFRS

Both IFRS and Swiss GAAP FER hold the preparers to a true and fair view 195 (underlying principle).<sup>614</sup> However, they differ in terms of regulatory density (formal difference).<sup>615</sup> In addition, Swiss GAAP FER's content and method are like those of IFRS.<sup>616</sup>

At a material level, a few differences can be listed.<sup>617</sup> IFRS also restrict the 196 ability to choose a valuation method, unlike Swiss GAAP FER.<sup>618</sup> In addition, the disclosure requirements under IFRS are higher than under Swiss GAAP FER.<sup>619</sup> The report of goodwill is also different; while IFRS<sup>620</sup> demand activation without depreciation, Swiss GAAP FER<sup>621</sup> offer the preparer different options.<sup>622</sup> Furthermore, the reporting of retirement benefit plans show differences.<sup>623</sup> Finally, the disclosures of Swiss GAAP FER for operating segments are less detailed than their counterparts in IFRS.<sup>624</sup>

## III. Rather Swiss GAAP FER than IFRS or IFRS for SMEs?

In Switzerland, entities can choose which standards they prefer to report with 197 (Art 962 CO icw Art 1 VASR). In addition, the SIX Exchange allows leeway

<sup>612</sup> HWP 2014, p 108; Kleibold, Ausschüttungsregulierung, p 60.

<sup>613</sup> Meyer/Suter, ST 2013, p 104.

<sup>614</sup> IAS 1.15; Swiss GAAP FER Conceptual Framework 1; Böckli, Rechnungslegung, para 44; Handschin, Rechnungslegung, para 42.

<sup>615</sup> IFRS have more than 3,400 pages, while Swiss GAAP FER are limited to 200 pages.

<sup>616</sup> Böckli, Rechnungslegung, paras 46, 50; Handschin, Rechnungslegung, para 43.

<sup>617</sup> Cf Eberle/Huber, ST 2010, p 561 et seq.

<sup>618</sup> PWC, Rechnungslegung im öffentlichen Sektor, p 26.

<sup>619</sup> PWC, Rechnungslegung im öffentlichen Sektor, p 26; Böckli, Rechnungslegung, para 46.

<sup>620</sup> IAS 28.

<sup>621</sup> Swiss GAAP FER 30.14 et seq.

<sup>622</sup> Eberle/Huber, ST 2010, p 561 et seq.

<sup>623</sup> IAS 19; Swiss GAAP FER 16; Eberle/Huber, ST 2010, p 561 et seq.

<sup>624</sup> IFRS 8; Swiss GAAP FER 31.8; Eberle/Huber, ST 2010, p 561 et seq.

for the application of different standards (Art 6 RLR; cf para 191). Entities can have different motives that influence their choice. This title will analyse the different reasons for entities to choose Swiss GAAP FER over IFRS or IFRS for SMEs.

## 1. Reasons for and against Swiss GAAP FER

- 198 In recent years, a number of listed entities<sup>625</sup> changed from IFRS to Swiss GAAP FER.<sup>626</sup> They provide the following reasons to defend their decision.<sup>627</sup> IFRS are complex, which leads to higher costs than with Swiss GAAP FER. Another reason used to defend this decision are the difficulties faced by entities participating in the standard-setting process in London; it is much easier to influence the process of developing a new Swiss GAAP FER standard in Switzerland.
- 199 In response, Frank Schneider, chairman of the Federal Audit Supervisory Authority (RAB), called attention to the drawbacks of this change.<sup>628</sup> First, IFRS are recognised worldwide and are, therefore, well known, whereas Swiss GAAP FER are not. Second, Swiss GAAP FER do not regulate as much as IFRS; thus, entities must use IFRS in cases in which no answer can be found within Swiss GAAP FER. Third, with the application of IFRS, a great deal of know-how was created, which will be lost in the long term. It should be added that reality is complex, and simplification can lead to bad results.<sup>629</sup> This holds up particularly for financial reporting, which, on its own, is an abstract of reality; thus, simplification is doomed to distort the results.

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<sup>625</sup> Examples: Conzzeta Group, <https://conzzeta.com/de/media-center/publikationen/gesellschaftsberichte/2017/1> (accessed on 28.09.17); Georg Fischer Group, <https://www.georgfischer.com/content/gf/com/de/news/mediareleases/mediarelease/media-releases-2013/georg-fischer-toswitchfromifrstoswissgaapfer.html> (accessed on 28.09.17); Migros Group, <https://report.migros.ch/2015/lagebericht-2015/finanzen/kennzahlen-2015/> (accessed on 28.09.17); Swatch Group, [http://www.swatchgroup.com/de/services/archiv/2012/swatch\\_group\\_wechsel\\_von\\_ifrs\\_zurueck\\_auf\\_swiss\\_gaap\\_fer](http://www.swatchgroup.com/de/services/archiv/2012/swatch_group_wechsel_von_ifrs_zurueck_auf_swiss_gaap_fer) (accessed on 28.09.17).

<sup>626</sup> Pezotta/Passardi, p 182; Kutscher, NZZ 12.11.2014; for details on the change from IFRS to Swiss GAAP FER of the Georg Fischer Group cf Bösiger/Teitler-Feinberg, EF 2015, p 560 et seq.

<sup>627</sup> Cf Behr, ST 2012, p 805; Bösiger/Teitler-Feinberg, EF 2015, p 560 et seq; Brendt/Hochreutener/Vial, Finanz und Wirtschaft, Samstag 11. Januar 2014 Nr. 2, p 15; Eberle/Huber, ST 2010, p 559; Leibfried, EF 2016, p 120 et seq; Meyer, NZZ 23.10.2012, p 33; Müller/Staub, SZW 2011, p 26; Müller/Wyss, p 54; Pezotta/Passardi, p 182; Kutscher, NZZ 12.11.2014; Sager/Vial, Newsletter Finanz- und Rechnungswesen vom 17.5.16, p 1 et seq; Teitler-Feinberg, ST 2009, p 812.

<sup>628</sup> Kutscher, NZZ 12.11.2014.

<sup>629</sup> Brendt/Hochreutener/Vial, Finanz und Wirtschaft, Samstag 11<sup>th</sup> January 2014 Nr. 2, p 15; Sager/Vial, Newsletter Finanz- und Rechnungswesen vom 17.5.16, p 1 et seq.

The coexistence of IFRS and Swiss GAAP FER can inter alia be explained 200 by the missing influence of Swiss standard setters in the IASB. With Swiss GAAP FER, Switzerland has the opportunity to adapt IFRS for Swiss circumstances; for example, reporting employee benefits.<sup>630</sup> Some authors are of the opinion that Swiss GAAP FER are better suited for SMEs than IFRS or IFRS for SMEs.<sup>631</sup> IFRS target public-traded entities, while Swiss GAAP FER were made for SMEs.<sup>632</sup> Small entities are better off reporting in accordance with Swiss GAAP FER.<sup>633</sup> For an international comparison of the entities' performance, IFRS are still the better standard.<sup>634</sup> The smaller number of norms in Swiss GAAP FER is an advantage, but a danger at the same time. If a group reports according Swiss GAAP FER, the subsidiaries may use the easier and more open wording of Swiss GAAP FER for their own interpretation. For this reason, the group shall train the control departments.<sup>635</sup> IFRS for SMEs are also not suited for SMEs, according to the doctrine,<sup>636</sup> even though the name suggests otherwise. They are still a complex summary of IFRS. Like IFRS, IFRS for SMEs demand challenging disclosures in the notes. The FER promotes its standard (Swiss GAAP FER) with better cost-effectivity.<sup>637</sup> For SMEs, a great deal of effort is required to report according to IFRS or IFRS for SMEs. As Swiss GAAP FER are better suited for SMEs, the effort to report with IFRS does not pay off for them.<sup>638</sup> The entities, which changed from IFRS to Swiss GAAP FER, also gave another reason. They see the frequent revision of IFRS as a drawback and, therefore, prefer Swiss GAAP FER.<sup>639</sup>

The standard chosen also depends on the addressees. The investors' 201 opinions will influence which standard will be used.<sup>640</sup> Do the shareholders come from all around the world? Does the entity have to procure capital from foreign markets? Does the outside capital come from a Swiss bank or a bank that is used for Swiss circumstances? Are the creditors Anglo-Saxon private-

<sup>630</sup> Müller/Wyss, p 54.

<sup>631</sup> Böckli, Aktienrecht, § 8 para 41; Gurtner, ST 2010, p 394.

<sup>632</sup> Behr, ST 2007, pp 136, 144 et seq.

<sup>633</sup> Teitler-Feinberg, ST 2009, p 811.

<sup>634</sup> Majo, EF 2015, p 559.

<sup>635</sup> Bösiger/Teitler-Feinberg, EF 2015, p 565.

<sup>636</sup> Böckli, ST 2010, p 29; Glanz, ST 2007, p 534.

<sup>637</sup> Bergmann, Jahrbuch 2009, p 200.

<sup>638</sup> Behr, ST 2012, p 805; Brendt/Hochreutener/Vial, Finanz und Wirtschaft, Samstag 11. Januar 2014 Nr. 2, p 15; Eberle/Huber, ST 2010, p 559; Meyer, NZZ 23.10.2012, p 33; Müller/Staub, SZW 2011, p 26; Sager/Vial, Newsletter Finanz- und Rechnungswesen vom 17.5.16, p 1 et seq; Teitler-Feinberg, ST 2009, p 812.

<sup>639</sup> Meyer, NZZ 23.10.2012, p 33.

<sup>640</sup> Glanz, Analyse, p 534.

equity entities? An entity should choose the standard that answers the questions properly for the user it wants to reach.<sup>641</sup>

202 With all the voices of the doctrine in mind, it is important to note that the FER has many members who are not only part of the standard-issuing committee but also important voices in the doctrine.<sup>642</sup> Thus, they tend to promote their own products.

## **2. IFRS or Swiss GAAP FER, with the Example of the Migros Group**

203 An interesting case study is the Migros Group. Together with Coop, Migros is the largest retail business in Switzerland. In January 2004, the management of Migros voted to change from Swiss GAAP FER to IFRS. The reason that led to this decision<sup>643</sup> was that IFRS' modern structure supports corporate governance<sup>644</sup> and the duties of the auditors. The growing internationalisation of Migros calls for a common language in financial reporting. Migros incorporates different entities. The CFO of each entity compares his results with those of other entities within or outside of the group. The right to choose different methods under Swiss GAAP FER has impaired the comparability (benchmarking). Basel II<sup>645</sup> forces banks to calculate the credit risk according to stricter guidelines.

204 Ten years later, Migros decided to change back to Swiss GAAP FER per 1<sup>st</sup> January 2015. What changed in the previous decade? The growing complexity of IFRS demanded more effort in the preparation of the financial report, and the costs began to outweigh the benefits. Migros still upholds transparency inter alia with detailed information about the segments.<sup>646</sup>

205 As well as Migros, the Conzzeta Group decided to continue to use Swiss GAAP FER due to its fear of the increase in costs due to the application of IFRS.<sup>647</sup> No disadvantages could be seen in the Conzzeta Group choosing to stay with Swiss GAAP FER.<sup>648</sup>

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<sup>641</sup> Eberle, ST 2010, p 124 et seq; Eberle/Huber, ST 2010, p 560.

<sup>642</sup> For the members cf <https://www.fer.ch/ueber-uns/mitglieder/> (accessed on 16.10.2018); examples are: former FER-president Giorgio Behr; acting President Peter Leibfried; Reto Eberle.

<sup>643</sup> Niess/Strasser, Jahrbuch 2009, p 168 (both authors had duties concerning financial reporting in the Migros Group).

<sup>644</sup> Cf Hohl, Private Standardsetzung, p 28 et seq.

<sup>645</sup> Now Basel III.

<sup>646</sup> Migros Bilanz-Medienkonferenz 31. März 2015, p 39.

<sup>647</sup> Kelterborn/Bachofen, ST 2009, p 432.

<sup>648</sup> Kelterborn/Bachofen, ST 2009, p 432.

### 3. Summary

An entity has more flexibility when reporting in accordance with Swiss GAAP FER than under IFRS due to a lower degree of regulation. Swiss GAAP FER is also less complex; thus, an entity can save money when auditing its books. Another factor is the influence on the standard-setting process. It is easier for Swiss entities to participate in the process of creating new norms for Swiss GAAP FER than for IFRS in London. The entities also fear the rapid novelties under IFRS, which seemingly cannot be influenced. If an entity is to change its standard, it should do so in a transparent way in order not to shock its stakeholders or shareholders. Thus, it is recommended that the resulting consequences of the change should be disclosed.<sup>649</sup>

## IV. In Comparison to the CO

The degree of detail is much less in the CO in comparison with Swiss GAAP FER.<sup>650</sup> The minimum requirements of structure in the financial report are also less in the CO.<sup>651</sup> This is also the case the disclosures in the notes.<sup>652</sup> Furthermore, within Swiss GAAP FER, the norms for the consolidated financial statement are more detailed.<sup>653</sup> Like IFRS, Swiss GAAP FER have only informational character and do not pursue goals such as the assessment of distributions (*Ausschüttungsbemessung*), raising capital (*Kapitalaufbringung*), preserving capital (*Kapitalerhaltung*), and tax assessment (*Steuerbemessung*).<sup>654</sup> Swiss GAAP FER<sup>655</sup> also incorporate the prudence principle by stipulating that, of two equally possible scenarios, the preparer shall choose the more pessimistic.<sup>656</sup>

## V. Legal Nature

In general, Swiss GAAP FER are a set of informal norms.<sup>657</sup> Their nature changes as soon as the legislature refers to the informal norm (cf para 141 et

<sup>649</sup> Eberle/Huber, ST 2010, p 563.

<sup>650</sup> Commercial accounting rules in the CO include 15 pages; the Swiss GAAP FER 200 pages on the other hand; cf also PWC, Rechnungslegung im öffentlichen Sektor, p 27.

<sup>651</sup> Cf Art 959a et seq CO.

<sup>652</sup> Cf Art 959c CO.

<sup>653</sup> Art 963 et seq CO; cf PWC, Rechnungslegung im öffentlichen Sektor, p 27.

<sup>654</sup> Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 116.

<sup>655</sup> Swiss GAAP FER, Conceptual Framework, 13.

<sup>656</sup> Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 59.

<sup>657</sup> Swiss GAAP FER, ed 2014/15, in English, p 9; HWP 2014, p 4; Böckli, Rechnungslegung, para 49; Kleibold, Ausschüttungsregulierung, p 55; CHK-Lipp, Art 962a para 18.

seq). Swiss law refers directly to Swiss GAAP FER numerous times in a static<sup>658</sup> and dynamic<sup>659</sup> way. With such a reference, the referenced source becomes Swiss law.<sup>660</sup> For example, due to the reference in Article 47 para 2 BVV 2 to Swiss GAAP FER 26, the latter receives the status of Swiss law.<sup>661</sup> The reference is static because the paragraph determines the reference to 1.1.2014. References such as this demonstrate the growing importance of Swiss GAAP FER in Swiss financial reporting.<sup>662</sup>

## VI. Swiss GAAP FER's Influence on the CO

- 209 As mentioned above, the prevailing doctrine<sup>663</sup> recognises Swiss GAAP FER as a permitted interpretation tool for the CO. Hence, Swiss GAAP FER is used as an auxiliary means in the interpretation process of the CO. In the other direction, the Swiss government has an influence on the standard-setting process in the FER. The Swiss Federal Department of Justice and Police has the official role as an observer in the FER.<sup>664</sup>
- 210 According to the prevailing doctrine,<sup>665</sup> Swiss GAAP FER has great influence on the interpretation of the CO. Thus, Swiss GAAP FER indirectly

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<sup>658</sup> Art 50 para 1 KVAV to Swiss GAAP FER 10.12.2014; Art 1 Verordnung des BAG über Rechnungslegung und Berichterstattung in der sozialen Krankenversicherung (SR 832.121.1) to Swiss GAAP FER 10.12.2014;

<sup>659</sup> Art 1 VASR; Art 3oquater para 4 EnV (SR 730.01); Art 8 para 2 Verordnung über die Gewährung von Steuererleichterungen im Rahmen der Regionalpolitik (SR 901.022); Art 20 para 4 Verordnung über die Förderung der Beherbergungswirtschaft (SR 935.121); Art 6 para 2 lit b VPOG (SR 783.11) to Swiss GAAP FER 16; Art 14 para 3 FDV (SR 784.101.1).

<sup>660</sup> BGE 123 I 124 et seq, 140 V 420 Consideration 4.2; Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 902; ZK-Jung, Vor Art 620–625 para 72.

<sup>661</sup> Cf Erläuternder Bericht VASR, p 7 n 27; Müller/Wyss, p 1.

<sup>662</sup> Kleibold, Ausschüttungsregulierung, p 57 n 247.

<sup>663</sup> HWP 2009, p 32; Behr, ST 2010, p 26; Behr, Stille Reserven, p 599; Böckli, Aktienrecht, § 8 para 41; Böckli, Rechnungslegung, paras 44, 50; Boemle, ST 1–2/2006, p 12; Boemle/Lutz, Jahresabschluss, pp 75, 83; Handschin, IFRS, p 9 et seq; Handschin, Rechnungslegung, para 30; Kleibold, Ausschüttungsregulierung, pp 49, 162; Kunz, FS Böckli, p 479; Müller/Lipp/Plüss, Der Verwaltungsrat, p 208; BSK-Neuhaus/Sutter, Art 958b para 2; Stoffel, Grundriss des Aktienrechts, paras 1025 et seq, 1029.

<sup>664</sup> Link: <https://www.fer.ch/mitglieder/bundesamt-fuer-justiz-eidgenoessisches-amt-fuer-das-handelsregister/> (accessed on 16.10.18).

<sup>665</sup> HWP 2009, p 32; Behr, ST 2010, p 26; Behr, Stille Reserven, p 599; Böckli, Aktienrecht, § 8 para 41; Böckli, Rechnungslegung, paras 44, 50; Boemle, ST 1–2/2006, p 12; Boemle/Lutz, Jahresabschluss, pp 75, 83; Handschin, IFRS, p 9 et seq; Handschin, Rechnungslegung, para 30; Kleibold, Ausschüttungsregulierung, pp 49, 162; Müller/Lipp/Plüss, Der Verwaltungsrat, p 208; Stoffel, Grundriss des Aktienrechts, paras 1025 et seq, 1029; Uhlmann/Gili, ZfR Band 5, p 18; implicit Nösberger, Wesentlichkeit, p 55.



become law because of the accounting principle's concretisation. Böckli<sup>666</sup> takes Swiss GAAP FER as a permitted interpretation tool for the CO. If the doctrine does not mention the connection to the recognised standards explicitly, they cite Swiss GAAP FER all the same,<sup>667</sup> but they do so with reservations.<sup>668</sup> Through the recognised financial reporting principles, Swiss GAAP FER reach the status of indirect law content.<sup>669</sup>

The Swiss GAAP FER Commission also states this view within its scope: 211  
 'The Commission hopes to transfer the Swiss GAAP FER from the stadium of 'informal norm' to 'generally accepted commercial principles,' in the sense of the Swiss GAAP, 'generally accepted accounting principles'".<sup>670</sup> However, it must be mentioned that the Swiss GAAP FER Commission consists of many well-known Swiss accounting researchers. The same are also prominent voices of the doctrine. Therefore, with Swiss GAAP FER, they have an incentive to promote their own project.

In Switzerland, the FER<sup>671</sup> (*Fachempfehlungen zur Rechnungslegung*) 212 undertake the task of creating recognised financial reporting principles, which are on their way to becoming fully accepted.<sup>672</sup> With this step, they become a part of the Swiss legal system, meaning that they are not only relevant for listed entities but also for not-listed entities.<sup>673</sup> The doctrine and case law regard Swiss GAAP FER as a part of the Swiss recognised financial reporting principles. Another indication of the influence of Swiss GAAP FER on Swiss regulation of financial reporting can be found in the personal choice of the contractor in submitting a proposal to revise Swiss financial reporting. Prof. Dr. Giorgio Behr, head of the Swiss GAAP FER Foundation, was commissioned to do this.<sup>674</sup>

<sup>666</sup> Böckli, *Rechnungslegung*, paras 50, 892.

<sup>667</sup> Cf Böckli, *Rechnungslegung*, para 358 n 653 et seq, para 360 n 658; Wirz, para 318 n 678, para 334 n 732 and 734, para 337 n 743 et seq, para 338 746 et seq, para 339 n 750 et seq, para 345 n 761.

<sup>668</sup> Cf Böckli, *Rechnungslegung*, para 945.

<sup>669</sup> HWP 2009, p 32; Böckli, *Aktienrecht*, § 8 para 41; Kleibold, *Ausschüttungsregulierung*, p 162.

<sup>670</sup> Swiss GAAP FER, ed 2014/15, in English, p 9.

<sup>671</sup> *Fachempfehlungen zur Rechnungslegung* = specialist recommendations on financial reporting.

<sup>672</sup> Bühlmann, *Stille Reserven*, p 35.

<sup>673</sup> Bühlmann, *Stille Reserven*, p 35.

<sup>674</sup> Begleitbericht zum Vorentwurf 2005, p 33.

## B. IPSAS' Influence on Swiss National Finances

- 213 This section deals with the connections of different financial reporting standards in the public sector with IFRS. These explanations will present the effects IFRS has on IPSAS, which have an impact on various standards in Swiss financial reporting in the public sector.

### I. Financial Report in the Public Sector

- 214 The public sector deals with financial reporting regulations in the Financial Budget Act (*Finanzhaushaltsgesetz*; FHG). The important feature is that the public sector can diverge from the recognised standards of the VASR (Art 53 and 64c FHV).<sup>675</sup> The reference in the public sector to the norms in the CO are not private, but rather subsidiary public law.<sup>676</sup> Article 53 Para 1 FHV: 'Financial reporting comply with International Public Sector Accounting Standards (IPSAS)'.<sup>677</sup> References in the public sector are dynamic.<sup>678</sup> The conditions for dynamic references are met because the law still sets broad lines.<sup>679</sup>

### II. IPSAS

- 215 IPSAS are standards regulating the financial report of public sector agencies or entities.<sup>680</sup> They also follow the concept a true and fair view.<sup>681</sup> Like IFRS, IPSAS are also principle based (cf para 49 et seq).<sup>682</sup> They are issued by the IPSAS Board (IPSASB) and have many similarities to IFRS, because IPSAS were built on the basis of IFRS.<sup>683</sup> The main difference between IPSAS and IFRS lies in the fact that the former do not hold actives to draw profit.<sup>684</sup> The

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<sup>675</sup> Erläuternder Bericht VASR, p 7.

<sup>676</sup> Erläuternder Bericht VASR, p 8; Häfelin/Müller/Uhlmann, Allgemeines Verwaltungsrecht, para 251.

<sup>677</sup> Cf Mächler, ZfR Band 5, p 110.

<sup>678</sup> Mächler, ZfR Band 5, p 115.

<sup>679</sup> Art 4 et seq, 47 et seq FHG; Mächler, ZfR Band 5, p 115.

<sup>680</sup> Behr/Leibfried, Rechnungslegung, p 109; Glanz/Hermann/Pfaff/Zihler, veb.ch Praxis-kommentar, Art 962a para VASR 12; for an authoritative German version of IPSAS cf KPMG, IPSAS, *passim*.

<sup>681</sup> Bergmann, Vergleich, p 579; Mächler, Finanzrecht, p 45.

<sup>682</sup> HWP 2014, p 115.

<sup>683</sup> IFRS, Preface to IFRSs, 9; EFV, Methoden, p 16; NRM, p 6; HWP 2014, p 115; Bergmann, Vergleich, p 578; Bergmann/Gamper, p 619; Mächler, Finanzrecht, p 45; Mächler, ZfR Band 5, p 111; PWC, Rechnungslegung im öffentlichen Sektor, p 22, 26; HRM2, p 14 et seq.

<sup>684</sup> Bergmann, Vergleich, p 578.

IPSASB is similar to the IASB and the FER, and all staffed by a broad spectrum of professionals dealing with accounting issues on an international level (Swiss GAAP FER board not so much). On the IPSASB and the IASB, there are representatives of different states, and the World Bank, the International Monetary Funds, and other stakeholders are represented.<sup>685</sup> The IPSASB has citizens, voters, and their political representatives as readers in mind.<sup>686</sup> The orientation toward the public sector can be found in different examples such as IPSAS 23 'Revenue from Non-Exchange Transactions (Taxes and Transfers)'.<sup>687</sup> For the interpretation of IPSAS, the reader is referred to IFRS.<sup>688</sup> If a certain case is not normed by IPSAS, they refer also to IFRS.<sup>689</sup> Thus, IFRS serve in this way as a reservoir.

IPSAS are rarely adopted directly. In most jurisdictions, they become national law after an endorsement process.<sup>690</sup> There are two ways in which IPSAS can be endorsed: directly or indirectly. The legislature can refer to IPSAS directly<sup>691</sup> or the IPSAS can be converted into national standards (indirectly<sup>692</sup>).<sup>693</sup> The indirect application of IPSAS is incorporated into HRM2. IPSAS are recognised standards in the sense of Art 962a para 5 CO.<sup>694</sup> Swiss law refers multiple times to IPSAS in a dynamic way.<sup>695</sup>

### III. HRM2

HRM2 is the abbreviation of '*Harmonisiertes Rechnungslegungsmodell*', meaning the harmonised financial reporting model.<sup>696</sup> HRM2 succeeded HRM and is issued by the Swiss Conference of Financial Directors (*Finanzdirektorenkonferenz*).<sup>697</sup> Although the delegates of the cantons created the HRM2, it cannot be seen as intercantonal law in the sense of Art 48 para 4

<sup>685</sup> HRM2, p 15.

<sup>686</sup> HWP 2014, p 115.

<sup>687</sup> HWP 2014, p 115.

<sup>688</sup> PWC, Rechnungslegung im öffentlichen Sektor, p 22 et seq.

<sup>689</sup> PWC, Rechnungslegung im öffentlichen Sektor, p 23.

<sup>690</sup> Bergmann, Jahrbuch 2009, p 197.

<sup>691</sup> Examples from Bergmann, Vom HRM zu IPSAS, p 9: OECD, Nato, EU, UNO.

<sup>692</sup> Examples from Bergmann, Vom HRM zu IPSAS, p 9: CDN, RSA, AUS, NZ, UK, ISR, USA.

<sup>693</sup> Bergmann, Vom HRM zu IPSAS, p 8.

<sup>694</sup> Art 1 para 1 lit e VASR.

<sup>695</sup> Art 4, 9 para 1, 16 para 5, 40 Verordnung über das Finanz- und Rechnungswesen des ETH-Bereichs (SR 414.123); Art 53, 64b et seq FHV (SR 611.01); VASR.

<sup>696</sup> For the history of the HRM cf Bolz/Blaser, p 175 et seq; cf for further information <http://www.srs-cspp.ch/de> (accessed on 20.04.17).

<sup>697</sup> Cf HRM2; Mächler, ZfR Band 5, p 112.

BV<sup>698, 699</sup> because they did not intend to create a formal norm.<sup>700</sup> Instead, it is an informal norm, meaning a private standard.<sup>701</sup> The norm setters chose the traditional rule-based accounting model with HRM2, unlike IPSAS or IFRS, which are principle-based.<sup>702</sup> HRM2 leans on IPSAS<sup>703</sup> and its goal is to harmonise the financial reports of the confederation, the cantons, and the communes. In addition, the standard-setters wanted to align HRM2 with IPSAS to customise them for Swiss circumstances.<sup>704</sup> The legal source for the harmonisation can be found in Art 48 Para 4 FHG: 'The Federal Council shall support the harmonisation of accounting standards of the confederation, the cantons, and the communes.'<sup>705</sup> HRM2 also leads to transparent financial reports in the public sector,<sup>706</sup> but without the purpose of a fair presentation.<sup>707</sup>

218 Different reasons can be listed for harmonisation in public sector accounting:<sup>708</sup> Coordinated financial politics through comparability leads to a uniform way for cantons to consolidate their communes. For the instrument of financial compensation, this means a common ground for calculating the compensation intercantinally and intercommunally. Financial statistics is keen to evaluate comparable numbers. This process is simplified by harmonisation; however, not only a harmonisation within the public sector is intended, but also

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<sup>698</sup> English version: 'The Cantons may by intercantonal agreement authorise intercantonal bodies to issue legislative provisions that implement an intercantonal agreement, provided the agreement: a. has been approved under the same procedure that applies to other legislation; b. determines the basic content of the provisions'; authoritative German version: '*Die Kantone können interkantonale Organe durch interkantonalen Vertrag zum Erlass rechtsetzender Bestimmungen ermächtigen, die einen interkantonalen Vertrag umsetzen, sofern der Vertrag: a. nach dem gleichen Verfahren, das für die Gesetzgebung gilt, genehmigt worden ist; b. die inhaltlichen Grundzüge der Bestimmungen festlegt*'.

<sup>699</sup> Mächler, ZfR Band 5, p 116.

<sup>700</sup> HRM2, p 9.

<sup>701</sup> Mächler, ZfR Band 5, p 116.

<sup>702</sup> Bergmann, Vergleich, p 577.

<sup>703</sup> HRM2, p 3; EFV, Methoden, p 16; FDK, Nr. 20: Musterfinanzhaushaltsgesetz (MFHG), para 4; Bergmann, Vergleich, p 577; Hunkeler/Graber, p 629; Siegrist/Fessler/Jenni, p 964; PWC, Rechnungslegung im öffentlichen Sektor, p 27; Wüest und Partner, p 4; Zanetti, Konsolidierte Betrachtungsweise, p 958.

<sup>704</sup> Bergmann, Jahrbuch 2009, p 199; Siegrist/Fessler/Jenni, p 964.

<sup>705</sup> Authoritative German text: '*Der Bundesrat setzt sich für harmonisierte Rechnungslegungsstandards von Bund, Kantonen und Gemeinden ein. Er kann diese Bestrebungen mit Beiträgen fördern*'.

<sup>706</sup> HRM2, p 21.

<sup>707</sup> Bergmann, Jahrbuch 2009, p 199.

<sup>708</sup> HRM2, p 13 et seq.

with the financial reporting of private entities.<sup>709</sup> In addition, the international standards for financial statistics must be considered.<sup>710</sup>

According to Art 51 Para 2 MFHG,<sup>711</sup> the senior civil servant 219 (*Regierungsrat*) decides which standard he wants to use for the financial report in his public-sector entity.<sup>712</sup> HRM2 is only a recommendation of the Swiss Conference of Financial Directors; thus, it has no legally binding effect on cantons per se.<sup>713</sup> To gain this effect, a canton needs to create its own statutory basis.<sup>714</sup>

HRM2 set only the minimal requirements for a financial report; thus, the 220 application of more detailed standards such as IPSAS is permitted.<sup>715</sup> Although HRM2 differs from IPSAS, a financial report fulfilling IPSAS' requirements are compliant with HRM2.<sup>716</sup> The cantons can be divided into two groups: One group aims at a fair presentation; the other group wants to keep the hidden reserves. Although they have different aims, both will be in accordance with HRM2.<sup>717</sup> The former group has the advantage of being able to consult IPSAS for many technical questions.<sup>718</sup> The other group has to find rules themselves for their behaviour, if a case is not dealt with by HRM2.<sup>719</sup>

HRM2 endorsement and its tendencies shall be monitored by a committee, 221 which periodically issues a report on the endorsement status in different parts of Switzerland.<sup>720</sup> The coordination of Swiss interest is of major importance for Swiss membership of the IPSASB.<sup>721</sup>

<sup>709</sup> HRM2, p 21; NRM, p 4.

<sup>710</sup> IMF and EU (GFSM2001/ESVG95).

<sup>711</sup> German wording: '*Der Regierungsrat bezeichnet das anzuwendende Regelwerk. Er kann in einzelnen Punkten vom Regelwerk abweichen. Jede Abweichung ist im Anhang zur Jahresrechnung zu begründen*'.

<sup>712</sup> Zanetti, Konsolidierte Betrachtungsweise, p 961.

<sup>713</sup> Bergmann, Vergleich, p 580; Mächler, ZfR Band 5, p 116.

<sup>714</sup> Mächler, ZfR Band 5, p 116.

<sup>715</sup> Bergmann, Vergleich, p 577.

<sup>716</sup> Bergmann, Vergleich, p 578.

<sup>717</sup> Bergmann, Vergleich, p 580; Wüest und Partner, p 4; Bolz/Blaser, p 177; for the application of HRM2 in praxis cf Siegrist/Fessler/Jenni, p 964 et seq.

<sup>718</sup> Bergmann, Vergleich, p 580.

<sup>719</sup> The differentiation in 2014 went even further: some cantons still use HRM1 (BE); some HRM2 light (FR, VD); others HRM2 plus (AG, GR, SO), and some IPSAS (GE, ZH), cf Bergmann et al, EVU, p 12.

<sup>720</sup> HRM2, p 21.

<sup>721</sup> HRM2, p 21.

## IV. Comparison between HRM2 and IPSAS

- 222 The main difference between HRM2 and IPSAS is the ability to create hidden reserves under HRM2.<sup>722</sup> This is only a possibility and is not mandatory. Thus, a report according to IPSAS (without hidden reserves or with few hidden reserves) is permitted under HRM2.<sup>723</sup> IPSAS also uses the prudence principle, but its definition is different.<sup>724</sup> While under the CO and HRM2 there is the ability to create arbitrary reserves, IPSAS only permits prudent reporting.<sup>725</sup>

## V. NRM

- 223 The NRM (*Neues Rechnungsmodell des Bundes*) is the new model for federal financial reporting.<sup>726</sup> The NRM is orientated towards IPSAS.<sup>727</sup> The NRM leads the way to an approximation of federal accounting practice towards one of the bodies in the public sector and also towards the private sector, thus improving comparability.<sup>728</sup> Transparency and comparability simplify financial management and create more trust in the public.<sup>729</sup> With the NRM, the federation aims to inform of its annual accounts in a more detailed and transparent way.<sup>730</sup> The NRM goes further than HRM2, because the latter gives only the ability to give a true and fair view, whereas the former demands it, like IPSAS.<sup>731</sup> Thus, the prudence principle is explicitly replaced.<sup>732</sup> The basis for the balance sheet structure builds the COFOG (Classification of Functions of Government).<sup>733</sup> Hence, with the NRM, Switzerland focuses on a true and fair view and considers informal norms on the federal level for public financial reporting.

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<sup>722</sup> Bergmann, Vergleich, p 540.

<sup>723</sup> Bergmann, Vergleich, p 540.

<sup>724</sup> HRM2, p 18: examples can be found in IPSAS 5, 9, 12, 13, 15, 16, 17, 19, 21.

<sup>725</sup> HRM2, p 18.

<sup>726</sup> Link: <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-4560.html> (accessed on 16.10.18); cf Mächler, Finanzrecht, p 43.

<sup>727</sup> EFV, Methoden, p 16; NRM, p 4; PWC, Rechnungslegung im öffentlichen Sektor, p 9; Mächler, Finanzrecht, p 43; Wüest und Partner, p 4.

<sup>728</sup> NRM, p 4.

<sup>729</sup> NRM, p 4.

<sup>730</sup> NRM, p 5, 15.

<sup>731</sup> Link: <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-4560.html> (accessed on 16.10.18); NRM, p 23; Mächler, Finanzrecht, p 43.

<sup>732</sup> NRM, p 23.

<sup>733</sup> NRM, p 17.

## VI. EPSAS

The EU created EPSAS (European IPSAS), which are the harmonised European form of IPSAS.<sup>734</sup> The EU published a call for proposals to EPSAS. The deadline was March 2015.<sup>735</sup> In October 2015, the European Parliament published a feedback report.<sup>736</sup> The *Hessischer Rechnungshof* had already developed a conceptual framework for EPSAS.<sup>737</sup> In addition to the goal of a transparent report, the purpose was also to protect current and future generations of citizens and residents.<sup>738</sup> The financial statement shall provide information.<sup>739</sup> This information must give the reader a true and fair view of the economic situation.<sup>740</sup> Moreover, the principle of prudence shall be applied (cf para 303), meaning that future risks must be considered in the period in which they are recognised, but incomes can only be reported after they have manifested themselves.<sup>741</sup> The latest information is that Germany rejects a binding declaration of the use of EPSAS.<sup>742</sup> If EPSAS become binding law, they can be considered foreign law in the comparative law approach (cf para 183 et seq).

## VII. Influence of Public Financial Reporting on Commercial Accounting Rules

Above, IPSAS' influence on Swiss public financial reporting was examined (cf para 213 et seq). Through the argument from analogy, IPSAS can have an impact on commercial accounting. IPSAS is based on IFRS; thus, one could argue that the application of argument from analogy leads to an indirect impact on the private sector from IPSAS. The chain of influence between the preparer/user of a financial

<sup>734</sup> Cf <http://www.epsas.eu/en/> (accessed on 16.10.18).

<sup>735</sup> Cf <http://www.epsas.eu/en/news.html> (accessed on 16.10.18).

<sup>736</sup> Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/552299/IPOL\\_STU%282015%29552299\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/552299/IPOL_STU%282015%29552299_EN.pdf) (accessed on 16.10.18).

<sup>737</sup> Available at: [http://gpanrw.de/media/1447057802\\_2015\\_09\\_14\\_epsas\\_framework.pdf](http://gpanrw.de/media/1447057802_2015_09_14_epsas_framework.pdf) (accessed on 16.10.18).

<sup>738</sup> Hessischer Rechnungshof, EPSAS Framework, para 5.

<sup>739</sup> Hessischer Rechnungshof, EPSAS Framework, para 5.

<sup>740</sup> Hessischer Rechnungshof, EPSAS Framework, para 14.

<sup>741</sup> Hessischer Rechnungshof, EPSAS Framework, para 10; for Germany cf Haushaltsteuerung, available at <http://www.haushaltssteuerung.de/weblog-die-dispersion-der-doppik-das-neue-oeffentliche-haushalts-und-rechnungswesen-zwischen-kommunaler-routine-und-europaeischer-harmonisierung.html> (accessed on 16.10.18); Bundesrechnungshof Report, available at <https://www.bundesrechnungshof.de/en/veroeffentlichungen/beratungsberichte/langfassungen/report-on-the-proposed-implementation-of-harmonised-european-public-sector-accounting-standards-epsas-in-the-member-states-of-the-european-union> (accessed on 16.10.18).

<sup>742</sup> Link: <https://www.iasplus.com/de/news/2017/mai/epsas> (accessed on 16.10.18).

statement and IFRS is rather long: if the question of how a certain case should be reported arises, the private would use the analogy to Swiss law (FHG) influenced by HRM2, which is similar to IPSAS (which has leaned on IFRS). An example is mentioned above of the use of the argument of analogy (cf para 178 et seq).

## C. EU-IFRS' Influence on Swiss Law

### I. In General

- 226 The 6<sup>th</sup> December 1992 was a historic day, because of the No vote for the accession of Switzerland to the EEA (European Economic Area; = EWR in German). For this reason, Switzerland had to negotiate different sectoral (bilateral) agreements with the EU, to avoid isolation in Europe. In the last century, it became more difficult to negotiate with the EU, possibly due to the increasing number of participating states, now 28. Thus, it is now more difficult to achieve a customised solution.<sup>743</sup> The term EU-IFRS was born when Europe started to diverge from the IFRS.<sup>744</sup>
- 227 IFRS became directly binding for the 28 member states after the EU endorsed them.<sup>745</sup> The reference to IFRS is not dynamic but static, because the EU must endorse every change the IASB makes through incorporation (cf para 157 et seq).<sup>746</sup> With the introduction of IFRS, the EU weakened its own minimum structuring requirements (*Mindestgliederungsvorschriften*), because the EU has a more detailed structure than IFRS.<sup>747</sup> EU member states can oblige entities to report the financial report not only the consolidated report according to IFRS, but the individual financial statement as well.<sup>748</sup>

### II. Relevance for Swiss Law

- 228 For all EU members, EU-IFRS become law after the directive has been adopted into national law.<sup>749</sup> Thus, they are seen as the DAS of the EU

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<sup>743</sup> Jaag, p 323 et seq.

<sup>744</sup> SGHB Finanzmarktrecht I-Brändli, § 2 para 28.

<sup>745</sup> SGHB Finanzmarktrecht I-Brändli, § 2 para 27; Evans/Baskerville/Nara, Language, p 3; cf <http://www.efrag.org/Endorsement> (accessed on 16.10.18).

<sup>746</sup> Cf Bischof/Daske, Endorsement, p 1 et seq; Handschin, Rechnungslegung, Glossar: EU-IFRS, p LXXIII.

<sup>747</sup> Begleitbericht zum Vorentwurf 2005, pp 38, 103.

<sup>748</sup> Kleibold, Ausschüttungsregulierung, p 1 et seq.

<sup>749</sup> Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002; HWP 2014, p 116; Evans/Baskerville/Nara, Language, p 3; cf <http://www.efrag.org/Endorsement> (accessed on 16.10.18).



member-states.<sup>750</sup> However, from the Swiss perspective, they are not a recognised standard in the sense of Art 962a para 5 CO.<sup>751</sup> They can still influence Swiss law through the tool of comparative law (cf para 183 et seq).

The Federal Council<sup>752</sup> stated that, in cases in which Swiss norms comply with EU norms, because of an autonomous adaption of European norms (*autonomer Nachvollzug*), they can be used as an interpretation tool for Swiss formal norms, which have been autonomously adapted.<sup>753</sup> The reasons lie in the aspired harmonisation.<sup>754</sup> The legislature considered the EU norms but diverged from them in some cases.<sup>755</sup> Wherever the CO does not diverge from EU law,<sup>756</sup> the latter can be utilised as an interpretation tool.<sup>757</sup> 229

Static direct references to European law are allowed if the following principles are fulfilled: principle of legality (cf para 275), conformity with Swiss law, and its fundamental principles.<sup>758</sup> In the principle dynamic, direct references to European law are not allowed without any basis in an international treaty, the constitution, or in the law.<sup>759</sup> This means that, if one argues that Swiss law should not refer to international standards dynamically, the same arguments can be applied for the autonomous adaption of European law. An autonomous adaption of European financial reporting regulation would lead to an influence of IFRS through EU-IFRS, making IFRS applicable all the same as an interpretation tool for the CO.<sup>760</sup> EU-IFRS are equal to the CO in terms of their legal quality. EU-IFRS are like the CO formal norms (cf para 264 et seq).<sup>761</sup> 230

<sup>750</sup> HWP 2014, p 116.

<sup>751</sup> Cf Art 1 VASR; HWP 2014, p 116; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 78.

<sup>752</sup> BGE 129 III 335, Consideration 6; cf also 124 II 372 Consideration 7b.

<sup>753</sup> SGHB Finanzmarktrecht I-Bartholet, § 5 para 52; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 77; Kunz, FS Bucher, p 460; Kunz, LeGes 2012, p 273; Kunz, recht 2012, p 47 et seq; Peyer, recht 2004, p 109; SGHB Finanzmarktrecht I-Sester, § 3 para 18 et seq; Wiegand, Jusletter 17<sup>th</sup> June 2002, para 1 et seq; cf Breitenmoser/Weyeneth, FHB Verwaltungsrecht, para 31.23.

<sup>754</sup> BGE 129 III 335, Consideration 6.

<sup>755</sup> Botschaft 2007, p 1634 et seq.

<sup>756</sup> Fourth Council Directive of 25 July 1978, (78/660/EEC); Seventh Council Directive of 13 June 1983, (83/349/EEC); also newer directives if they do not diverge from the CO or IFRS too much, cf also Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 78.

<sup>757</sup> Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 78.

<sup>758</sup> Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 905.

<sup>759</sup> Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 905.

<sup>760</sup> Schreiber, International Standards, p 161.

<sup>761</sup> CHK-Lipp, Art 963a para 16.

231 In theory, the EU's implementation process can lead to discrepancy between IFRS and EU-IFRS.<sup>762</sup> These discrepancies can also influence the interpretation of Swiss law. Here is why: the interpreter of Swiss law can use the comparative approach to consider foreign law; in this case, EU-IFRS. A divergence of EU-IFRS and IFRS can be an indication that IFRS do not promote a solution, which is appropriate in Continental European circumstances. In this case, it is maybe more suitable for a Swiss interpreter to apply the EU-IFRS rather than the IFRS solution.

#### D. Interim Conclusion

232 This chapter has presented the impacts of IFRS on other standards, which themselves have an influence on Swiss law. The result is an indirect impact from IFRS on Swiss law. The influence of IFRS on the interpretation of the CO exists by using the comparative approach (cf para 183 et seq) and the argument of analogy (cf para 178 et seq). Standards such as Swiss GAAP FER consult IFRS in their standard-setting process. Thus, they show similarities to IFRS in terms of structure, content, and underlying principles. Swiss GAAP FER are particularly interesting in terms of the influence of private standards on Swiss commercial accounting rules. They are regarded as a part of Swiss recognised financial reporting principles. As a result, IFRS influence Swiss GAAP FER, which have an impact on Swiss law. Thus, an indirect influence from IFRS on the CO can be observed through Swiss GAAP FER (cf para 190 et seq):

IFRS – Swiss GAAP FER – Swiss Law

233 IFRS' impact is observable even in the public sector. IPSAS, and with them HRM2, are of importance for financial reporting in the public sector. IFRS are the point of orientation for IPSAS, which were considered for the creation of HRM2. The Conference of Finance Directors (*Finanzdirektorenkonferenz*) promotes their use in the communes, cantons, and federation. This creates a chain of influence from IFRS to IPSAS, to HRM2, to financial reporting of authorities (cf para 213 et seq). HRM2 and Swiss GAAP FER are both recognised financial reporting principles. However, they lack the legal basis in Swiss law, though they do have significant influence on Swiss financial reporting. HRM2 can develop itself to become the pendant to Swiss GAAP FER.<sup>763</sup> IFRS influence Swiss Law in the following way:

IFRS – IPSAS – HRM2/NRM/EPAS – Swiss Law

234 It is possible to be compliant with HRM2 and IPSAS in one financial report due to their broad scope. The influence of IFRS on EU-IFRS is already a part of

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<sup>762</sup> HWP 2014, p 116 et seq.

<sup>763</sup> Hunkeler/Graber, p 629.

the term. The two differ only slightly from each other. The EU's incorporation of IFRS makes EU-IFRS foreign law, which enables the interpreter to consider EU-IFRS in the comparative law approach (cf para 228 et seq).

This chapter is the last to analyse IFRS' influence. It follows the previous 235 two chapters, which explained certain aspects of IFRS' influence on Swiss law. § 4 explained the adoption of IFRS on a formal level. This was followed by § 5, concerning the different ways in which IFRS influence Swiss law and how this impact changes the legal nature of IFRS as private standards. As we have seen, IFRS also have an indirect influence on Swiss law through other private standards, which themselves influence Swiss law. In conclusion, IFRS have an impact on Swiss commercial accounting rules and exercise this impact in various ways.



## § 7 Previous Research and the Revision of the CO

The following explanations are divided into abstract and concrete. The following chapter presents the previous research and analyses the critiques of the use of IFRS in the interpretation of Swiss law. In other words, statements concerning the permissibility of IFRS as auxiliary means for the interpretation of the CO are analysed. Then, the manifestations of IFRS' influence on the various positions in the financial report are examined (cf para 351 et seq).

This chapter explains the different opinions regarding the influence of IFRS on Swiss commercial accounting law. In this context, different subjects are examined. The question is how legislature, case law, and the doctrine uses recognised standards when they worked with Swiss commercial accounting law. Concerning the legislature, the CO's norms are analysed in a search for similarities with IFRS. In addition, the new CO is compared with the old CO in order to present the novelties. Case law is limited in financial reporting. Some verdicts follow a more conservative view and others are based explicitly on IFRS (cf para 241 et seq). For the doctrine, different works concerning Swiss financial reporting were considered to find whether experts interpret the CO with the help of recognised standards. My findings show that, if an author rejects IFRS, he uses Swiss GAAP FER as an interpretation tool for the CO.

Most of the research conducted in recent years has not been concerned with legal questions concerning IFRS' influence on national commercial accounting rules, but instead has focused on economic issues.<sup>764</sup> The legal perspective is of particular interest, however. There are two camps in the doctrine: one pro (cf para 246), using IFRS as a tool to interpret the CO under the condition of CO-compatibility; and the other against their use (cf para 243 et seq). The following explanations related only to statements in the Swiss literature concerning the question of whether the interpreter can use recognised standards to interpret Swiss commercial accounting rules. The next chapter will deal with the concrete influence of the recognised standards on the CO (cf para 351 et seq). It is important to distinguish between the recognised standards. Some authors permit only Swiss GAAP FER as an interpretation tool (cf para 209 et seq).

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<sup>764</sup> Instead of many Kemper-Scharpegge, *passim*.

## A. Legislature

- 239 No clear evidence was found on what the legislature intended with the incorporation of recognised standards.<sup>765</sup> Some argue that the legislature chose intentionally to go another path than considering the IFRS in certain points; thus, IFRS cannot be utilised as an interpretation tool to reverse this decision.<sup>766</sup> Where the legislature diverged intentionally from recognised standards, the interpreter is, in my view, not permitted to apply the recognised standards. Other authors promote a different view (cf para 246). The interpreter is allowed to use recognised standards only as an auxiliary means, where they are also in line with the underlying principles of the CO.
- 240 Although the legislature mentions differences between the CO and IFRS, legislature consulted the recognised standards in the legislation process (for the results cf para 351 et seq).<sup>767</sup> The legislature saw need for action to keep up with the growing dynamic, international interdependencies, and digitalisation in society.<sup>768</sup> The legislative power tried to minimise contradictions between the CO and the recognised standards.<sup>769</sup> Thus, the legislature created an approximation to the recognised standards without making clear what this convergence means.

## B. Case Law

- 241 Two verdicts concerning the use of IFRS as an interpretation tool for the CO were found.<sup>770</sup> One case<sup>771</sup> dealt with the question of when entities must report a provision and to which amount. The SFT holds that entities can have an obligation to report a provision when multiple risks must be dealt with and their probability of realisation is under 50 per cent. In such cases, the entity should report a provision. It is important to note, however, that, here, the SFT dealt with a case of abuse. Böckli<sup>772</sup> sees this verdict as a rejection of the recognised standards,<sup>773</sup> which state that provision must be set if the event is more likely to

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<sup>765</sup> Cf for the discussions link: <https://www.parlament.ch/de/ratsbetrieb/suche-amtliches-bulletin/#k=PdAffairId:20080011> (accessed on 16.10.18).

<sup>766</sup> Cf Behr, ST 2012, p 802.

<sup>767</sup> Glanz, ST 2007, p 534.

<sup>768</sup> Botschaft 2007, p 1597 et seq; Kleibold, Ausschüttungsregulierung, p 1; cf also Schluép, SZW (Sonderheft) 1997, p 3.

<sup>769</sup> Botschaft 2007, p 1724.

<sup>770</sup> BGE 136 II 88 = ASA 78 2009/2010, 495 = StE 2010 B 72.11 Nr. 17 = RDAF 2009 570, Consideration 3.2.

<sup>771</sup> Verdict of the BGer from 2<sup>nd</sup> September 2010, 4A\_277/2010, Consideration 2.1.

<sup>772</sup> Böckli, Rechnungslegung, para 1023 et seq.

<sup>773</sup> IAS 37.

occur than not. However, IFRS<sup>774</sup> add that multiple risks lead to a provision, because, in these cases, it is very probable that one risk of many risks will be realised in the future.<sup>775</sup> Hence, the SFT actually does not deviate from IFRS.

In the decision of 2009, the SFT admitted the application of IFRS under the Swiss commercial accounting rules in relation to the foreign-currency financial statement.<sup>776</sup> The SFT considered Glauser<sup>777</sup> in its verdict.<sup>778</sup> IFRS shall be used as an interpretation tool as long as they do not contradict Swiss law.<sup>779</sup> Therefore, IFRS are analysed for their compatibility with Swiss recognised financial reporting principles (cf paras 353 et seq, 303 et seq).<sup>780</sup> There are observable tendencies in Europe to approximate the domestic accounting standards with IFRS.<sup>781</sup> The SFT chose IFRS even though the HWP proposed another solution.<sup>782</sup> IFRS do not have an influence ‘ex officio ... but due to the arguments’.<sup>783</sup> The SFT, therefore, considers IFRS, like the HWP, as a non-exclusive offer for interpretation (*nicht exklusives Auslegungsangebot*; cf paras 286, 435).<sup>784</sup> It reserves the right to find a reasonable solution without any mandate concerning which sources it must consider.

## C. Doctrine

In assessing the verdict, different opinions come to light.<sup>785</sup> A number of authors separate the CO and IFRS strictly and do not permit an interpretation of the CO by means of IFRS.<sup>786</sup> Zihler,<sup>787</sup> for example, states that the CO cannot be mixed with elements of IFRS, because both are fundamentally different, and a mixture would create a concept that is unknown. Behnisch and Opel labelled the use of

<sup>774</sup> IAS 37.24.

<sup>775</sup> Cf Riederer, Rückstellungen, para 222 et seq.

<sup>776</sup> BGer 2C\_897/2008 from 1<sup>st</sup> October 2009; for a neutral overview cf Handschin, eSkript.

<sup>777</sup> Glauser, Archives 74, p 529 et seq.

<sup>778</sup> Cf BGE 136 II 88 et seq.

<sup>779</sup> BGer 2C\_897/2008 from 1<sup>st</sup> October 2009.

<sup>780</sup> Hüttche, ST 2013, p 669; cf Böckli, ST 2012, p 823.

<sup>781</sup> BGer 2C\_897/2008 from 1<sup>st</sup> October 2009.

<sup>782</sup> BGer 2C\_897/2008 from 1<sup>st</sup> October 2009.

<sup>783</sup> Cf Hüttche, ST 2013, p 669.

<sup>784</sup> Uhlmann, LeGes 2013, p 96; cf Baltzer, Zertifizierte Managementsysteme, para 168.

<sup>785</sup> Cf for further reference Glanz/Pfaff, StR 2011, p 473 n 13.

<sup>786</sup> Behnisch/Opel, ZBJV 146/2010, p 484; Behr, ST 2012, p 802; Benz, Währungsverluste, p 1 et seq; Böckli, Aktienrecht, § 8 para 84 et seq, 342; Böckli, Rechnungslegung, para 892 n 1534; Gurtner, ST 2010, p 394; Neuhaus/Schneider, p 810; Oesterhelt/Grüniger, p 49 et seq; Oswald, Jusletter 22<sup>nd</sup> September 2014, para 45; Röthlisberger, p 84; Zihler, ST 2011a, p 45; less absolute: Simonek, p 132 et seq.

<sup>787</sup> Zihler, ST 2011a, p 45.

IFRS as a tool to interpret the CO a mistake (*Fehlgriff*).<sup>788</sup> The most prominent proponent of the contra camp is Böckli, whose opinion is presented in many publications.<sup>789</sup> Böckli recognises the similarities in the wording of certain norms in the CO and the recognised standards.<sup>790</sup> However, he sees the dangers in using IFRS as an interpretation tool for the CO, listing the conceptual conflict of the prudence principle with the true and fair view (cf para 303 et seq).<sup>791</sup> He is more suspicious of taking IFRS as an interpretation tool than Swiss GAAP FER. For certain positions, he dismisses the possibility of interpreting with the help of IFRS altogether.<sup>792</sup> However, Böckli does not exclude the influence of the informal norm on national law in general, but recognises the risk in taking IFRS as an interpretation tool for the CO.<sup>793</sup> He uses, for example, Swiss GAAP FER<sup>794</sup> and the Swiss Code of Best Practice for Corporate Governance as interpretation tools for the CO.<sup>795</sup>

244 The concerns relating to IFRS being used as an interpretation tool can be summarised as follows. (1) IFRS have other addressees and a different goal to that of the CO.<sup>796</sup> § 9 will respond to the conflict of the prudence concept with fair presentation (cf para 303 et seq). (2) In particular, IFRS cannot be seen as a basis of assessment for profit taxes, because the IASB do not consider the effects of the rules on the taxation.<sup>797</sup> The application of IFRS for tax reporting is also critical from a constitutional viewpoint.<sup>798</sup> In addition, the draft of Swiss commercial accounting law committed to tax neutrality.<sup>799</sup> (3) IFRS<sup>800</sup> forbid

<sup>788</sup> Behnisch/Opel, ZBJV 146/2010, p 481 et seq, 485.

<sup>789</sup> Böckli, Aktienrecht, § 8 paras 84 et seq, 342; Böckli, ST 2011, p 237; Böckli, ST 2012, p 696 et seq; Böckli, FS Reich, p 189 et seq; Böckli, ST 2010, p 160 et seq; Böckli, ST 2012, p 822 et seq; Böckli, Rechnungslegung, paras 40, 892 n 1534.

<sup>790</sup> Böckli, Aktienrecht, § 8 para 41; Böckli, Rechnungslegung, paras 44, 346 et seq.

<sup>791</sup> Böckli, Rechnungslegung, paras 346 et seq, 1135.

<sup>792</sup> Böckli, Rechnungslegung, paras 892 n 153, 1029; Böckli, ST 2010, p 28.

<sup>793</sup> Böckli, Rechnungslegung, para 346 et seq.

<sup>794</sup> For Art 958b CO, Böckli, Rechnungslegung, para 136 or the capitalisation of leased assets, Böckli, Rechnungslegung, para 653.

<sup>795</sup> For Art 706 CO, Böckli, ST 2002, p 981 et seq; cf also SGHB Finanzmarktrecht I-Brändli, § 2 para 42 et seq; Giger, Corporate Governance, p 76.

<sup>796</sup> Böckli, Rechnungslegung, paras 346 et seq, 1135; Neuhaus/Schneider, p 810.

<sup>797</sup> Böckli, ST 2011, p 243; Neuhaus/Schneider, p 810; Glanz/Pfaff, StR 2011, p 475.

<sup>798</sup> Cf also Oswald, Jusletter 22<sup>nd</sup> September 2014, para 45.

<sup>799</sup> Cf for tax neutrality Botschaft 2007, p 1626; cf also Böckli, Aktienrecht, § 8 para 73; Böckli, Rechnungslegung, para 248; Böckli, ST 2010, p 28; Brülisauer/Mühlemann, Art 58 para 31; OFK-Dekker, Vorbem Art 957 et seq para 2; Giger, ST 2009, p 324; Neuhaus/Schneider, p 810 et seq; Oswald, Jusletter 22<sup>nd</sup> September 2014, para 45; Zihler, veb.ch Praxiskommentar, Sicht des Gesetzgebers, para 34 et seq; Zihler, ST 2011b, p 811.

<sup>800</sup> IAS 1.16.



the application of a single standard without applying the rest.<sup>801</sup> IAS 1.16 simply states that an entity can only claim to report according to IFRS if it applies every IAS, every IFRS, every IFRIC Interpretation, and every SIC Interpretation.<sup>802</sup> In other words, cherry picking is not permitted.<sup>803</sup> Taking IFRS as an instrument in the preparation of the statutory report is a different matter. (4) The legislature dismissed the possibility of reporting only according to IFRS.<sup>804</sup>

All of the arguments mentioned are also viable against the use of Swiss GAAP FER as an interpretation tool. (1) They also follow the true and fair view (cf paras 190 et seq, 303 et seq). (2) Swiss GAAP FER are tax neutral. (3) They should be applied in their predetermined way. (4) The subjective-historic interpretation does not necessarily lead to this conclusion (cf para 467 et seq). Since IFRS were not mentioned specifically, but as the recognised standard, the turnaround would have been not only from IFRS but also from Swiss GAAP FER and US GAAP, which are recognised standards in the sense of Swiss commercial accounting rules.<sup>805</sup> It would only have been a complete turnaround if legislature had eliminated all of the novelties, which would lead to more similarities to IFRS. Thus, these arguments can only be applied if they are applied to Swiss GAAP FER as well.

Part of the doctrine accepts the possibility of IFRS affecting the CO and permits the process of using IFRS as tool in the interpretation of Swiss commercial accounting rules.<sup>806</sup> An interpretation with IFRS can only be applied if it does not contradict the CO's principles.<sup>807</sup> Sester<sup>808</sup> takes an

<sup>801</sup> Neuhaus/Schneider, p 810.

<sup>802</sup> IAS 1.7; cf Böckli, Aktienrecht, § 10 para 16.

<sup>803</sup> Böckli, Rechnungslegung, para 64.

<sup>804</sup> Neuhaus/Schneider, p 811; Oswald, Jusletter 22<sup>nd</sup> September 2014, para 45.

<sup>805</sup> Art 962 para 1 fig 1 CO icw Art 1 VASR; Art 6 SIX-RLR.

<sup>806</sup> HWP 2014, p 5; ZK-Bossard, Vorbemerkungen para 276 et seq; Buchmann/Dolente, ST 2012, p 890 et seq; von der Crone, Aktienrecht, § 7 para 25; OFK-Dekker, Art 958d para 24; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 31; Duss/Duss, p 408 et seq; Glauser, Archives 74, p 529, 555 et seq; cf Glauser/Beusch, SJZ 106/2010, p 269; Glanz/Pfaff, veb.ch Praxiskommentar, Art 958d para 25 et seq; Gutsche, veb.ch Praxiskommentar, Art 959a para 25; Handschin, Rechnungslegung, para 27 et seq, 291; BankG Komm-Handschin, Art 6 para 37 et seq; Jutzi, Unternehmenspublizität, para 981; Kleibold, Ausschüttungsregulierung, p 163; CHK-Lipp, Art 959 para 13; Locher, Art 57 DBG para 15; Matteotti/Felber, p 753 et seq; Müller, SZW 2008, p 400 et seq; Müller/Thomann, Jusletter 21<sup>st</sup> October 2013, paras 19, 65; BSK-Neuhaus/Gerber, Art 959 para 15; Nösberger/Boemle, ST 2014, p 14; Riederer, ex ante 2016, p 14 et seq; Riederer, Rückstellungen, para 31 et seq; Stoffel, Grundriss des Aktienrechts, para 1029.

<sup>807</sup> BGE 136 II 88, Consideration 3.4; Glauser, Archives 74, p 529, 555 et seq; Gutsche, veb.ch Praxiskommentar, Art 959a para 25; Handschin, Rechnungslegung, para 31; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 79; Müller/Thomann, Jusletter 21. October 2013, paras 19, 65; Riederer, ex ante 2016, p 14; Riederer, Rückstellungen, para 35.

<sup>808</sup> SGHB Finanzmarktrecht I-Sester, § 3 para 32.

extreme position by promoting the notion that he who is IFRS compliant is also compliant with Swiss commercial accounting rules. A number of voices in the doctrine do not promote the interconnection between the CO and IFRS, but do not exclude IFRS' influence on the CO.<sup>809</sup> IFRS cannot be applied without hesitation,<sup>810</sup> and this should be decided on a case-by-case basis. If the authors do not mention the connection to the recognised standards explicitly, they cite IFRS all the same (cf para 351 et seq).<sup>811</sup>

## D. Comparison 'oCO-CO-IFRS'

- 247 On 1<sup>st</sup> January 2013, the legislative power enacted the revised Swiss commercial accounting law.<sup>812</sup> The term 'old CO' (oCO) is used to define the applicable norms before the revision. The revision<sup>813</sup> of the Swiss commercial accounting rules changed the set of norms in Swiss commercial accounting law. The revision was influenced by IFRS.<sup>814</sup> The following sections will outline this transition. However, it is not clear whether IFRS' takeover means that the legislature wanted to refer to the whole context of a norm, or if they simply wanted to create new 'Helvetic' terms.<sup>815</sup>

## I. Art 962 CO

- 248 Article 962 CO<sup>816</sup> regulates the relationship between the CO and the recognised standards. They have a cumulative rather than an alternating relationship, meaning that, if the conditions in Article 962 CO are met, two reports must be prepared: one according to the CO and one according to a recognised standard.

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<sup>809</sup> Altorfer/Duss/Felber, veb.ch Praxiskommentar, Massgeblichkeit für die Steuerbilanz, para 65 et seq; Brendt, Das neue Rechnungslegungsrecht, p 144 et seq; Buchmann/Duss/ Handschin, p 832; Dell'Anna/De Haller/Schneider, EF 2015, p 619 et seq; Huber/Duvoisin, Bulletin for International Taxation February 2011, p 113 et seq; Glanz/Pfaff, veb.ch Praxiskommentar, Art 958d para 48; Glanz/Pfaff, StR 2011, p 470 et seq; Kocher, ASA 78, p 474; Mühlemann/Revaz, Tax News (Ernst & Young) März 2010, p 6; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 79 et seq; Rechsteiner/Scholl, p 422; Revaz/Bignens, ST 84/2010, p 418 et seq; Revaz/Schmid, p 531 et seq; Simonek, Unternehmenssteuerrecht, p 132 et seq.

<sup>810</sup> Rechsteiner/Scholl, p 422.

<sup>811</sup> Wirz, para 334.

<sup>812</sup> Art 957 et seq CO.

<sup>813</sup> Cf Botschaft 2007, p 1589 et seq.

<sup>814</sup> Böckli, Aktienrecht, § 8 paras 84 et seq, 342; Oswald, Jusletter 22. September 2014, para 22; Rechsteiner/Scholl, p 422.

<sup>815</sup> Cf Böckli, Aktienrecht, § 8 para 75; Oswald, Jusletter 22. September 2014, para 22.

<sup>816</sup> The English and German wording can be found in Note 2.

An entity must prepare a financial statement 'in accordance with a recognized financial reporting standard: companies whose equity securities are listed on a stock market, if the stock market so requires, cooperatives with a minimum of 2000 members, and foundations that are required by law to have an ordinary audit. The following may also request financial statements in accordance with a recognised standard: company members who represent at least 20 per cent of the basic capital, 10 per cent of cooperative members or 20 per cent of the members of an association, any company member or any member subject to personal liability or a duty to pay in further capital' (Article 962 Para 1 CO).

The predraft of Article 962 para 1 CO foresaw the possibility of reporting 249 according to a recognised standard only in addition to the CO report.<sup>817</sup> The draft, on the other hand, went a step further and permitted (as a right to choose) reporting only according to a recognised standard.<sup>818</sup> Thus, an entity could choose, for example, to report only according to IFRS. The reason for this was to save costs.<sup>819</sup> In the parliamentary process, this possibility was dismissed after the vote on the proposal by parliamentary member Hans Kaufmann (NR SVP ZH).<sup>820</sup> The current version corresponds with the predraft (Article 962 Para 1 OR). This possibility was cancelled due to the doctrine's criticism, which points out the missing norm explaining the relationship between IFRS and the protection of creditors and capital.<sup>821</sup> In Germany, in 1988,<sup>822</sup> a modification was introduced to permit entities depending on foreign money to report only according to recognised standards.<sup>823</sup>

## II. Effects on Company Law

The implementation of the possibility to report only according to a recognised 250 standard can lead to difficulties in the application of company and tax law. In the application of IFRS, the legislature gives up the protection of the entity's capital. The protection of the entity's capital relies on the requirements of corporate and accounting law.<sup>824</sup>

<sup>817</sup> Art 962 para 1 VE-OR 2005; cf Handschin, Rechnungslegung, para 33 et seq; CHK-Lipp, Art 962 para 7; Zihler, veb.ch Praxiskommentar, Art 962 para 2 et seq; Wandeler/Suter, ST 2008, p 118 et seq.

<sup>818</sup> Art 962 para 1 E-OR 2008.

<sup>819</sup> Botschaft 2007, p 1719; CHK-Lipp, Art 962 para 7.

<sup>820</sup> The proposal can be found in its German version in INTERN; cf Zihler, ST 2011b, p 809.

<sup>821</sup> Schüle, Steuerneutral, p 48; cf Simon, paras 363 et seq

<sup>822</sup> On 20<sup>th</sup> April 1998 the Kapitalaufnahmeerleichterungsgesetz was introduced; cf § 292a HGB; cf also Art 2 and 5 IAS-directive Nr 1606/2002.

<sup>823</sup> Hohl, Private Standardsetzung, p 136.

<sup>824</sup> Kleibold, Ausschüttungsregulierung, p 6 et seq.

- 251 The change may also lead to a different base for the petition of bankruptcy. Art 725 para 2 CO<sup>825</sup> states that an entity shall file for bankruptcy if the interim balance shows overindebtedness (*Überschuldung*).<sup>826</sup> The base for this report would have changed from the CO to a recognised standard, such as IFRS. Wirz<sup>827</sup> showed in his work that the basis for Art 725 para 2 CO can be a recognised standard.
- 252 The entity's equity can be valued higher under the recognised standards in comparison to the CO (cf para 361 et seq).<sup>828</sup> The reasons for this lie in the different valuation of assets (cf para 373 et seq), provisions (cf para 399 et seq), and not-yet-realised profits (cf para 312).<sup>829</sup> Thus, overindebtedness can be present according to the CO, although the figures under the recognised standards do not show this situation.<sup>830</sup> Another problem is the possibility to appreciate an asset under the recognised standards. This option of appreciating assets gives the board of directors the opportunity to choose whether to file for bankruptcy.<sup>831</sup> By appreciating assets, the board of directors can postpone filing for bankruptcy. However, this possibility also exists under the CO. Art 670 CO<sup>832</sup> gives the option to appreciate certain assets.

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<sup>825</sup> For the wording cf the note 1.

<sup>826</sup> Cf Handschin/Jucker, *Vermutung der Überschuldung*, p 190 et seq; Jucker, *Beweisvereitelung*, para 7 et seq; Wirz, para 222 et seq.

<sup>827</sup> Wirz, para 244 et seq.

<sup>828</sup> CHK-Lipp, Art 962 para 8; Zihler, ST 2011a, p 44.

<sup>829</sup> Zihler, ST 2011a, p 44.

<sup>830</sup> AB 2010 N 1905; CHK-Lipp, Art 962 para 8; Zihler, ST 2011a, p 44.

<sup>831</sup> Handschin, *Rechnungslegung*, para 34.

<sup>832</sup> English version: 'Where as a result of a net loss for the year the company's capital cover falls below one-half of the share capital and the legal reserves, in order to rectify the negative net worth, the company may revalue land, buildings or equity participations whose real value has risen above their value stated at cost up to a maximum equal to one-half of the share capital and the legal reserves. The revaluation amount is stated separately as a revaluation reserve. 2 The revaluation is permitted only where a licensed auditor issues written confirmation for the attention of the general meeting that the revaluation complies with the relevant statutory provisions'; authoritative German version: *1 Ist die Hälfte des Aktienkapitals und der gesetzlichen Reserven infolge eines Bilanzverlustes nicht mehr gedeckt, so dürfen zur Beseitigung der Unterbilanz Grundstücke oder Beteiligungen, deren wirklicher Wert über die Anschaffungs- oder Herstellungskosten gestiegen ist, bis höchstens zu diesem Wert aufgewertet werden. Der Aufwertungsbetrag ist gesondert als Aufwertungsreserve auszuweisen. 2 Die Aufwertung ist nur zulässig, wenn ein zugelassener Revisor zuhanden der Generalversammlung schriftlich bestätigt, dass die gesetzlichen Bestimmungen eingehalten sind*'.

Like the CO,<sup>833</sup> IFRS<sup>834</sup> oblige management to control the financial situation 253 of an entity and to check whether it can be maintained as an going concern, but without the legal consequence of having to file for bankruptcy.

There are two possibilities to protect shareholders and stakeholders from 254 losses. States can rely on insolvency as a reason for bankruptcy and/or on overindebtedness. In other words, if the debts are no longer covered by the equity (= share capital + reserves + profit or loss), the entity must file for bankruptcy. If a state relies only on insolvency, the valuation of assets and liabilities does not matter for this declaration; however, for states based on bankruptcy, differences in the valuation of assets and liabilities are of significance.

Differences in the valuation can have the following effects. A prudent 255 financial report undervalues assets and overvalues liabilities.<sup>835</sup> Therefore, a prudent financial report will sooner fulfil the requirements for an entity to file for bankruptcy than a report according to the true and fair view. It is important to note, however, that a report according to the CO is not necessarily more prudent than one according to recognised standards (cf para 303 et seq).

Swiss law uses a system that combines the two variations to protect 256 shareholders and stakeholders from losses. The CO demands predicted solvency for twelve months (Art 958a para 2 CO<sup>836</sup>) and a test of overindebtedness (Art 725 para 2 CO). Both instruments define the date, which triggers the obligation to test the going concern of an entity (cf para 352). If the interim report shows that 'the company's creditors are not covered, whether the assets are appraised at going concern or realisable values (or liquidation values), the board of directors must notify the court unless certain company creditors subordinate their claims to those of all other company creditors to the extent of the capital deficit'.<sup>837</sup>

<sup>833</sup> Art 725 para 2, 958a para 2 CO.

<sup>834</sup> IAS 1.23; cf Kleibold, Ausschüttungsregulierung, p 191.

<sup>835</sup> BK-Käfer, Art 959 para 428; Bühlmann, Stille Reserven, p 71; von der Crone, Aktienrecht, § 7 para 70.

<sup>836</sup> English version: 'If it is intended or probably inevitable that all or some activities will cease in the next twelve months from the balance sheet date, then the financial reports for the relevant parts of undertaking must be based on realisable values. Provisions must be made for expenditures associated with ceasing activities'; authoritative German version: '*Ist die Einstellung der Tätigkeit oder von Teilen davon in den nächsten zwölf Monaten ab Bilanzstichtag beabsichtigt oder voraussichtlich nicht abwendbar, so sind der Rechnungslegung für die betreffenden Unternehmensteile Veräußerungswerte zugrunde zu legen. Für die mit der Einstellung verbundenen Aufwendungen sind Rückstellungen zu bilden*'.

<sup>837</sup> Art 725 para 2 CO.

### III. Effects on Taxation

- 257 The novelty of reporting only according to a recognised standard could have had impacts on the taxation due to the authoritative principle (cf para 54 et seq). First, the change influences the dissolution of hidden reserves, which are allowed under the CO to a greater extent than under IFRS. Therefore, the draft foresaw the possibility of phasing the taxation of hidden reserves in three years.<sup>838</sup> Article 207b dDBG<sup>839</sup> states transitional provisions in order to regulate the taxation of the conversion from the CO to a recognised standard.<sup>840</sup> For Giger,<sup>841</sup> this is a move away from the authoritative principle (cf para 54 et seq) and splits the statutory from the tax report.
- 258 Second, the application of recognised standards as a tax base would have led to the following effects in future periods. The change would have led to an increasing tax burden during good years.<sup>842</sup> During bad years, the impairment regulations in the recognised standards would have led to a smaller profit, according to Böckli.<sup>843</sup> This would mean that the CO report would not be as prudent as the IFRS report. In cases in which the recognised standards lead to a prudent or even more prudent report, they should also experience application under the CO. Thus, the impairment regulations of the recognised standards shall be applied under the CO (cf para 402 et seq), meaning that there is no difference at all between the CO report and the report according to the recognised standards in this area.
- 259 Three issues can be made out.<sup>844</sup> The most significant problem, in my view, is that, with a report according to recognised standards as the tax base, states' incomes will be exposed to a private standard setter.<sup>845</sup> It is a constitutional problem if private standard setter's actions have an immediate influence on the amount of collected taxes. In the end, a private organisation will decide how much taxes a state could collect. This is a dangerous path.
- 260 The second problem concerns the entity's incentive. In addition, under the recognised standards as a tax base, the entity will have no incentive to present its numbers fairly. This may lead to tax-driven reports, which possibly neglect the concept of the true and fair view.<sup>846</sup> The application of the true and fair

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<sup>838</sup> Botschaft 2007, p 1592.

<sup>839</sup> DBG's draft.

<sup>840</sup> Cf Botschaft 2007, p 1740 et seq.

<sup>841</sup> Giger, ST 2009, p 325.

<sup>842</sup> Botschaft 2007, p 1719; Böckli, Aktienrecht, § 8 para 83.

<sup>843</sup> Böckli, Aktienrecht, § 8 para 86.

<sup>844</sup> Cf also Simon, para 413 et seq.

<sup>845</sup> Böckli, ST 2011, p 243; Neuhaus/Schneider, p 810; cf also Oswald, Jusletter 22. September 2014, para 45.

<sup>846</sup> Becker/Steinhoff, Conservative Accounting, p 2 et seq; Schildbach, ST 2004, p 164.

view to the tax base will lead to restrictions on the recognition of expenses and to an increase in income.<sup>847</sup> The legislature tried to avoid this effect and committed to tax neutrality (cf para 244).<sup>848</sup>

Third, the concept of the true and fair view leads to higher volatility for the income statement.<sup>849</sup> This has the effect of inflating earnings and equity in good years, with a rapid decline in bad years. Without hidden reserves to dampen this effect, the change of due taxes will be huge.<sup>850</sup> The appreciation may also lead to the taxation of added value, which has not yet been realised, and which collides with the realisation principle.<sup>851</sup> Thus, neither the entity nor the state has an interest in volatile taxes.

## E. Interim Conclusion

This chapter has analysed the different opinions on IFRS' influence on Swiss commercial accounting rules. The doctrine can be divided into two camps: conservatives and progressives. Although IFRS influenced the legislation (cf paras 239 et seq, 351 et seq), a part of the doctrine suggests that the influence stops there (cf para 243 et seq). The SFT used IFRS as an interpretation tool (cf para 241 et seq). Common ground can be found in the acknowledgement by a number of authors that the new CO has similarities to IFRS.<sup>852</sup> Opponents raise two concerns: IFRS lack democratic legitimacy and follow a completely different purpose to the true and fair view than the CO with the prudence principle. These concerns, however, exist not only in terms of IFRS but also appear in the analysis of Swiss GAAP FER (cf paras 245, 190 et seq).

The following conditions that IFRS must fulfil in order to serve as auxiliary means can be extracted: IFRS must not contradict the CO nor Swiss tax law, and they shall have a tax-neutral effect.<sup>853</sup> To meet this condition, all of the norms in the revised CO showing similarities to IFRS must be interpreted with the CO's

<sup>847</sup> Bockli, Rechnungslegung, para 37.

<sup>848</sup> Botschaft 2007, pp 1626, 1714 et seq; Bockli, Rechnungslegung, para 37; OFK-Dekker, Vorbem Art 957 et seq para 2; Giger, ST 2009, p 324; CHK-Lipp, Art 962 para 3; Zihler, veb.ch Praxiskommentar, Sicht des Gesetzgebers, para 34 et seq.

<sup>849</sup> Neuhaus/Schneider, p 810 et seq; Oswald, Jusletter 22<sup>nd</sup> September 2014, para 45.

<sup>850</sup> Neuhaus/Schneider, p 810 et seq.

<sup>851</sup> Handschin, Rechnungslegung, para 35.

<sup>852</sup> Bockli, Aktienrecht, § 8 para 41; Bockli, Rechnungslegung, para 38; Brendt, Das neue Rechnungslegungsrecht, p 155; Kleibold, Ausschüttungsregulierung, p 155; Neuhaus/Schneider, p 811; Riederer, Rückstellungen, para 47 et seq.

<sup>853</sup> Cf OFK-Dekker, Vorbem Art 957 et seq para 2; Giger, ST 2009, p 324; von der Crone, Aktienrecht, § 7 para 5; Neuhaus/Schneider, p 811; Zihler, veb.ch Praxiskommentar, Sicht des Gesetzgebers, para 34.

underlying principles (namely with the prudence principle).<sup>854</sup> Although the wording of the CO and IFRS might be similar, differences in their interpretations may occur.<sup>855</sup>

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<sup>854</sup> Neuhaus/Schneider, p 811.

<sup>855</sup> Neuhaus/Schneider, p 811.



## § 8 Informal Norms

The doctrine raises two main concerns regarding IFRS' influence on Swiss commercial accounting rules: lack of democratic legitimacy (cf para 264) and conflict with the prudence principle (cf para 303 et seq). The following chapters analyse both problems and present solutions. However, the arguments against the use of IFRS as an interpretation tool for Swiss law are only viable if they are presented for Swiss GAAP FER's impact on Swiss law as well. Some authors tend to favour Swiss GAAP FER over IFRS, but only bring forth arguments against the use of IFRS, which are also applicable for the use of Swiss GAAP FER. The same problems arise for both standards. If these problems cannot be solved, neither standard can be used in the interpretation of Swiss law. 264

The argument of missing democratic legitimacy will focus on two issues. 265 The first argument will create democratic legitimacy with the help of the legitimacy chain (cf para 293 et seq). Second, the permissibility of references to informal norms must be clarified. This is a general argument affecting every private norm with the quality of becoming an interpretation tool for formal law.

Specific issues arise when dealing with the regulation of financial reporting. 266 Here, the most basic material difference is whether or not a standard is prudent. The second step will compare the prudence principle with the fair presentation of IFRS (cf para 303 et seq). The chapter on interpretation is concerned with how the norms of the CO and IFRS must be interpreted (cf para 417 et seq). Interpretation is the key to preventing incompatibilities. The CO, as well as IFRS, must be interpreted. Here, empirical studies help to show the influence of the interpreter's cultural background on the interpretation of IFRS (cf para 484 et seq). Depending on the interpreter, IFRS may be interpreted prudently. This opens the door to the application of IFRS as an auxiliary means for the interpretation of the CO.

The informal norm came into existence with growing complexity and interconnectivity on a global level. States could not keep up with the demand of regulating technical sectors. This helps to explain 'why so much standards activity has been diverted into private institutions'.<sup>856</sup> The central point of this chapter is the permissibility of references in formal norms to informal norms (cf para 277 et seq). This chapter is not only relevant in connection with IFRS, 267

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<sup>856</sup> Abbott/Snidal, *International Standards and the Law*, p 116 et seq.

but also with regard to other informal norms influencing Swiss law, such as professional ethics (*Standesregeln*) for banks. The SFT used both as interpretation tools.<sup>857</sup>

## A. Informal Norms Defined

### I. Definition

- 268 Not every norm is of the same quality. Differences can be made based on the legal validity of norms. A norm can be legally binding or not. An informal norm is not legally binding.<sup>858</sup> At the same time, it cannot be mistaken as weak law.<sup>859</sup> It is an expression of private autonomy,<sup>860</sup> and it changes to a legally binding character when the quality of the norm changes (cf para 141 et seq). Hence, it becomes a part of formal law as soon as it is adopted in a treaty or when it emerges as part of customary law.<sup>861</sup> Informal norms help to resolve ambiguities in a treaty or fill in the gaps.<sup>862</sup> These are cases in which privately organised interests are implemented into the exercise of the state authority. Dederer<sup>863</sup> calls this ‘corporate state authority’ (*korporative Staatsgewalt*).

### II. Differentiation

- 269 In the terminology used in this work, informal norms are equal to soft law. Informal norms, as used here, must be understood as legally non-binding norms/law. Soft law is also legally non-binding,<sup>864</sup> and can be created by states

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<sup>857</sup> BGE 125 IV 139 et seq; cf to this decision Giger, Corporate Governance, p 79 et seq.

<sup>858</sup> SGHB Finanzmarktrecht I-Brändli, § 2 paras 8, 13; Charney, Commitment and Compliance, p 116; Flückiger, Sjö 2004, p 224 et seq; Nobel, SZW 2105, p 556; Shelton, Commitment and Compliance, p 6, 554; Thürer, Grundidee Gerechtigkeit, Band 2, p 159; Troxler, Jusletter 16<sup>th</sup> November 2015, para 2; Weber, SZW 2015, p 582; Wheatley, p 219.

<sup>859</sup> Teubner, Constitutional Fragments, p 47.

<sup>860</sup> Teubner, Constitutional Fragments, p 47; Wheatley, p 219.

<sup>861</sup> Shelton, Commitment and Compliance, p 554; Teubner, Constitutional Fragments, p 47; Wheatley, p 219.

<sup>862</sup> Shelton, Commitment and Compliance, p 10.

<sup>863</sup> Dederer, Korporative Staatsgewalt, p 25.

<sup>864</sup> SGHB Finanzmarktrecht I-Brändli, § 2 para 8; Charney, Commitment and Compliance, p 116; Flückiger, Sjö 2004, p 224 et seq; Nobel, SZW 2105, p 556; Shelton, Commitment and Compliance, p 6, 554; SGHB Finanzmarktrecht I-Peter/Neri-Castracane, § 6 para 23; Thürer, Grundidee Gerechtigkeit, Band 2, p 159; Troxler, Jusletter 16<sup>th</sup> November 2015, para 2; Weber, SZW 2015, p 582; Wheatley, p 219.

and/or privates in collaboration.<sup>865</sup> However, some authors<sup>866</sup> use the terms differently. Thus, only the term ‘informal norms’ is used.

Similar to ‘informal norm’ is the term ‘self-regulation’. This is best 270 explained by showing the differences to the legislation process in a state. Parliament has sovereign powers, so it issues norms from the top down in a vertical axis. Self-regulation, on the other hand, consists of equals creating norms for themselves. Hence, the concerned parties create their own rules.<sup>867</sup> Here, we have a horizontal axis.

Informal norms can be differentiated from other texts issued by privates, 271 such as expert reports (*Sachverständigengutachten*). In Germany, informal norms have the same rank as expert reports.<sup>868</sup> However in my view, informal norms should have a higher rank than expert reports due to the process (cf para 92 et seq) private norms often go through.<sup>869</sup> Informal norms are often put through a consultation process. The result is a norm supported by multiple professionals working in the same sector. This gives the norm a broad acceptance.<sup>870</sup> Informal norms can develop into formal norms (cf para 141 et seq).<sup>871</sup>

Thürer<sup>872</sup> distinguishes soft law from gentlemen’s agreements and codes of 272 conduct. Gentlemen’s agreements are legally non-binding contracts between two or more parties. The contracts are limited to the specific persons involved in the agreement. Soft law binds not the statesmen but their represented states. Codes of conduct are used in transnational business relations. Soft law differs from this by the fact that it is produced by subjects of international law.<sup>873</sup> The result is a ranking of international norms, which can be displayed in the form of a pyramid:<sup>874</sup> at the top is *ius cogens*, followed by international law, customary international law, soft law (informal norms), and other acts of standard setting.

The differentiation used here does not go that far. The term ‘informal norm’ 273 is used in a broader sense, capturing every norm that is not an element of formal

<sup>865</sup> Baltzer, *Zertifizierte Managementsysteme*, para 186.

<sup>866</sup> For example Thürer, *Grundidee Gerechtigkeit*, Band 2, p 159 et seq.

<sup>867</sup> Kunz, FS Böckli, p 476; Watter/Dubs, ST 2005, p 743.

<sup>868</sup> With further references Baltzer, *Zertifizierte Managementsysteme*, para 186.

<sup>869</sup> Cf Baltzer, *Zertifizierte Managementsysteme*, para 186.

<sup>870</sup> Cf Kunz, FS Böckli, p 481.

<sup>871</sup> SGHB *Finanzmarktrecht I*-Peter/Neri-Castracane, § 6 para 41 et seq.

<sup>872</sup> Thürer, *Grundidee Gerechtigkeit*, Band 2, p 162 et seq.

<sup>873</sup> Thürer, *Grundidee Gerechtigkeit*, Band 2, p 177.

<sup>874</sup> For the role of *ius cogens* cf Thürer, *Grundidee Gerechtigkeit*, Band 2, p 204 et seq, the rest can be found in Thürer, *Grundidee Gerechtigkeit*, Band 2, p 162 et seq; Tschannen, *Staatsrecht*, § 44 para 23 et seq.

law. The main doctrine<sup>875</sup> distinguishes norms issued by privates from norms set mainly by states, meaning that states dominate the norm-setting process. In both cases, the result is an informal norm in contrast to the traditional law making carried out by the states. However, one difference can be seen: only a legitimate body, such as the state's legislature, can set legally binding norms.<sup>876</sup>

## B. Informal Norms' Use

### I. In General

274 Often, self-regulation precedes national regulation. An international committee (eg Basel committee) issues norms (eg Basel III), which are later followed by domestic implementation (eg BankG; FinfraG; FIDLEG; FINIG; LiqV).<sup>877</sup> An informal norm is also used regularly by judges<sup>878</sup> to determine the extent of a duty of care in torts. In general, courts use self-regulation to represent the standard of industry practice to interpret domestic law.<sup>879</sup> The duty of care is measured by comparing the behaviour with the expected behaviour of the concerned sector. These expectations are codified in the form of self-regulation.<sup>880</sup> The accepted private norms generally need to be recognised by a larger number of parties concerned with the same matter.<sup>881</sup> Today, Swiss federal law refers to technical norms in 150 of its own laws.<sup>882</sup>

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<sup>875</sup> Andonova/Elsig, *Informal International Lawmaking*, p 63 et seq; cf for further differentiations Dann/von Engelhardt, *Informal International Lawmaking*, p 106 et seq; Pauwelyn, *Informal International Lawmaking*, p 125 et seq; Ruiter/Wessel, *Informal International Lawmaking*, p 162 et seq.

<sup>876</sup> I choose only this difference knowing of the more precise notions made by Pauwelyn, *Informal International Lawmaking*, p 132 et seq.

<sup>877</sup> Cf SGHB Finanzmarktrecht I-Brändli, § 2 para 29 et seq; Schreiber, *International Standards*, p 46.

<sup>878</sup> Instead of many cf BGer 4A\_321/2015 Consideration 2.2, for further reference Baltzer, *Zertifizierte Managementsysteme*, para 167.

<sup>879</sup> Cf Baltzer, *Zertifizierte Managementsysteme*, para 168; Muchlinski, *Global Law without a State*, p 84.

<sup>880</sup> Cf Baltzer, *Zertifizierte Managementsysteme*, para 168; Kunz, FS Böckli 2006, p 478 et seq; Mader, *LeGes 2006*, p 9.

<sup>881</sup> For further reference Giger, *Corporate Governance*, p 80.

<sup>882</sup> Bock, *ZfR Band 5*, p 22.

## II. Problems and Advantages with Informal Norms

The principle of legality upholds that a sovereign act must be based on a general abstract norm that is sufficiently precise,<sup>883</sup> and a responsible organ must issue the norm.<sup>884</sup> A norm is considered general abstract if it is aimed at an indefinite circle of addressees and relates to an indefinite number of concrete cases.<sup>885</sup> The SRO does not have to uphold democratic and fundamental principles in the development of a private norm. Thus, private norms lack the same degree of legitimacy.<sup>886</sup> There are also disadvantages,<sup>887</sup> one such being that an informal norm misses democratic legitimacy; without democratic legitimacy it is difficult to enforce the norm, this difficulty is accompanied by the danger of cartels. However, states began to declare informal norms as legally binding and thus are able to enforce them.<sup>888</sup> In these cases, democratic legitimacy can only be created by falling back on the legitimacy chain (cf para 293 et seq).

Informal norms bring the following advantages, in contrast to formal law:<sup>889</sup> individual needs are best served when the the concerned party creates its own norms; standard setters are themselves experts in the concerned field; informal norms are not bound to the borders of a state; the standard can be improved quickly, creating flexibility;<sup>890</sup> acceptance grows with the participation of the parties concerned.

## III. Permissibility of References to Informal Norms

Normally, the legislature must itself issue laws. However, it can refer to other norms if certain conditions are fulfilled. This section explains the expected

<sup>883</sup> Cf for the comprehensible norm Höfler, ZfR Band 7, p 143 et seq.

<sup>884</sup> Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 589; cf Keller, Runde Tische, pp 27, 161, 239 et seq.

<sup>885</sup> Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 589.

<sup>886</sup> Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 901; SGHB Finanzmarktrecht I-Brändli, § 2 para 63 et seq.

<sup>887</sup> Watter/Dubs, ST 2005, p 748; cf Hettich, Kooperative Risikoversorge, para 610 et seq; Schreiber, International Standards, p 150.

<sup>888</sup> SGHB Finanzmarktrecht I-Winzeler, § 7 para 12.

<sup>889</sup> Watter/Dubs, ST 2005, p 747 et seq; cf also Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 900 et seq; Gornitzka/Holst, Politics and Governance, p 2; Hettich, Kooperative Risikoversorge, para 598 et seq; Keller, Runde Tische, p 8 et seq; Kunz, FS Böckli, p 478 et seq; Mader, LeGes 2006, p 9.

<sup>890</sup> Brunner, Technische Normen, p 93; Hettich, Kooperative Risikoversorge, para 550; Troxler, Jusletter 16. November 2015, para 9; cf SGHB Finanzmarktrecht I-Brändli, § 2 para 27.

conditions for references to informal norms and then applies them to the use of IFRS (cf para 417 et seq).

## 1. Conditions

- 278 The question is, under which conditions is the state permitted to refer to informal norms? References to informal norms take different forms (cf para 152 et seq). Dynamic references lead to more difficulties than static references. With static references, the legislative body knows what exactly it is referencing. The referenced source can change, but the law will not change with it. This is not the case with dynamic references. If the referenced source changes in a dynamic reference, the law will automatically change with it. This is also why the SFT<sup>891</sup> stated that *in dubio* the legislature wanted to create a static reference.<sup>892</sup> Thus, authorities created a static reference, rather than a dynamic reference, in case of doubt because authorities only within their competences.<sup>893</sup> Although dynamic references have legitimacy issues, they should be allowed for reasons of practicability.<sup>894</sup> A dynamic reference to a certain norm is similar to choosing an open wording in the legislation process to ensure an interpretation is adaptable to the ever-changing environment (cf paras 295, 500). In addition, the federal constitution allows private organisations to issue public law.<sup>895</sup> The state gives the framework and the privates put it into concrete terms.<sup>896</sup>
- 279 The conditions for the permissibility of references to informal norms are not the same on every legal level. The following cascade shows the permissibility of dynamic references to informal norms.<sup>897</sup> (1) If the norm is important, dynamic references to informal norms are not allowed (falling under Art 164 BV). The following criteria lead to the assumption of an important norm:<sup>898</sup> degree of interference with fundamental rights; dimension of the scope of addressees and regulated content; relevance of the norm for the political system; financial

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<sup>891</sup> BGE 136 I 316 et seq.

<sup>892</sup> BGE 136 I 316, Consideration 2.4.1; Uhlmann, LeGes 2013, p 94; Uhlmann/Gili, ZfR Band 5, p 10.

<sup>893</sup> BGE 136 I 316, Consideration 2.4.1; Uhlmann/Gili, ZfR Band 5, p 10.

<sup>894</sup> Brunner, Technische Normen, p 119 et seq; cf Schreiber, International Standards, p 159 et seq.

<sup>895</sup> Häfelin/Haller/Keller/Thurnherr, Schweizerisches Bundesstaatsrecht, para 1890.

<sup>896</sup> Häfelin/Haller/Keller/Thurnherr, Schweizerisches Bundesstaatsrecht, para 1889.

<sup>897</sup> BGE 136 I 316, Consideration 2.4.1; Uhlmann/Gili, ZfR Band 5, p 8 et seq; cf also Häfelin/Haller/Keller/Thurnherr, Schweizerisches Bundesstaatsrecht, para 1872, 1877; Mächler, ZfR Band 5, p 114.

<sup>898</sup> Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 595; Köbrich, LeGes 2014, p 60; Müller/Uhlmann, Rechtssetzungslehre, para 489 et seq.

consequences; and degree of acceptance of the targeted group. (2) For less important norms, the constitution has to allow the involvement of privates and name the law that refers to informal norms. (3) Dynamic references are permitted if norms of technical quality could have been subject of an enforcement ordinance (*Vollziehungsverordnung*). The classification is important because authorities must base decrees (*Verfügungen*) on legal principles and not on administrative regulation (*Verwaltungsverordnung*).<sup>899</sup>

In one case,<sup>900</sup> the SFT concluded that the delegation of legislative power for a decree (*gesetzesvertretende Verordnung*) is only permissible if the constitution sees the privates as acceptable standard setters.<sup>901</sup> In cases in which norms that belong to an enforcement ordinance are delegated (*Vollziehungsverordnung*), official tasks are delegated to privates.<sup>902</sup> 280

The legislature can delegate legislative powers to privates.<sup>903</sup> The SFT only allows private regulation as an implementation provision (*Vollzugsvorschriften*).<sup>904</sup> 281 According to Uhlmann/Fleischmann,<sup>905</sup> implementation provisions refer to technical enforcement ordinance (*Vollziehungsverordnungen*), or perhaps only the equivalent of administrative regulations (*Verwaltungsverordnungen*).<sup>906</sup>

The delegation of enforcement tasks (*Vollzugsaufgaben*) to privates requires a legal basis. A basis in a directive is not enough.<sup>907</sup> The question is, whether the references in the CO to the recognised standards fulfil this requirement. The different standards are not mentioned in the CO; only 'recognized standards' are mentioned as an umbrella term. Which standards are recognised is answered in the VASR. This process was chosen because, in this way, the Federal Council can adjust the list of recognised standards to the circumstances. 282

<sup>899</sup> Uhlmann/Gili, ZfR Band 5, p 11; cf Köbrich, LeGes 2014, p 59 et seq.

<sup>900</sup> BGE 136 I 316 et seq.

<sup>901</sup> Uhlmann, LeGes 2013, p 94.

<sup>902</sup> Cf Art 178 para 3 BV; Uhlmann, LeGes 2013, p 94.

<sup>903</sup> Art 164 para 2, 178 para 3 BV; Keller, Runde Tische, p 6; Köbrich, LeGes 2014, p 59; Mader, LeGes 2006, p 10; Marti, ZBl 2000, p 566 et seq; Müller/Uhlmann, Rechtssetzungslehre, para 489 et seq; Rhinow/Schefer/Uebersax, Schweizerisches Verfassungsrecht, para 2739 et seq; Häfelin/Haller/Keller/Thurnherr, Schweizerisches Bundesstaatsrecht, para 1890.

<sup>904</sup> BGE 136 I 316, Consideration 2.4.1; 137 III 37, Consideration 2.2.1.

<sup>905</sup> Uhlmann/Fleischmann, ZfR Band 7, p 20.

<sup>906</sup> Cf SGHB Finanzmarktrecht I-Hettich, § 1 para 3; Köbrich, LeGes 2014, p 57 et seq; Uhlmann, LeGes 2013, p 89 et seq; Uhlmann/Gili, ZfR Band 5, p 7 et seq.

<sup>907</sup> Uhlmann, LeGes 2013, p 95.

## 2. IFRS

- 283 In this section, the previous explanations of IFRS are applied in consideration of Swiss commercial accounting. IFRS influence namely Swiss financial reporting, which is a legal sector demanding a high degree of technical knowledge.<sup>908</sup> In exactly these technical areas, the legislature can refer to informal norms, which are issued by experts.<sup>909</sup> References in Swiss law, mainly the CO and VASR, are therefore permitted. However, IFRS cannot go further than Swiss law permits.
- 284 The Federal Council determines which standards are recognised (*Bundesrat*; Art 962 para 962a para 5 CO).<sup>910</sup> The result can be found in the VASR.<sup>911</sup> According to Article 1 para 1 VASR, the recognised standards are the following: IFRS, IFRS for SMEs, Swiss GAAP FER, US GAAP,<sup>912</sup> IPSAS, and, for banks, the issued FINMA regulations (Art 2 para 1 VASR). The Federal Council could create the conditions that a standard must fulfil in order to achieve the label of recognised standard, but the Federal Council has not made use of this possibility, yet.<sup>913</sup> The recognised standards are generally characterised by greater detail and the fact that they are issued by a private organisation.<sup>914</sup> In addition, their application is mainly voluntary.<sup>915</sup>
- 285 The reference to the VASR does not mean that other organisations such as the SIX Exchange cannot restrict the application of certain standards.<sup>916</sup> For a while, the SIX Exchange excluded the application of Swiss GAAP FER from use as an international reporting standard (cf para 190 et seq).<sup>917</sup> In the domestic standard and the standard for real estate companies, the application of

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<sup>908</sup> Cf Brunner, Technische Normen, pp 4 et seq, 93; Müller, FS Richli, p 760; Schreiber, International Standards, p 166; Troxler, Jusletter 16<sup>th</sup> November 2015, para 9.

<sup>909</sup> Cf Brunner, Technische Normen, p 105 et seq; Hettich, Kooperative Risikoversorge, para 549; Müller/Uhlmann, Rechtssetzungslehre, para 369.

<sup>910</sup> Cf Wandeler/Suter, ST 2008, p 117.

<sup>911</sup> VASR, Verordnung über die anerkannten Standards zur Rechnungslegung, vom 21. November 2012, SR 221.432.

<sup>912</sup> US-GAAP are the sum of all US norms in financial reporting, but mainly the standards issued by the FASB (Financial Accounting Standards Board), Handschin, Rechnungslegung, Glossar: US-GAAP, p LXXXIII.

<sup>913</sup> HWP 2014, p 83.

<sup>914</sup> Wirz, para 168.

<sup>915</sup> Handschin, Rechnungslegung, Glossar: Anerkannte Standards zur Rechnungslegung, p LXIX.

<sup>916</sup> Erläuternder Bericht VASR, p 8.

<sup>917</sup> Art 6 SIX-RLR; cf HWP 2014, p 94; Behr/Leibfried, Rechnungslegung, p 117; Kleibold, Ausschüttungsregulierung, p 56 et seq; Leu/Erdt/Kiefer, ST 85 (2011), p 567 et seq; ZK-Jung, Vor Art 620–625 para 72.



Swiss GAAP FER is allowed.<sup>918</sup> Since the compliance costs with IFRS and US GAAP are growing, some entities have changed to Swiss GAAP FER.<sup>919</sup> After the 1<sup>st</sup> August 2015, the distinction made is between international and Swiss reporting.<sup>920</sup> Swatch and Bobst choose the latter.<sup>921</sup>

#### IV. Informal Norms as a Non-exclusive Offer for Interpretation

Judges can measure the fulfilment of a legal enforcement obligation with the compliance to private norms. This is also called 'acceptable means of compliance'.<sup>922</sup> Hence, the informal norm gives a non-exclusive offer for interpretation (*nicht exklusives Auslegungsangebot*; cf paras 242, 435).<sup>923</sup> The privates will uphold the private norms because they prove that the privates acted with due diligence.<sup>924</sup> It is important to note that international formal or informal norms shall not be used to undermine democratic principles.<sup>925</sup> In this way, the use of informal norms is limited to administrative regulations.<sup>926</sup>

#### V. Restrictions of Fundamental Rights through Private Standards

The doctrine<sup>927</sup> also considers the effects of private financial reporting standards on fundamental rights. Reporting according to recognised standards demands more disclosure.<sup>928</sup> Changes to the financial reporting method can also result in a reduction in the value of the entity. Property rights can only be violated when the change to a private standard attacks the existence of the property rights, but not concerning their value.<sup>929</sup> Interventions into fundamental rights are possible as long as they are justifiable.<sup>930</sup>

<sup>918</sup> Art 6 SIX-RLR; ZK-Jung, Vor Art 620–625 para 72; Jutzi, Unternehmenspublizität, para 468.

<sup>919</sup> Kleibold, Ausschüttungsregulierung, p 57.

<sup>920</sup> Majo, EF 2015, p 559.

<sup>921</sup> Majo, EF 2015, p 559.

<sup>922</sup> Cf Uhlmann, LeGes 2013, p 96.

<sup>923</sup> Uhlmann, LeGes 2013, p 96; cf Baltzer, Zertifizierte Managementsysteme, para 168.

<sup>924</sup> Uhlmann, LeGes 2013, p 96.

<sup>925</sup> Cf Thürer, Grundidee Gerechtigkeit, Band 2, p 210.

<sup>926</sup> Cf Uhlmann/Gili, ZfR Band 5, p 11; cf Köbrich, LeGes 2014, p 59 et seq.

<sup>927</sup> Cf for further reference Hettich, Kooperative Risikovorsorge, para 699; Hohl, Private Standardsetzung, p 148 et seq; cf in general Müller/Uhlmann, Rechtssetzungslehre, para 492.

<sup>928</sup> Hohl, Private Standardsetzung, p 149.

<sup>929</sup> Hohl, Private Standardsetzung, p 149.

<sup>930</sup> Hohl, Private Standardsetzung, p 150; cf Art 36 BV for Swiss law.

## VI. Ways of Implementation

- 288 Informal norms can be implemented into formal law in two ways: directly and indirectly. ‘The former means that the respective national regulations reflect or correspond with international standards in terms of content. The latter, in contrast, concerns references or links to international standards.’<sup>931</sup>
- 289 References in formal laws to informal laws lack the requirement of legal clarity and certainty.<sup>932</sup> Three problems are associated with references.<sup>933</sup> First, in general, formal laws should be understandable on their own. With the understandability of a norm comes also the principle of publicity, meaning that every formal norm should be accessible. This is not always the case with international standards. Second, some formal references do not specify exactly which standards are meant. In financial reporting, the references to recognised standards are clear through the VASR (cf para 152 et seq), but not with broader references to the recognised financial reporting principles. Third, the references do not always declare if they are meant to be dynamic or static. In financial reporting, we find examples of both (cf para 152 et seq).

## VII. Examples

- 290 As in other legislatures, Swiss legislature is influenced in the norm-setting process by foreign laws and norms issued by privates (cf also para 183 et seq). However, before implementing an idea, one must compare the different principles underlying a codex. If they are comparable principles found in other norms, only then can they be applied in Swiss law.<sup>934</sup>
- 291 FINMA-RS are circular letters and are issued by FINMA. They are considered to be part of the regulation for financial institutions.<sup>935</sup> The question is, how can FINMA-RS be qualified? In comparison to FINMA-RS, BankV is easy to qualify. It is a dependent (*unselbständige*)<sup>936</sup> legislative

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<sup>931</sup> Marti, ZBl 2000, p 566 et seq; Troxler, Jusletter 16<sup>th</sup> November 2015, para 8; cf for a detailed differentiation Mader, LeGes 2006, p 10 et seq.

<sup>932</sup> Troxler, Jusletter 16<sup>th</sup> November 2015, para 19.

<sup>933</sup> Troxler, Jusletter 16<sup>th</sup> November 2015, para 19.

<sup>934</sup> Cf Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 31.

<sup>935</sup> FINMA-RS 15/1, para 2; Art 7 para 1 lit b FINMAG: *Die FINMA reguliert durch Rundschreiben über die Anwendung der Finanzmarktgesetzgebung*; for FINMA’s regulation cf also Kilgus, Expertengutachten, para 38 et seq.

<sup>936</sup> Definition: ‘*Unselbständige Verordnungen beruhen auf einer Ermächtigung zur Rechtssetzung in einem Gesetz.*’ Häfelin/Müller/Uhlmann, Allgemeines Verwaltungsrecht, para 110; Tschannen, Staatsrecht, § 46 para 14 et seq.

(*Rechts-*)<sup>937</sup> and enforcement directive (*Vollziehungsverordnung*).<sup>938</sup> With FINMA-RS, FINMA presents its interpretation of the specific laws and directives. This creates legal certainty and equal treatment.<sup>939</sup> FINMA-RS can only state how they interpret the specific laws and directives; they cannot create new duties, except when there is a legal basis (Art 7 para 1 lit a FINMAG).<sup>940</sup> Only legislature is able to impose new duties (cf para 275).

The following articles are mentioned as a legal basis: Art 7 para 1 lit b 292 FINMAG; Art 6 et seq BankG (new Art 60 et seq E-FINIG); Art 25 et seq BankV; Art 16 BEHG; Art 29 BEHV. These articles show the relevance but not the legal status *per se*. FINMA-RS do not have the rank of law, nor that of a directive; rather, they can be seen as an administrative regulation.<sup>941</sup> FINMA-RS, therefore, cannot create new obligations for the supervised,<sup>942</sup> though they have a factual binding effect (cf para 10 et seq) because the authorities always rely on the expertise of the previous instance.<sup>943</sup> Thus, FINMA-RS cannot contradict the CO. *E contrario*, FINMA-RS must promote a financial reporting system equivalent to the CO.<sup>944</sup>

<sup>937</sup> Definition: ‚*Rechtsverordnungen enthalten Rechtsnormen, die dem Einzelnen Rechte einräumen oder Pflichten auferlegen oder die Organisation und das Verfahren der Behörden regeln.*‘ Häfelin/Müller/Uhlmann, Allgemeines Verwaltungsrecht, para 78.

<sup>938</sup> Definition: ‚*Vollziehungsverordnungen führen die durch das Gesetz bereits begründeten Verpflichtungen und Berechtigungen näher aus, passen das schon im Gesetz Bestimmte den konkreten praktischen Gegebenheiten an.*‘ Häfelin/Müller/Uhlmann, Allgemeines Verwaltungsrecht, para 99; Tschannen, Staatsrecht, § 46 para 18 et seq.

<sup>939</sup> Kilgus, Expertengutachten, para 115.

<sup>940</sup> Art 182 para 2 BV; Kilgus, Expertengutachten, para 67 et seq.

<sup>941</sup> Urteil des BVGer from 26.11.2009, B-7764/2008, Consideration 8.4.1; BVGer from 27.01.2010, B-4409/2008, Consideration 7.2; ZK-Marti, Vorbem. Art 5 and 6 para 169.

<sup>942</sup> Weber, Informationsmissbrauch, p 27.

<sup>943</sup> Weber, Informationsmissbrauch, p 27 et seq; cf also Urteil des BVGer from 26.11.2009, B-7764/2008, Consideration 8.4.1; cf in general SGHB Finanzmarktrecht I-Bartholet, § 5 para 38; SGHB Finanzmarktrecht I-Brändli, § 2 para 13.

<sup>944</sup> Cf BankG Komm-Handschin, Art 6 paras 3, 5 et seq.

## C. Legitimacy Chain

- 293 The basis of the legitimacy chain is democratic legitimacy. Democracy means the ‘rule of the people,’<sup>945</sup> for the people by the people’.<sup>946</sup> Thürer<sup>947</sup> defines democracy as a form of ruling in which the members of a community are included in its political organisation based on equality. In our current system, democracy is ensured if the people are at the one end of the legitimacy chain and the act or the decision to be examined on the other end.<sup>948</sup> Concerning financial reporting, the chain comprises the following links: the people elect the parliamentarians (Art 149 para 2, Art 150 BV); Parliament issues the CO based on Art 64 BV; the CO speaks of recognised standards – these are defined by the Federal Council, which is elected by Parliament (Art 168 BV). Hence, the inclusion of experts is only democratically legitimised when the process of a decision can be traced back to the people.<sup>949</sup>
- 294 The control still should lay in the hands of the people. The argument of the legitimacy chain can be carried even further. In the application of the law, a judge can use private standards in its interpretation. In my view, the legitimacy chain is upheld as long as the people can modify private norms through their representatives. With this argumentation, a judge can also consider private norms to interpret formal laws. He functions as a representative of the people: at the federal level, the people elect Parliament, which elects judges; hence, the people are still in control. The judge can consider informal norms, but he must adapt them to domestic circumstances. The legitimacy chain can also be found in the management of public entities.<sup>950</sup> In such entities, all important decisions must be made by a democratically legitimised decision maker.<sup>951</sup>
- 295 The rule is that, the more important a decision, the higher the democratic legitimacy of the deciding organ must be (Art 164 para 1 BV; cf para 160 et seq).<sup>952</sup> In other words, as the decision moves up the legitimacy chain, its

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<sup>945</sup> The word originates from the Greek *demos*, meaning people, and *cracy* meaning rule; cf Holst, *What is Epistocracy?*, p 41 et seq.

<sup>946</sup> Van Reybrouck, *Against Elections*, p 24; cf for this difference also Rosanvallon, *Democratic Legitimacy*, p 226; was also the definition used by Abraham Lincoln, cf Uebersax, *FS Rhinow*, p 23.

<sup>947</sup> Thürer, *Grundidee Gerechtigkeit*, Band 1, p 42 et seq; cf also Thürer, *Grundidee Gerechtigkeit*, Band 2, p 243 et seq.

<sup>948</sup> Dederer, *Korporative Staatsgewalt*, p 130 et seq; Hohl, *Private Standardsetzung*, pp 66, 106; cf Wojcik, *IFRS als europäisches Recht*, p 165.

<sup>949</sup> Hohl, *Private Standardsetzung*, p 106.

<sup>950</sup> I thank Luca Kenel for this hint.

<sup>951</sup> Hänni/Stöckli, *Staat als Unternehmer*, § 4 para 1778 et seq.

<sup>952</sup> Cf Müller, *FS Richli*, p 758; Tschannen, *Staatsrecht*, § 45 para 23 et seq; Uhlmann/Fleischmann, *ZfR Band 7*, p 10 et seq.

importance increases. The most significant decision shall be in hands of the people. The more links between the people and the norm, the less democratically legitimate.<sup>953</sup> This weaker legitimacy can be defended in cases in which the whole process becomes more efficient and flexible.<sup>954</sup>

This means that, when applied to the recognised standards, the effect of the reference in a broader sense to the recognised standards should result in efficiency and flexibility. As long as the legitimacy chain is not broken, the use of dynamical references is allowed because the people can still intervene through their representatives by restricting or deleting the reference. The resulting question is whether the sole possibility of intervention is enough. In my view, the argument of the unbroken legitimacy chain in the case of recognised standards is upheld. The Federal Council has the opportunity to delist a standard if they find that it no longer fits (Art 962a para 5 CO).

From the explanations concerning democratic legitimacy, the following can be said. For democratic legitimacy, it is enough to ensure a continuous legitimacy chain, with the people at one end and the concerned norm at the other. All norms that are created outside the legitimacy chain cannot be legitimate law.<sup>955</sup> We start with IFRS and trace the legitimacy chain back to the people. The Federal Council chooses IFRS as recognised standards (Art 962a para 5 CO). The Federal Council is elected by Parliament (Art 168 BV). The people elect Parliament (Art 149 et seq BV). As a result, IFRS has an unbroken link back to the Swiss people.

However, democracy means more than just checking each link of the legitimacy chain to see if it is not broken.<sup>956</sup> The concept of the legitimacy chain is based on the idea that citizens are only voters, but the people are more than that. Representative democracy demands the election of representatives, as well as the representation of the people's will in parliamentary decision making.<sup>957</sup>

## D. Interim Conclusion

Authorities with legislative power issue formal norms. Informal norms are norms set by non-state actors, and are used to harmonise rules on an international level (cf para 30 et seq). This is achieved by the creation of a set of norms, which states can introduce into their domestic legal systems.

<sup>953</sup> Wojcik, IFRS als europäisches Recht, p 165.

<sup>954</sup> Wojcik, IFRS als europäisches Recht, p 165.

<sup>955</sup> Cf Schepel, Informal International Lawmaking, p 366.

<sup>956</sup> With further references Pünder, Representative Demokratie in der Krise?, p 197 et seq.

<sup>957</sup> Pünder, Representative Demokratie in der Krise?, p 199.

However, this process is not always carried out voluntarily. The process allows states to adopt norms into their domestic legal system and adapt them to their circumstances. States sometimes go further than the private standard setter wished or demanded. In these cases, the term ‘Swiss finish’ is used in Switzerland.

300 ‘Informal international law-making is here to stay.’<sup>958</sup> Informal norms are a source of inspiration for legislation and interpretation. Problems arise when they encounter formal law, either through a reference in a broader sense (cf para 152 et seq) or as an interpretation tool (cf para 417 et seq). The main question is the permissibility of the use of informal norms (cf para 277 et seq). The same holds up for IFRS in terms of their influence on the CO. Dynamic references are only allowed if they are norms of technical quality and could have been the object of an enforcement ordinance (*Vollziehungsverordnung*). In the other cases, dynamic references are permitted if they have a constitutional basis and are not important (cf para 278 et seq).

301 If the norm is important, dynamic references are allowed (falling under Art 164 BV). The following criteria lead to the assumption of an important norm:<sup>959</sup> (1) degree of interference with fundamental rights, dimension of the scope of addressees and regulated content, relevance of the norm for the political system, financial consequences, and degree of acceptance of the targeted group; (2) for less important norms, the constitution has to allow the involvement of privates and name the law that refers to informal norms; (3) dynamic references are permitted if norms of technical quality could have been the object of an enforcement ordinance (*Vollziehungsverordnung*).

302 With the tool of the legitimacy chain a certain act or decision can be tested. If there is an unbroken chain between the tested act and the people, the act is democratically legitimate. It was shown, that this is the case for recognised standards. The essential step is here the Federal Tribunal’s ability to delist for example the IFRS from the list of recognised standards. That way a democratically legitimized authority has the power to cut of the ties with the standard as soon as it is deemed necessary.

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<sup>958</sup> Pauwelyn, *Informal International Lawmaking*, p 14.

<sup>959</sup> Bundesamt für Justiz, *Gesetzgebungsleitfaden* 2007, para 595; Köbrich, *LeGes* 2014, p 60; Müller/Uhlmann, *Rechtssetzungslehre*, para 489 et seq.

## § 9 Prudence in Conflict with Fair Presentation

Each accounting standard developed its own philosophy with its own principles. 303  
The adoption of a foreign norm is only possible if the underlying principles conform with each other.<sup>960</sup> This is where the main argument against the influence of IFRS on Swiss law comes into play: fair presentation is not prudent enough for the CO.<sup>961</sup> The concept of prudence and fair presentation are supposedly totally different. This leads to the following conclusion: if IFRS are as prudent or more prudent than the CO, they can be used as an interpretation tool; however, if they are less prudent, they cannot be applied.<sup>962</sup>

This chapter elaborates the differences and the similarities between the CO 304 and IFRS. The question is whether or not they overlap, and, if they do, where exactly the intersection lies.<sup>963</sup> My structure begins with a definition of the prudence principle (cf para 307 et seq) and its limits (cf para 313 et seq). Then, the prudence principle is compared with fair presentation (cf para 320). Subsequently, the effects of the prudence principle are presented with an explanation of its impact on hidden reserves in the different regulations (cf para 330 et seq). Finally, the prudence principle is explained from the addressees' point of view (cf para 339 et seq).

The question is whether it is possible to report according to DAS and IFRS 305 in the same financial report. In other words, can both coexist in the same financial report?<sup>964</sup> The main difference is found in the accounting principles. While Swiss DAS has a prudent approach,<sup>965</sup> IFRS<sup>966</sup> aim to provide a fair presentation. Swiss DAS promotes the prudent financial reporting of assets and liabilities, meaning assets are mostly undervalued and liabilities overvalued (= imparity principle = *Imparitätsprinzip*; cf para 312). This process results in

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<sup>960</sup> Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 31.

<sup>961</sup> Cf Böckli, Rechnungslegung, para 168.

<sup>962</sup> Cf Handschin, Rechnungslegung, paras 346 et seq, 620, 774b, 812a; Riederer, ex ante 2016, p 14.

<sup>963</sup> Cf for a graphic INTERN; This intersection is also of François Schmid's main interest. He tries to create a scheme with which the preparer complies with the CO and IFRS at the same time, cf <https://ifrs.ius.unibas.ch/en/23-2/dual-standard-accounting/> (accessed on 16.08.17).

<sup>964</sup> Schmid gives a response to this question in his thesis, cf <https://ifrs.ius.unibas.ch/en/23-2/dual-standard-accounting/> (accessed on 16.08.17).

<sup>965</sup> Art 958c para 1 fig 5 CO.

<sup>966</sup> IAS 1.13.

hidden reserves. IFRS, on the other hand, aim to give to the reader a fair presentation.<sup>967</sup> This fundamental difference cannot be easily bypassed. However, IFRS foresee different options to report certain items. For example, ‘an entity shall choose either the cost model [...] or the revaluation model [...]’.<sup>968</sup>

## A. The Prudence Principle

- 306 Some authors see the central criterion of the CO’s financial reporting in the prudence principle.<sup>969</sup> It still is highly relevant in Swiss accounting.<sup>970</sup> Nonetheless, the Federal Council proposed the removal of the principle from the list of recognised financial reporting principles (Art 958c para 1 CO).<sup>971</sup> Swiss Parliament did not favour this idea and relisted the prudence principle in the recognised principles of financial reporting.<sup>972</sup> Some voices in the doctrine<sup>973</sup> see this step as a commitment from the legislature to the strict separation of the CO and IFRS. Although the legislature expects a reliable presentation, it still allows the entity to present the financial status in a worse state than it is.<sup>974</sup> If only the prudence principle is used, the financial report will not fulfil the purpose of showing the transparent financial status of an entity (Art 959 para 1 CO).<sup>975</sup>

## I. Definition

- 307 Financial reporting is prudent if the economic value of an entity’s equity is higher than its book value.<sup>976</sup> Thus, the entity shall not present a financial status that is too optimistic. The prudence principle expects that the economic lifetime is not too long, the impairment not too scarce, and the risks are not reported too low.<sup>977</sup> According to the prudence principle, chances must be carefully

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<sup>967</sup> IAS 1.15 et seq.

<sup>968</sup> IAS 16.29.

<sup>969</sup> In the opinion of CHK-Lipp, Art 958c para 29; cf Böckli, Rechnungslegung, para 168; Kleibold, Ausschüttungsregulierung, p 43.

<sup>970</sup> HWP 2014, p 20.

<sup>971</sup> Botschaft 2007, pp 1701, 1710; Böckli, Rechnungslegung, para 168.

<sup>972</sup> Art 958c para 1 fig 5 CO.

<sup>973</sup> Neuhaus/Schneider, p 810 et seq.

<sup>974</sup> Behr, Stille Reserven, p 606; Handschin, Rechnungslegung, paras 295 et seq, 343 et seq.

<sup>975</sup> Brendt, Das neue Rechnungslegungsrecht, p 154 et seq.

<sup>976</sup> Barker, Accounting and Business Research 2015, p 518.

<sup>977</sup> Botschaft 2007, p 1710; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 960 para 27.



evaluated and risks shall be considered carefully.<sup>978</sup> Therefore, assets and income are reported lower and liabilities and expenses are reported higher.<sup>979</sup> This is an asymmetric procedure that is applied in Continental Europe.<sup>980</sup> Predictable risks have to be reported, even though they might not occur in the future.<sup>981</sup> Income can only be considered if it is realised before the period ends.<sup>982</sup>

One part of the doctrine uses the terms ‘prudence’ and ‘conservatism’ 308 interchangeably.<sup>983</sup> Barker<sup>984</sup> distinguishes between the two. He sees conservatism as a result of the book value being less than the economic value, and prudence as part of conservatism, which arises from a cautious response to uncertainty.<sup>985</sup> Conservatism refers ‘to any method of accounting that leads to book value being less than economic value, while “prudence” is a specific type of conservatism arising from a “cautious” response to uncertainty’.<sup>986</sup> According to this definition, the CO is both conservative and prudent. IFRS’ conceptual framework is also conservative.<sup>987</sup> Furthermore, not only is the framework of IFRS conservative, but IFRS as a whole can also appear conservative.<sup>988</sup> In the use of Barker’s definition, this means that reporting according to IFRS leads to book values that are lower than their economic value. The term ‘conservatism’ can only be defined in relation to a neutral position. This neutral position is occupied by the ‘economic value’.<sup>989</sup> In other words, if the carrying amount falls under the economic value, the entity has measured this asset conservatively. IFRS do not use the same benchmark as Barker; instead, they define their method as ‘a method of accounting that is a consistent application of the concepts and definitions in the framework’.<sup>990</sup>

<sup>978</sup> BK-Käfer, Art 959 para 428; Bühlmann, Stille Reserven, p 71.

<sup>979</sup> BK-Käfer, Art 959 para 428; Bühlmann, Stille Reserven, p 71; von der Crone, Aktienrecht, § 7 para 70.

<sup>980</sup> Barker, Accounting and Business Research 2015, p 518.

<sup>981</sup> Hessischer Rechnungshof, EPSAS Framework, para 14.

<sup>982</sup> Hessischer Rechnungshof, EPSAS Framework, para 14.

<sup>983</sup> Bischof/Daske, Endorsement, p 18; for further reference Thijssen/Iatridis, Conditional Conservatism, p 2.

<sup>984</sup> Barker, Accounting and Business Research 2015, p 515.

<sup>985</sup> Barker, Prudence, p 515.

<sup>986</sup> Barker, Prudence, p 515.

<sup>987</sup> Barker, Accounting and Business Research 2015, p 515.

<sup>988</sup> Barker, Accounting and Business Research 2015, p 521; cf Bermann/Knight, Financial Intelligence, p 30.

<sup>989</sup> Barker, Accounting and Business Research 2015, p 516.

<sup>990</sup> Barker, Accounting and Business Research 2015, p 520.

## II. The Prudence Principle as Valuation Principle or as Fundamental Maxim

309 The prudence principle can either be qualified as a valuation principle or as a fundamental maxim. A valuation principle is a principle concerning the estimation of an item, which must be reported. Applied to the prudence principle, the valuation principle results in the principle of imparity (cf para 312), the lowest value and the cost principle (cf para 310). In addition to the previous mentioned principles, the realisation principle (cf para 311) is also a part of the prudence principle.<sup>991</sup> The original idea in the revision was that the prudence principle shall only be applied as a valuation principle,<sup>992</sup> but Parliament reinserted it as a recognised financial reporting principle in the legislation process.<sup>993</sup> Behr<sup>994</sup> regrets this decision because of the wrong messages the relisting sends. The prudence principle shall not be seen as a fundamental principle, but rather as a principle of valuation.<sup>995</sup> A conflict exists between the purpose of a reliable view and a prudent presentation.<sup>996</sup> The more prudent a financial report, the less reliable it becomes for the user.

## III. Principle of the Lowest Value/Cost-Value-Principle/Ban of Appreciation

310 According to the principle of the lowest value (*Niederstwertprinzip*), current assets must be reduced on the possible lower net market value in the subsequent measurement.<sup>997</sup> In the initial recognition of assets, the value cannot be higher than the costs<sup>998</sup> (cost-value-principle; *Kostenwertprin-*

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<sup>991</sup> Böckli, Aktienrecht, § 8 para 122, 728 et seq; Boemle/Lutz, Jahresabschluss, p 131; Behr, Stille Reserven, p 608; OFK-Dekker, Art 958c para 16 et seq; Forstmoser/Meier-Hayoz/Nobel, § 51 para 43; Handschin, Rechnungslegung, para 347; Wirz, para 216 et seq.

<sup>992</sup> Botschaft 2007, pp 1701 et seq, 1710; cf Böckli, Aktienrecht, § 8 paras 98, 130 et seq; Böckli, Rechnungslegung, para 168.

<sup>993</sup> For further reference Behr, ST 2012, p 805.

<sup>994</sup> Behr, ST 2012, p 805.

<sup>995</sup> Brendt, Das neue Rechnungslegungsrecht, p 152.

<sup>996</sup> Handschin, Rechnungslegung, para 296 et seq; Brendt, Das neue Rechnungslegungsrecht, p 154 et seq.

<sup>997</sup> Behr/Leibfried, Rechnungslegung, p 189 et seq; Böckli, Aktienrecht, § 8 para 128; Böckli, Rechnungslegung, paras 188, 856; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 152; Handschin, Rechnungslegung, para 587; Madörin/Bertschinger, Accounting and Auditing in Switzerland, p 50; CHK-Lipp, Art 960c para 14; Kleibold, Ausschüttungsregulierung, p 154 et seq; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 54; Stoffel, Grundriss des Aktienrechts, para 1035; Wirz, para 217.

<sup>998</sup> *Anschaftungs- bzw. Herstellungskosten.*

*zip*).<sup>999</sup> Book value can only be raised if certain conditions are met (ban of appreciation; *Aufwertungsverbot*).<sup>1000</sup> However, according to Böckli,<sup>1001</sup> assets shall not be undervalued. Although this valuation would be prudent, it would violate the purpose of achieving a reliable view.

#### IV. Realisation Principle

The realisation principle states that the profits can only be reported in a period if they are realised on the balance date.<sup>1002</sup> Profit is realised when the entity has a fixed claim towards a third party.<sup>1003</sup> The realisation principle is breached by the possible application of the POC method (cf para 381).<sup>1004</sup> The breach can also be found in the ability to settle increases and decreases of single items between each other in the group valuation (cf para 315). 311

#### V. Imparity Principle

The imparity principle is the same as the asymmetric prudence principle, meaning that not-yet-realised profits cannot be reported, but expected risks shall be considered.<sup>1005</sup> In Swiss law, the underlying principle is prudence. Therefore, profits should be slightly undervalued and expenses to the same degree overvalued.<sup>1006</sup> This is also known as the principle of imparity, coming from the Latin word *impares*, meaning ‘not equal’. 312

<sup>999</sup> Böckli, Rechnungslegung, paras 187, 854 et seq; Böckli, Aktienrecht, § 8 para 127.

<sup>1000</sup> Böckli, Rechnungslegung, para 189, 857 et seq.

<sup>1001</sup> Böckli, Aktienrecht, § 8 para 126; cf also Kleibold, Ausschüttungsregulierung, p 48.

<sup>1002</sup> Behr/Leibfried, Rechnungslegung, pp 174, 190; Benz, SJZ 1999, p 543; Bühlmann, Stille Reserven, p 67; Böckli, Rechnungslegung, para 173; Brülisauer/Mühlemann, Art 58 para 50; Kleibold, Ausschüttungsregulierung, p 154; Madörin/Bertschinger, Accounting and auditing in Switzerland, p 49; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 51; CHK-Lipp, Art 958b para 10.

<sup>1003</sup> Böckli, Aktienrecht, § 8 para 124.

<sup>1004</sup> Kleibold, Ausschüttungsregulierung, p 115.

<sup>1005</sup> BGE 116 II 533, Consideration 2.a.dd; HWP 2014, p 36; Behr/Leibfried, Rechnungslegung, p 190; Benz, SJZ 1999, p 543; Böckli, Aktienrecht, § 8 para 122; Böckli, Rechnungslegung, paras 171, 174, 347 et seq; Boemle/Lutz, Jahresabschluss, pp 128 et seq and 130 et seq; Bühlmann, Stille Reserven, p 68; Brülisauer/Mühlemann, Art 58 para 48, OFK-Dekker, Art 958c para 16 et seq; Handschin, Rechnungslegung, Glossar: Imparitätsprinzip, p LXXVII; Handschin, Rechnungslegung, para 347; BK-Käfer, Art 960 para 77; CHK-Lipp, Art 958b para 13; Madörin/Bertschinger, Accounting and Auditing in Switzerland, p 49; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 52; Stoffel, Grundriss des Aktienrechts, para 1034; Wirz, para 216.

<sup>1006</sup> Handschin, Rechnungslegung, para 347 et seq.

## VI. Limits of the Prudence Principle

- 313 The prudence principle has its limits.<sup>1007</sup> It is not necessary, nor demanded, to base the valuation on a worst-case scenario, which is highly unlikely.<sup>1008</sup> The prudence principle also has significant effects on taxation.<sup>1009</sup> Thus, tax authorities will keep entities in check by not allowing them to create too many hidden reserves. By focusing on objective experience values, arbitrary hidden reserves can be avoided.<sup>1010</sup>

## VII. The CO: More Intransparent than Prudent?

- 314 As an explanation has been given for a prudent financial report, the CO must be qualified. In addition, a second qualifying character can be added, namely transparency. The question is whether the CO is qualified correctly as prudent or whether it be more accurate to qualify it as intransparent. The prudence principle gives the management board discretionary powers (*Ermessensspielräume*).<sup>1011</sup> The legislature's purpose however was to create a more transparent law without affecting taxation.<sup>1012</sup> Nevertheless, the new law still cannot be described as transparent.<sup>1013</sup> Even the legislature recognised that it had missed the target of transparency, and it required entities to report according to recognised standards in addition to the statutory report.<sup>1014</sup>
- 315 Handschin<sup>1015</sup> describes the CO not as prudent, but rather as intransparent; although transparency is a self-proclaimed important purpose of Swiss financial reporting.<sup>1016</sup> Many cases can be listed in which the recognised standards are more prudent than the CO. For example, the group valuation (*Gruppenbewertung*), where, under the CO,<sup>1017</sup> it is possible to offset losses

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<sup>1007</sup> Boemle/Lutz, Jahresabschluss, p 138; Brendt, Das neue Rechnungslegungsrecht, p 153.

<sup>1008</sup> Brendt, Das neue Rechnungslegungsrecht, p 153; Handschin, Rechnungslegung, para 343; CHK-Lipp, Art 958c para 31; cf HWP 2014, pp 38, 58.

<sup>1009</sup> Böckli, Rechnungslegung, para 185.

<sup>1010</sup> Brendt, Das neue Rechnungslegungsrecht, p 153.

<sup>1011</sup> CHK-Lipp, Art 958c para 30.

<sup>1012</sup> Botschaft 2007, p 1626; cf also Böckli, Aktienrecht, § 8 para 73; Böckli, Rechnungslegung, para 248; Neuhaus/Schneider, p 810 et seq; CHK-Lipp, Art 962 para 3; von der Crone, Aktienrecht, § 7 para 5; Neuhaus/Schneider, p 811; Zihler, veb.ch Praxis-kommentar, Sicht des Gesetzgebers, para 34 et seq.

<sup>1013</sup> Handschin, Rechnungslegung, para 299 et seq; CHK-Lipp, Art 962 para 3.

<sup>1014</sup> CHK-Lipp, Art 962 para 4.

<sup>1015</sup> Handschin, Rechnungslegung, para 299 et seq; cf also Benz, SJZ 1999, p 544; CHK-Lipp, Art 962 para 3.

<sup>1016</sup> Böckli, Rechnungslegung, para 11; Stoffel, Grundriss des Aktienrechts, para 1014b.

<sup>1017</sup> Art 960 para 1 CO.

with profits in the same group.<sup>1018</sup> One part of the doctrine<sup>1019</sup> promotes this possibility. Another part of the doctrine<sup>1020</sup> follows the recognised standards,<sup>1021</sup> which allow the group presentation only if the items behave in the same direction. In my opinion, it is not prudent, nor transparent, to compensate losses with profits; thus, the unification of assets that behave differently in one group is not allowed under the CO. Although Swiss GAAP FER<sup>1022</sup> demand the individual valuation (*Einzelbewertung*), Swiss practice increasingly follows the standards.<sup>1023</sup>

Another example of permissible imprudence under the CO is the possibility 316 to appreciate an asset having a market value without building a revaluation reserve affecting net income (Art 960b para 2 CO).<sup>1024</sup> Under IFRS,<sup>1025</sup> this action is only possible if the business model has the purpose of holding financial assets to collect contractual cash flows.<sup>1026</sup> A revaluation with impact on profits and losses is allowed according to Article 960b CO. This possibility is not particularly prudent. The prudence principle has further issues. For example, a part of the doctrine<sup>1027</sup> permit settlement between increases and decreases in group valuation (cf also para 315). Others<sup>1028</sup> declare the

<sup>1018</sup> Cf Boemle/Lutz, Jahresabschluss, p 144 et seq; OFK-Dekker, Art 960 para 7; Handschin, Rechnungslegung, para 581 et seq; Kleibold, Ausschüttungsregulierung, p 121; BSK-Neuhaus/Haag, Art 960 para 10; for an overview on the different opinions cf Buchmann/Haag/Haas, EF 2015, p 661 et seq.

<sup>1019</sup> HWP 2014, p 60; Böckli, Rechnungslegung, para 869; cf Böckli, Aktienrecht, § 8 para 746; Kleibold, Ausschüttungsregulierung, p 121; Kleibold, ST 2012, p 873; Krügel/Blattmann/Lichtsteiner, EF 2016, p 719 et seq; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 960 para 22; cf Passardi, TREX 2013, p 272.

<sup>1020</sup> Cf Boemle/Lutz, Jahresabschluss, p 144 et seq; Handschin, Rechnungslegung, para 583a; BSK-Neuhaus/Haag, Art 960 para 10.

<sup>1021</sup> IAS 1.29; Swiss GAAP FER, Conceptual Framework, 6.

<sup>1022</sup> Swiss GAAP FER, Conceptual Framework, 25, Swiss GAAP FER 18.13; cf also IAS 2.27.

<sup>1023</sup> Böckli, Rechnungslegung, para 871.

<sup>1024</sup> Handschin, Rechnungslegung, para 620.

<sup>1025</sup> IFRS 9.4.1.2 (a).

<sup>1026</sup> Handschin, Rechnungslegung, para 622; Haufe, IFRS Kommentar-Lüdenbach, § 28 para 335.

<sup>1027</sup> HWP 2014, p 60; Böckli, Rechnungslegung, para 869; Kleibold, Ausschüttungsregulierung, p 121; Kleibold, ST 2012, p 873; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 960 para 22.

<sup>1028</sup> HWP 2014, p 169; Behr/Leibfried, Rechnungslegung, p 311; Brülisauer/Mühlemann, Art 58 para 51; OFK-Dekker, Art 960b para 18; CHK-Lipp, Art 960c para 19 et seq; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958b para 17 et seq; Kleibold, Ausschüttungsregulierung, p 137; Handschin allows the POC-method only if certain conditions are met, Handschin, Rechnungslegung, para 631 et seq.

application of the POC method to be permissible under the CO (cf para 381). If legislature does not regulate this issues the legal uncertainties will still remain.

## B. Prudence vs True and Fair View

- 317 The primary task of the interpreter of an inaccurate norm is to find the meaning of each term. The CO's purpose is for the preparer to create a 'reliable view' of the entity's financial situation.<sup>1029</sup> However, IFRS<sup>1030</sup> list 'fair presentation' as their main goal, whereas the doctrine<sup>1031</sup> talks about the 'true and fair view'. IFRS lists prudence numerous times.<sup>1032</sup> The question arising, therefore, is whether these terms are actually so different.

### I. Reliability

- 318 The main goal is to present the business transactions completely, truthfully, and systematically.<sup>1033</sup> The term 'reliability' was implemented in the CO due to the international tendency to list this term.<sup>1034</sup> The CO uses the term 'reliable assessment'. The doctrine agrees that this term is not equal to 'true and fair view'.<sup>1035</sup> Therefore, is a fair presentation described as a 'reliable' valuation of the asset and financing position (*Vermögens- und Finanzierungslage*) of an entity?<sup>1036</sup>
- 319 According to the HWP, a CO report cannot give a true and fair view of the financial situation, and that only the application of recognised standards can do this; however, this is not necessarily the case.<sup>1037</sup> The legislature<sup>1038</sup> did not want

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<sup>1029</sup> Art 958 para 1 CO.

<sup>1030</sup> IAS 1.15.

<sup>1031</sup> For example Böckli, Rechnungslegung, paras 44, 57; Handschin, Rechnungslegung, para 344.

<sup>1032</sup> IFRS, conceptual framework, BC3.19; BC3.22; BC3.27 et seq; IFRS 1.BC8(c)(iv); 4.IN 7; 4.23; 4.26; 4.28; 4.BC110; 4.BC112; 4.BC124(c); 4.BC133; 4.BC202; 9.BCZ 4.57; 9.BCZ 4.71 et seq; 9.BC5.86; 9.BC5.101; 9.BC5.116(b); 9.BC5.173; 9.BC5.178; 9.BC5.246(c); 9.BC5.282 et seq; 9.BCE. 94; 9.BCE. 125 et seq; 9.BCE. 152; 9.DO2; IAS 1.BC92; IAS 8.10(b)(iv); 19.77; 37.43; 38.93; IAS 40.B53; IFRIC 14.BC24; IFRS, Due Process Handbook, 3.56 et seq.

<sup>1033</sup> Greter/Zihler, veb.ch Praxiskommentar, Art 957 para 72; CHK-Lipp, Art 957a para 12.

<sup>1034</sup> Böckli, Rechnungslegung, para 162.

<sup>1035</sup> HWP 2014, p 104 et seq; Botschaft 2007, pp 1625, 1699; Böckli, Aktienrecht, § 8 para 101; Böckli, Rechnungslegung, para 106; CHK-Lipp, Art 958 para 5; Kleibold, Ausschüttungsregulierung, p 50.

<sup>1036</sup> Handschin, Rechnungslegung, Glossar: Fair Presentation, p LXXIV.

<sup>1037</sup> HWP 2014, p 104 et seq.

<sup>1038</sup> Botschaft 2007, p 1625.

to introduce the concept of fair presentation into Swiss law.<sup>1039</sup> The CO favours the prudence principle over the concept of true and fair view.<sup>1040</sup> Thus, the CO does not realise the true and fair view principle to its full extent.<sup>1041</sup> This difference from IFRS enables the preparer to build or dissolve hidden reserves (cf para 330 et seq).<sup>1042</sup> The dispatch uses the same ideology as the international standards with fair presentation, but applies only a hard line of the true and fair view for entities with the obligation to report according to an international standard.<sup>1043</sup> The original wording of the dispatch is the following:

*Nach dem Entwurf bedeutet 'fair presentation', dass die Rechnungslegung die wirtschaftliche Lage des Unternehmens so darstellen soll, dass sich Dritte ein zuverlässiges Urteil bilden können (Art. 958 Abs. 1). Nur für Publikums-gesellschaften, grosse Genossenschaften und Stiftungen, die zur ordentlichen Revision verpflichtet sind, sowie für Konzerne schreibt der Entwurf die Rechnungslegung nach einem anerkannten Standard zur Rechnungslegung vor. Die 'fair presentation' wird somit konsequent im Sinne der international üblichen Standards umgesetzt. Bei Unternehmen, in denen dies nicht notwendig ist, wird mit Blick auf das Verhältnis zwischen Kosten und Nutzen und aufgrund der individuellen Steuerplanung die Bildung stiller Reserven zugelassen soweit, diese nicht willkürlich sind (vgl. dazu auch Art. 669 Abs. 3 OR im geltenden Recht).*<sup>1044</sup>

According to the draft, 'fair presentation' means that accounting is the economic situation of the company in such a way that third parties can form a reliable judgment (Art 958 para 1). Only for public companies, large cooperatives and foundations obliged to undergo ordinary audits, as well as for corporations, the draft requires accounting according to a recognised accounting standard. The 'fair presentation' is therefore consistently implemented in the sense of international standards. For enterprises where this is not necessary, the formation of hidden reserves is allowed as far as they are not arbitrary regarding the relationship between costs and benefits and the individual tax planning (see Art 669 para 3 CO in the applicable law).

## II. Fair Presentation = True and Fair View

The next step must distinguish fair presentation from the true and fair view. 320 Different terms are used to explain the mindset and philosophy behind a

<sup>1039</sup> Böckli, Aktienrecht, § 8 para 101; Böckli, Rechnungslegung, paras 106, 168; CHK-Lipp, Art 958 para 5; Kleibold, Ausschüttungsregulierung, p 50.

<sup>1040</sup> Böckli, Rechnungslegung, para 106.

<sup>1041</sup> Böckli, Aktienrecht, § 8 para 101 et seq; cf Böckli, Rechnungslegung, para 1086 et seq; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 10.

<sup>1042</sup> PWC, Rechnungslegung im öffentlichen Sektor, p 27.

<sup>1043</sup> Botschaft 2007, p 1626.

<sup>1044</sup> Botschaft 2007, p 1626.

standard. Some refer to it as fair presentation,<sup>1045</sup> and others as true and fair view.<sup>1046</sup> The question is whether both parties describe the same thing but simply use different terms. According to Kleibold,<sup>1047</sup> true and fair view is a myth. With it, the preparer will be anxious to display the complex financial reality of an entity faithfully.<sup>1048</sup> ‘Fair’ simply means that the state of business assets and the profits/losses of a trader are presented fairly.<sup>1049</sup>

321 Fair presentation is an American term and shows no differences to the English term ‘true and fair view’.<sup>1050</sup> In 2011, IFRS<sup>1051</sup> changed the term ‘reliability’ to ‘faithful representation’.<sup>1052</sup> IFRS<sup>1053</sup> mentions fair presentation in its standards. The Swiss government<sup>1054</sup> and the doctrine<sup>1055</sup> use the terms interchangeably. The Swiss CO states the following (Art 958 para 1 CO):

Financial reporting is intended to present the economic position of the undertaking in such a manner that third parties can make a reliable assessment of the same.<sup>1056</sup>

322 However, the meaning of these terms is still unclear. What can be said is that each standard/law creates its own philosophy and defines this with the standard/law as a whole. Thus, the terms ‘reliable assessment’, ‘fair presentation’, and ‘true and fair view’ should not be seen as an absolute benchmark (*Massstab*).<sup>1057</sup> The common ground is a presentation free from arbitrariness (*Willkür*) and an orientation on economic criteria.<sup>1058</sup> Although the dispatch<sup>1059</sup> demands a financial report free from arbitrariness, there are still

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<sup>1045</sup> Botschaft 2007, p 1625.

<sup>1046</sup> Art 2 Fourth Council Directive 78/660/EEC of 25 July 1978; cf Evans, Accounting and Business Research 2003, Vol 33, No 4, p 319.

<sup>1047</sup> Kleibold, Ausschüttungsregulierung, p 157.

<sup>1048</sup> IAS 1.13; Kleibold, Ausschüttungsregulierung, p 157.

<sup>1049</sup> Definition by Prof. Yanaga Masao Professor at the University of Tsukuba.

<sup>1050</sup> Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 12 n 2.

<sup>1051</sup> IFRS, Conceptual Framework, BC 3.20.

<sup>1052</sup> Böckli, Rechnungslegung, para 162 n 294; cf Böckli, Aktienrecht, § 8 para 175 et seq.

<sup>1053</sup> IAS 1.15.

<sup>1054</sup> Botschaft 2007, p 1625.

<sup>1055</sup> Handschin, Rechnungslegung, Glossar: True and Fair, pLXXXII, Fair Presentation, pLXXIV.

<sup>1056</sup> Authoritative German version: ‘Die Rechnungslegung soll die wirtschaftliche Lage des Unternehmens so darstellen, dass sich Dritte ein zuverlässiges Urteil bilden können’.

<sup>1057</sup> Cf Botschaft 2007, p 1625.

<sup>1058</sup> Cf Art 958c para 1 fig 3 CO; Art 662a para 2 fig 2 oCO; Botschaft 2007, p 1625; Swiss GAAP FER, Conceptual Framework, 32; Behr/Leibfried, Rechnungslegung, p 68; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 100; Handschin, Rechnungslegung, para 322; CHK-Lipp, Art 958c para 15; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 36.

<sup>1059</sup> Botschaft 2007, p 1626.



possibilities left for the board of directors to create hidden reserves out of arbitrariness (to the hidden reserves cf para 330 et seq).<sup>1060</sup> However, the CO cannot fulfil this requirement. The CO is dishonest. The legislator has a bad conscience. On the one hand, the CO permits hidden reserves, but not so much that the reliable presentation is sacrificed. This is a balancing act.

The CO follows the imparity principle (cf para 312). Meanwhile, the recognised standards request a transparent financial report that gives a clear view of the values of an entity. This method is the true and fair view. While a prudent report aims to hide the assets and highlight the liabilities, the true and fair view report places the main emphasis on transparency. In conclusion, each view interferes with the other's conceptual qualities and values. However, there are possibilities to remove the differences.

The German term *Bilanzwahrheit* can be translated as 'fair representation' or 'economic reality'. In my view, the most accurate translation is 'balanced truth'. However, the term 'true and fair view' cannot be interpreted with true standing for *Bilanzwahrheit*. The term 'true' is more like the obligation to report with enough information, and under no circumstances should the information be misleading.<sup>1061</sup>

### III. Application of these Purposes

The principle of true and fair view is an indeterminate legal concept that needs interpretation.<sup>1062</sup> The difficulty is that the interpretation and application of the true and fair view depend on the perspective of the spectator.<sup>1063</sup> There is evidence to support this hypothesis, which shows that, even though reporters may be using the same standard, their states' cultures influence differences in their financial reports (cf for the cultural differences para 484 et seq).<sup>1064</sup> However, this possibility creates the opportunity to translate the true and fair view to the true circumstances.<sup>1065</sup> This is problematic, because the predicated true and fair view financial report can only be used if the principle is applied throughout the whole report.<sup>1066</sup>

<sup>1060</sup> As a manifestation of this possibility cf Art 960a para 4, 960e para 3 fig 4, 960e para 4 CO; cf Böckli, Rechnungslegung, paras 107, 1083 et seq.

<sup>1061</sup> For further reference Bühlmann, Stille Reserven, p 74.

<sup>1062</sup> Wojcik, IFRS als europäisches Recht, p 139.

<sup>1063</sup> Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 12.

<sup>1064</sup> Wehrfritz/Haller, National influence, p 197; cf also Haller/Wehrfritz, Impact, p 40.

<sup>1065</sup> Cf Art 958 para 1 CO; HRM2, p 19; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 12 n 1; PWC, Rechnungslegung im öffentlichen Sektor, p 22.

<sup>1066</sup> PWC, Rechnungslegung im öffentlichen Sektor, p 22.

326 The introduction of the true and fair view of IFRS in the EU came with problems. Most countries did not understand the concept and ignored it. According to Zeff,<sup>1067</sup> the only state following this concept is the UK. The problem is that, if a concept is introduced that is unknown to the accounting traditions in a state, the professionals will not apply it.<sup>1068</sup>

#### IV. Discrepancies Resolved by Interpretation?

327 The question remains, what are the differences between the prudence principle and the concept of true and fair view? The answer is that this depends on the beholder. EFRAG takes prudence as a part of the true and fair view.<sup>1069</sup> This is because stakeholders lobbied in the EU for a prudent approach of true and fair view.<sup>1070</sup> In 1996, the European Court of Justice declared the prudence principle to be the core of the European true and fair view principle.<sup>1071</sup> The EU commission expects a dynamic interpretation, especially for the interpretation of the true and fair view principle.<sup>1072</sup> The German *zweite Senat des Finanzgerichts Hamburg*, on the other hand, ruled that the concept of the true and fair view shall be applied in the same manner as under IFRS.<sup>1073</sup> The ECJ (European Court of Justice) refers to the national comprehension of this principle.<sup>1074</sup> The BFH (Bundesfinanzhof) did not follow the prior decision for the promotion of a dynamic interpretation.<sup>1075</sup> The application of the true and fair view principle is, therefore, a controversial issue.

328 In essence, it depends on the applicant of the norm as to whether he sees the prudence principle as a part of the true and fair view or whether he holds them as opposites. Despite this difference, several researchers<sup>1076</sup> show that the

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<sup>1067</sup> Zeff, *British Accounting Review* 2007, p 296.

<sup>1068</sup> Zeff, *British Accounting Review* 2007, p 296.

<sup>1069</sup> Bischof/Daske, *Endorsement*, p 16 with n 17.

<sup>1070</sup> Bischof/Daske, *Endorsement*, p 16 with n 17.

<sup>1071</sup> Case C-234/94, *Waltraud Tomberger v Gebrüder von der Wettern GmbH*, of 27 June 1996; cf also Bischof/Daske, *Endorsement*, p 2.

<sup>1072</sup> Cf Kommissionsvorschlag zur IAS-VO vom 13. Februar 2001, KOM (2001) 80 endg., 2001/0044 (COD), fig 3.2.

<sup>1073</sup> FG Hamburg Urt. v. 22.4.1999 – II 23/97, EFG 1999, 1022 – BIAO, Consideration I.1.k.; cf MüKoHGB-Reiner HGB, § 264 para 39.

<sup>1074</sup> EuGH Urt. v. 7.1.2003 – C-306/99, Slg. I 2003, 1-77, RdNr. 118 – BIAO.

<sup>1075</sup> BFH Urt. v. 15.9.2004 – I R 5/04, BFH/NV 2005, 421, Consideration II.2; cf to the verdicts also MüKoHGB-Reiner HGB, § 264 para 38 et seq.

<sup>1076</sup> Bonner, *Accounting Horizons*, December 1999, p 394; Davidson/Chrisman, *Journal of International Accounting Auditing and Taxation* (1994) 3(2), p 187 et seq; Doupnik/Richter, *Accounting, Organizations and Society* 28 (2003), p 15 et seq; Feleaga/Dragomir/Feleaga, p 1 et seq; Gray, p 1 et seq; Han/Hellmann/Lu, *Asian Review of*

interpreter is influenced by his culture in the preparation of a financial report. Even if he wants to follow a fair presentation, he will produce a financial report that is characterised by his culture. A German accountant, for example, will report more prudently than his English counterpart, even when applying the same standard.<sup>1077</sup>

In my opinion, the contrasting opinions result from a misconception about 329 the underlying principles of the CO and IFRS. Authors representing contrasting views suggest that the CO is fundamentally different from IFRS. While the CO follows the prudence principle, IFRS focus on the true and fair view. However, Handschin<sup>1078</sup> shows that the Swiss prudence principle is not always prudent in its application, but rather it is intransparent (cf para 315). Furthermore, the prudence principle and the realisation principle are breached in several cases (cf paras 315, 399 et seq),<sup>1079</sup> meaning that the CO does not hold the prudence principle as high as some authors suggest.

## C. Hidden Reserves (*Stille Reserven*)

### I. Definition of Hidden Reserves

Hidden reserves can be defined as values that are not visible in the equity, which 330 are created by incurred benefits that are not reported, meaning that liabilities are overvalued and assets undervalued.<sup>1080</sup> The foundation for the general creation of hidden reserves is the principle of going concern (cf para 352). In the application of this principle, the entity relies on the usefulness of its items.<sup>1081</sup>

The more prudence the standard setter demands, the more hidden reserves 331 will exist in the financial reports. Thus, the principle of prudence amplifies the creation of hidden reserves.

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Accounting (2016), Vol 24 Iss 2, p 185 et seq; Hellmann/Perera/Patel, p 108 et seq; Nobes, Accounting and Business Research 43 (2013), Issue 2, p 83 et seq; Waterstraat, passim; Wehrfritz/Haller, p 196 et seq.

<sup>1077</sup> Haller/Wehrfritz, p 39 et seq; Hellmann/Perera/Patel, p 108 et seq; Wehrfritz/Haller, p 196 et seq.

<sup>1078</sup> Handschin, Rechnungslegung, para 299 et seq, 344 et seq, 581 et seq.

<sup>1079</sup> Kleibold, Ausschüttungsregulierung, p 266.

<sup>1080</sup> Böckli, Rechnungslegung, para 1084; ZK-Bossard, Vorbemerkungen para 477; Bühlmann, Stille Reserven, p 35; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 117; Forstmoser/Merer-Hayoz/Nobel, § 50 para 68; Handschin, Rechnungslegung, para 852; Kleibold, Ausschüttungsregulierung, p 112; BK-Käfer, Art 960 para 183; Nösberger/Boemle, ST 2014, p 14; Stoffel, Grundriss des Aktienrechts, para 1100; Wirz, para 387; cf also Böckli, Aktienrecht, § 8 para 887 et seq; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 27.

<sup>1081</sup> Kleibold, Ausschüttungsregulierung, p 113.

## II. Hidden Reserves under the CO

- 332 The principle of prudence promotes the possibility to create hidden reserves. Switzerland and other industrial nations are aware of these hidden reserves.<sup>1082</sup> According to Behr,<sup>1083</sup> the difference is that the Swiss tax authorities tolerate more hidden reserves than other nations. Hidden reserves can occur in two ways: through an undervaluation of assets or through overrated liabilities.<sup>1084</sup> The entity does not always have the liberty to choose whether to undervalue assets or overrate liabilities. The CO follows a prudent financial report, meaning that the entity is obliged to undervalue assets (Art 960a para 1 CO) and to overvalue liabilities (Art 960e para 2 CO).
- 333 The CO qualifies hidden reserves in two ways: the preparer is either free (= *Willkürreserven*) or forced (= *Zwangsreserven*) to create them. If the entity has to depreciate the asset, it unwillingly accumulates hidden reserves.<sup>1085</sup> In such cases, the CO forces the entity to build hidden reserves.<sup>1086</sup> The CO also foresees the possibility to choose whether or not one wants to create a hidden reserve in some cases, meaning arbitrary reserves (Art 960e para 3 and 4; = *Willkürreserven*).<sup>1087</sup> Reserves resulting from the scope of valuation (= *Ermessensreserven*) are created due to a more prudent than necessary valuation of assets and liabilities.<sup>1088</sup> Therefore, arbitrary reserves and discretion reserves are optional. Only compulsory reserves are demanded by the Swiss legislature. However, they also appear in the recognised standards (cf para 336 et seq).

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<sup>1082</sup> For example: France, Germany, the Netherlands, Finland, Belgium and Austria, cf Feleaga/Dragomir/Feleaga, p 8.

<sup>1083</sup> Behr, *Stille Reserven*, p 619.

<sup>1084</sup> Bühlmann, *Stille Reserven*, p 47; Druey/Druey Just/Glanzmann, *Gesellschafts- und Handelsrecht*, § 25 para 177; Handschin, *Rechnungslegung*, Glossar: *Stille Reserven*, p LXXXII; Müller/Henry/Barmettler, *veb.ch Praxiskommentar*, Art 958c para 55.

<sup>1085</sup> Kleibold, *Ausschüttungsregulierung*, p 134.

<sup>1086</sup> Böckli, *Aktienrecht*, § 8 para 890; Böckli, *Rechnungslegung*, para 1086; Koch, *Handbuch*, para 69.2; Handschin, *Rechnungslegung*, Glossar: *Stille Zwangsreserven*, p LXXXII; Handschin, *Rechnungslegung*, paras 344, 853; Kleibold, *Ausschüttungsregulierung*, p 43; Stoffel, *Grundriss des Aktienrechts*, para 1104.

<sup>1087</sup> Benz, *SJZ* 1999, p 543; Böckli, *Aktienrecht*, § 8 para 890; Böckli, *Rechnungslegung*, para 1087; Bühlmann, *Stille Reserven*, p 36 et seq; Druey/Druey Just/Glanzmann, *Gesellschafts- und Handelsrecht*, § 25 para 179; Handschin, *Rechnungslegung*, Glossar: *Stille Willkürreserven*, p LXXXII; Handschin, *Rechnungslegung*, para 855; Müller/Henry/Barmettler, *veb.ch Praxiskommentar*, Art 958c para 56; Kleibold, *Ausschüttungsregulierung*, p 43; Stoffel, *Grundriss des Aktienrechts*, para 1106; cf Wirz, para 388 et seq; Zihler, *ST* 2011b, p 811.

<sup>1088</sup> Böckli, *Rechnungslegung*, para 1088; Stoffel, *Grundriss des Aktienrechts*, para 1106 et seq.

With the possibility of creating arbitrary hidden reserves, the CO restricts 334 the preparer to building as many hidden reserves as he sees fit. Simultaneously, the CO permits the valuation of assets at market prices (cf para 375). Glanzmann summarises these possibilities as follows: Switzerland does not have a problem with the principle of true and fair view, but it does have a problem with the unlimited possibilities to build hidden reserves, which is not compatible with the true and fair view.<sup>1089</sup>

### III. Hidden Reserves under HRM2

HRM2 is an interesting example of an attempt to incorporate both the prudent 335 view and the true and fair view at the same time. *‘Die Rechnungslegung soll ein Bild des Finanzhaushalts geben, welches möglichst weitgehend der tatsächlichen Vermögens-, Finanz- und Ertragslage entspricht.’*<sup>1090</sup> ‘Accounting is intended to provide a picture of the financial position that corresponds as far as possible to the actual asset, financial and earnings situation.’ Public organisations hold assets for different reasons. They can possess financial wealth and administrative assets. The distinction between the two lies in the purpose of their ownership. Those values belong to administrative assets that serve authorities or a limited circle of persons for the fulfilment of their tasks.<sup>1091</sup> Administrative assets cannot be realised; ie, if the assets are used to fulfil a public mandate, no one can resort to them.<sup>1092</sup> Thus, they appear only in the income statement and in the disclosures.<sup>1093</sup>

### IV. Hidden Reserves under the Swiss GAAP FER

Within Swiss GAAP FER, the prudence principle is regarded not as 336 fundamental maxim, but rather as a valuation principle.<sup>1094</sup> Thus, under Swiss GAAP FER hidden reserves exist.<sup>1095</sup> Similar to IFRS, Swiss GAAP FER forbid the creation of biased hidden reserves,<sup>1096</sup> although they do state that the preparer shall choose the less optimistic option to report an item if there is a

<sup>1089</sup> Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 11.

<sup>1090</sup> HRM2, 02.1, 02.12.

<sup>1091</sup> Häfelin/Müller/Uhlmann, Allgemeines Verwaltungsrecht, para 2205.

<sup>1092</sup> HRM2, p 19.

<sup>1093</sup> HRM2, p 19.

<sup>1094</sup> Kleibold, Ausschüttungsregulierung, p 266.

<sup>1095</sup> Kleibold, Ausschüttungsregulierung, p 149, for further examples cf Kleibold, Ausschüttungsregulierung, p 166 et seq.

<sup>1096</sup> Kleibold, Ausschüttungsregulierung, p 114; Meyer, Swiss GAAP FER, p 34; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 100.

valuation spectrum.<sup>1097</sup> This means that Swiss GAAP FER is also characterised by the imparity principle (cf para 312).<sup>1098</sup> At the same time, Swiss GAAP FER demands that assets shall not be purposely undervalued or liabilities overvalued.<sup>1099</sup> The creation of hidden reserves depends on the depreciation rate. If the asset is used for longer than expected, then the entity has created hidden reserves.<sup>1100</sup>

## V. Hidden Reserves under IFRS

- 337 A strict adoption of the true and fair view does not allow hidden reserves.<sup>1101</sup> Hence, IFRS neglects in general prudence or conservatism, because either concept will lead to an inconsistency with neutrality,<sup>1102</sup> meaning that negative as well as positive influences on the measurement have to be weighted evenly in their consideration.<sup>1103</sup> However, the principle of prudence is also mentioned in IFRS;<sup>1104</sup> it is a part of a reliable financial statement.<sup>1105</sup> Hidden reserves however are explicitly forbidden under IFRS.<sup>1106</sup> Nevertheless, the prudence principle also plays a role within IFRS; not as a fundamental maxim, but instead as a valuation principle (cf para 309).<sup>1107</sup> Parts of the prudence principle can also be found in IFRS.<sup>1108</sup> For example, IAS 2.9 uses the lower of cost or market rule, or it uses IAS 36 or IAS 3.7 for the subsequent measurement of inventories.<sup>1109</sup> With IAS 16.30, there is the option to choose the cost model. Under this model, hidden reserves will be created when the book value decreases faster than the economic value.<sup>1110</sup>

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<sup>1097</sup> Swiss GAAP FER, Conceptual Framework, 13; Kleibold, Ausschüttungsregulierung, pp 64, 166.

<sup>1098</sup> Kleibold, Ausschüttungsregulierung, p 65; cf Swiss GAAP FER 2.9, 17.3; cf also Briccola, ST 2013, p 121.

<sup>1099</sup> Swiss GAAP FER, Conceptual Framework, 13; Kleibold, Ausschüttungsregulierung, p 114; cf also CHK-Lipp, Art 960 para 16; Müller/Henry/Barmettler, veb.ch Praxis-kommentar, Art 958c para 99 et seq.

<sup>1100</sup> Kleibold, Ausschüttungsregulierung, p 64.

<sup>1101</sup> Benz, SJZ 1999, p 543 et seq; Bühlmann, Stille Reserven, p 75.

<sup>1102</sup> IFRS, Conceptual Framework, BC 3.27; cf also Böckli, Rechnungslegung, para 181.

<sup>1103</sup> Brendt, Das neue Rechnungslegungsrecht, p 152.

<sup>1104</sup> IFRS, Conceptual Framework, 37; Behr/Leibfried, Rechnungslegung, p 58 et seq.

<sup>1105</sup> IAS 8.10 (b) (iv).

<sup>1106</sup> IFRS, Conceptual Framework, 37; cf Böckli, Aktienrecht, § 10 para 63.

<sup>1107</sup> Böckli, Aktienrecht, § 8 para 46, § 10 para 59.

<sup>1108</sup> Brendt, Das neue Rechnungslegungsrecht, p 152; Handschin, Rechnungslegung, para 299 et seq.

<sup>1109</sup> Brendt, Das neue Rechnungslegungsrecht, p 152.

<sup>1110</sup> Handschin, Rechnungslegung, para 5.

The IASB removed the principle of prudence from its list of fundamental qualitative characteristics (for its reintroduction cf para 96 et seq).<sup>1111</sup> The remaining characteristics are the following: relevance,<sup>1112</sup> faithful representation,<sup>1113</sup> applying the fundamental qualitative characteristics,<sup>1114</sup> comparability,<sup>1115</sup> verifiability,<sup>1116</sup> timeliness,<sup>1117</sup> understandability,<sup>1118</sup> and applying the enhancing qualitative characteristics.<sup>1119</sup>

## D. The Influence of Addressees

The addressees/users of the reports have an important influence on the preparation of the financial report. The CO's addressees are shareholders, stakeholders, employees, management, the state, and the public.<sup>1120</sup> The question can be raised as to the extent to which a prudent financial report fulfils the addressees' expectations, or if a true and fair report would better serve the needs of the addressees.

The recognised standards serve the purpose of fair presentation to ensure a true and fair view.<sup>1121</sup> The CO, on the other hand, serves different purposes, such as the assessment of distributions (*Ausschüttungsbemessung*), raising capital (*Kapitalaufbringung*), preserving capital (*Kapitalerhaltung*), and tax assessment (*Steuerbemessung*).<sup>1122</sup>

While the recognised standards mainly have the investors as the primary users in mind, the CO and other DAS aim to protect creditors as well.<sup>1123</sup> Shareholders are interested in a share that rises in value and generates a high dividend. A financial report according to the true and fair view will reach this goal better than a prudent one. The same goes for minority shareholders. They are interested in a fair presentation as well because they cannot influence the entity's strategy.<sup>1124</sup> The stakeholders however tend to prefer a prudent report,

<sup>1111</sup> Brendt, Das neue Rechnungslegungsrecht, p 152.

<sup>1112</sup> IFRS, Conceptual Framework, QC 6 et seq.

<sup>1113</sup> IFRS, Conceptual Framework, QC 12 et seq.

<sup>1114</sup> IFRS, Conceptual Framework, QC 17 et seq.

<sup>1115</sup> IFRS, Conceptual Framework, QC 20 et seq.

<sup>1116</sup> IFRS, Conceptual Framework, QC 26 et seq.

<sup>1117</sup> IFRS, Conceptual Framework, QC 29.

<sup>1118</sup> IFRS, Conceptual Framework, QC 30 et seq.

<sup>1119</sup> IFRS, Conceptual Framework, QC 33 et seq.

<sup>1120</sup> Bühlmann, Stille Reserven, p 18.

<sup>1121</sup> IAS 1.9.

<sup>1122</sup> Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 106.

<sup>1123</sup> Behr/Leibfried, Rechnungslegung, p 58.

<sup>1124</sup> Cf Botschaft 2007, p 1592.

because that way the alarm goes off sooner in case the entity is overindebted. On the other hand, they prefer to know the entity's financial status,<sup>1125</sup> which is best displayed with a fair presentation.

342 A further influence can have impairments. If impairments on assets are no longer needed, or if the asset has experienced too much depreciation, both of which have an impact on the income statement (*Erfolgsrechnung*), the entity could report a revaluation reserve (*Aufwertungsreserve*). This will lead to an appreciation without affecting the income.<sup>1126</sup> Within recognised standards, appreciations always must affect the income.<sup>1127</sup> The reasoning for this lays in the fact that depreciation and impairment both had an effect on the income statement. Thus, the appreciation must also have an effect, otherwise the shareholders' abilities are diminished.<sup>1128</sup> This dimension results from the fact that, under Swiss law, the general assembly of shareholders is responsible for setting the profit distribution (Article 716a para 1 fig 3 CO).<sup>1129</sup>

343 Even revaluation without any impact on profit or loss is more transparent than not reporting the revaluation, which results in an increase in hidden reserves. Due to the lack of impact, the entity cannot distribute the amount of revaluation as dividends. Thus, this solution is prudent. Any changes in the following periods could then be intercepted by the revaluation reserve.<sup>1130</sup> Therefore, the solution is prudent as well as transparent.

344 Within IFRS, it is possible to choose between two different models (IAS 16.29): either the cost or the revaluation model (cf para 375). For stakeholders,<sup>1131</sup> both ways of reporting have their own advantages. However, while the prudent principle shows an amount not less than the reported actives, the true and fair view model is more transparent. A stakeholder will prefer the latter because he cannot reliably estimate the hidden reserves in the former way. If the stakeholder is a foreigner, he is also more likely to prefer a standard he knows, such as IFRS, rather than the domestic standard.

345 If the employee's wage is tied to the profit, he is more likely to choose the true and fair view rather than the prudent method. This is because of the greater possibility of creating hidden reserves in the prudent report and, therefore, a smaller profit (for example, by reporting provisions Art 960e Para 3 CO, which are not possible under IFRS).

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<sup>1125</sup> Bühlmann, Stille Reserven, p 20.

<sup>1126</sup> Simon, para 95.

<sup>1127</sup> IAS 36.114 icw 36.119; Swiss GAAP FER 20.17 et seq.

<sup>1128</sup> Simon, para 99.

<sup>1129</sup> Cf Simoniello, SJZ 2017, p 546.

<sup>1130</sup> Simon, para 104; cf Handschin, Rechnungslegung, para 669 et seq.

<sup>1131</sup> Kleibold, Ausschüttungsregulierung, p 13; cf also Bühlmann, Stille Reserven, p 20.



Management has an interest in reporting to the outside prudently, while 346 internally they should use the true and fair view. The former method is applied because of taxation and the ability to level the profits and losses; the latter method is used internally because management has an obligation to lead the entity financially. This is only possible if management knows at a specific date the value of the entity's specific assets. With the prudent report, this possibility only exists with an additional economic report. This additional report shows the real value of the entity's assets deviating from the statutory report.

The state wants to generate taxes. The tax burden should occur during the 347 period when the profits occur, meaning it should be time compliant (*periodengerecht*). These goals are achieved best by using the true and fair view approach.

## E. Interim Conclusion

This chapter has dealt with the supposedly contradicting underlying principles 348 of IFRS and the CO. The contradiction only holds up on first sight. The prudence principle is not necessarily incompatible with the regulations in the recognised standards. These standards demand a prudent approach themselves. Swiss law does not have an issue with concept of the true and fair view. The problems lay within the ability to build arbitrary hidden reserves, which are not permitted in a fair presentation.<sup>1132</sup> The key difference between the prudence principle in the CO and in the recognised standards is that the CO allows bias.<sup>1133</sup> The question of how prudent a financial report should be compiled is a question that relates to the management of risk. The problem here is 'that there are no generally accepted risk management accounting principles'.<sup>1134</sup>

The CO is not sincere. On the one hand, it permits arbitrary hidden reserves; 349 on the other hand, it demands a financial report that provides a reliable view of the entity's financial situation. This is the biggest contradiction mentioned in this chapter, and not the contradiction between the CO's prudence principle and IFRS' true and fair view. It could be shown that the prudence principle can be regarded as a part of the fair presentation. Thus, the CO is not necessarily more prudent than IFRS. In some cases, the opposite is true. This thesis provides some examples of this aspect (for example, in group valuation or in reporting a risk with a probability of more than 50 per cent of occurring; cf paras 315, 399 et seq). In some cases, the CO is not only imprudent but even leaves room for

<sup>1132</sup> Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 11.

<sup>1133</sup> Cf Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 58.

<sup>1134</sup> OECD, Financial Crisis, p 25.

arbitrary reserves. One example is Art 960e para 4 CO, where the entity can choose to dissolve provisions after the risk has not occurred.

350      Reporting prudently leads unavoidably to hidden reserves. They occur in the CO, HRM2, Swiss GAAP FER, and IFRS. However, the degree of hidden reserves created always depends on the interpreter of the standard. Comparing IFRS and the CO leads to the following rule: if IFRS are as prudent or even more prudent than the CO, they can be relied upon as an interpretation tool.

## § 10 Manifestations of IFRS' Impact on the CO

The following sections demonstrate IFRS' influence on Swiss law in terms of its wording and interpretation. It will not be shown how the different positions are reported,<sup>1135</sup> but rather how the legislature consulted IFRS in the legislation process and how the doctrine uses the standards (especially IFRS) to interpret the CO's wording. The best way to analyse the recent developments is to compare the CO before the revision<sup>1136</sup> (in act since 1<sup>st</sup> January 2013)<sup>1137</sup> and after, from the latest literature on this topic. My explanations are limited in terms of the impact of IFRS on the CO. Appendix 1 provides further references in Swiss law to recognised financial reporting standards. 351

### A. Results of IFRS' Influences on Swiss Commercial Accounting Rules in the CO

#### I. Going Concern

The growing list of similarities between the CO and IFRS begin with the premise of 'going concern'. The going concern concept is the fundamental assumption in financial reporting, meaning that all numbers in the financial report are true under the expectation that the enterprise will be continued.<sup>1138</sup> The entity fulfils the requirement of a going concern, as long as it cannot be said with certainty that the entity must cease all enterprise activities.<sup>1139</sup> The 352

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<sup>1135</sup> This question will be dealt with by Schmid, cf <https://ifrs.ius.unibas.ch/en/23-2/dual-standard-accounting/> (accessed on 16.08.17).

<sup>1136</sup> The law refers to this revision as 'changes of 23. December 2011' with the explaining draft from 2007; in the text the author uses the abbreviation oCO (old CO meaning the CO in act in 2012).

<sup>1137</sup> Mandatory application since 1<sup>st</sup> January 2015, cf Transitional Provisions for the changes of 23<sup>rd</sup> December 2011, Art 2 para 1 CO.

<sup>1138</sup> Cf HWP 2014, pp 35, 37; Behr/Leibfried, Rechnungslegung, pp 29, 74 et seq; Böckli, Rechnungslegung, para 123; von der Crone, Aktienrecht, § 7 para 59 et seq; CHK-Lipp, Art 958a para 1; Madörin/Bertschinger, Accounting and Auditing in Switzerland, p 50; Kleibold, Ausschüttungsregulierung, p 60; Handschin, Rechnungslegung, Glossar: Unternehmensfortführung (going concern), p LXXXII; Handschin, Rechnungslegung, paras 304, 579 et seq; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958a para 1, Art 958c para 26 et seq; Simoniello, SJZ 2017, p 546; Stoffel, Grundriss des Aktienrechts, para 1036; Wirz, para 206; Zemp/Haas, EF 2015, p 869 et seq.

<sup>1139</sup> Wirtz, para 268.

condition to uphold the premise of going concern is the ability to continue as a going concern for twelve months (Art 958a para 2 CO) and is similar to the recognised standards.<sup>1140</sup> Like IFRS<sup>1141</sup> and Swiss GAAP FER,<sup>1142</sup> the CO requires the withstanding of the premise of liquidity for a minimum of 12 months (Art 958a para 2 CO).<sup>1143</sup> Before the revision, there was no such norm.<sup>1144</sup> Even now, the CO does not regulate every case. Nor does the new CO contain a rule to report a discontinued operation. The doctrine<sup>1145</sup> considers IFRS<sup>1146</sup> in such a case and states the duty to report the cash flow of the discontinued operation separately if the operation is held for trade.

## II. Recognised Financial Reporting Principles

- 353 The Swiss recognised financial reporting principles are listed in Art 958c CO.<sup>1147</sup> These are similar to the principles found in the recognised standards<sup>1148</sup>.<sup>1149</sup> Art 959c shows similarities to IFRS<sup>1150</sup> and Swiss GAAP FER<sup>1151</sup>.<sup>1152</sup> The legislature considered the recognised standards in the revision concerning the valuation principles.<sup>1153</sup>
- 354 The financial report shall be arranged clearly and easy to understand (Art 958c para 1 fig 1 and 2 CO).<sup>1154</sup> The principle of completeness expects the

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<sup>1140</sup> IFRS, Conceptual Framework, 4.1; IAS 1.25 et seq; Swiss GAAP FER, Conceptual Framework, 9; cf also PS 570 et seq; cf Kleibold, Ausschüttungsregulierung, p 189; Simoniello, SJZ 2017, p 546; Zemp/Haas, EF 2015, p 869.

<sup>1141</sup> IAS 1.26.

<sup>1142</sup> Swiss GAAP FER, Conceptual Framework, 9.

<sup>1143</sup> Behr, Stille Reserven, p 607; Böckli, Rechnungslegung, para 123; Druey/Druey Just/Glanzmann, § 8 para 61, § 25 para 166; CHK-Lipp, Art 958a para 3 et seq; cf BSK-Neuhaus/Sutter, Art 958a para 18 et seq; Simoniello, SJZ 2017, p 547.

<sup>1144</sup> Cf Art 662a para 2 fig 4 oCO.

<sup>1145</sup> PS 570.3 et seq; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958a para 12.

<sup>1146</sup> IFRS 5.32 (a).

<sup>1147</sup> Art 958c CO's wording can be found in Note 2.

<sup>1148</sup> IFRS, Conceptual Framework, QC 1 et seq.

<sup>1149</sup> Müller, SZW 2008, pp 400, 412; Müller, Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 89.

<sup>1150</sup> IAS 1.7, 1.10, 1.22.

<sup>1151</sup> Swiss GAAP FER, Conceptual Framework, 11, 28.

<sup>1152</sup> Böckli, Rechnungslegung, para 249.

<sup>1153</sup> Böckli, Aktienrecht, § 8 para 784.

<sup>1154</sup> Cf HWP 2014, pp 20, 33; Behr/Leibfried, Rechnungslegung, p 81 et seq; von Bhicknapahari, veb.ch Praxiskommentar, Art 957a para 33 et seq; Böckli, Aktienrecht, § 8 para 117 et seq; von der Crone, Aktienrecht, § 7 para 64; OFK-Dekker, Art 957a para 10, Art 958c para 5; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 98; Handschin, Rechnungslegung, paras 90, 159 et seq, 321 et seq; Koch,

creator of the report to present all the relevant<sup>1155</sup> information (Art 958c para 1 fig 2 and 4 CO).<sup>1156</sup> 'Relevant financial information is capable of making a difference in the decisions made by users.'<sup>1157</sup> This principle is also referred to as materiality.<sup>1158</sup> It must be considered that relevant information can result from the sum of irrelevant information.<sup>1159</sup>

An entity shall report consistently over the years using the same methods 355 and assumptions (Art 958c para 1 fig 6 CO).<sup>1160</sup> This enables the report user to compare the numbers from different years.<sup>1161</sup> The consistency shall be applied to the presentation, valuation, and disclosure.<sup>1162</sup>

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Handbuch, para 63.6; CHK-Lipp, Art 958c para 6 et seq; Madörin/Bertschinger, Accounting and Auditing in Switzerland, p 46, 48; Wirz, para 213.

<sup>1155</sup> Sometimes referred to as materiality, cf Bermann/Knight, Financial Intelligence, p 32.

<sup>1156</sup> HWP 2014, pp 19, 32, 37; Behr/Leibfried, Rechnungslegung, p 80 et seq; Böckli, Aktienrecht, § 8 para 115 et seq; Böckli, Rechnungslegung, paras 85 et seq, 161 et seq; von der Crone, Aktienrecht, § 7 para 66; OFK-Dekker, Art 958c para 14 et seq; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 99; Handschin, Rechnungslegung, para 324; Koch, Handbuch, para 63.7; Kleibold, Ausschüttungsregulierung, p 48; CHK-Lipp, Art 958c para 10; Madörin/Bertschinger, Accounting and Auditing in Switzerland, p 46, 48; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 29 et seq; Stoffel, Grundriss des Aktienrechts, para 1030; Wirz, para 210.

<sup>1157</sup> IFRS, Conceptual Framework, QC6; cf also Swiss GAAP FER Conceptual Framework, 29; HWP 2014, pp 21, 32, 37 et seq; Behr/Leibfried, Rechnungslegung, p 68; von der Crone, Aktienrecht, § 7 para 68; Böckli, Aktienrecht, § 8 para 159 et seq, § 10 para 52; OFK-Dekker, Art 958c para 11 et seq; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 101; Forstmoser/Meier-Hayoz/Nobel, § 51 para 40; Handschin, Rechnungslegung, para 323; BK-Käfer, Art 959 para 445; Koch, Handbuch, para 63.9; CHK-Lipp, Art 958c para 25; CHK-Lipp, Art 958c para 22 et seq; Stoffel, Grundriss des Aktienrechts, para 1032; Wirz, para 212.

<sup>1158</sup> Behr/Leibfried, Rechnungslegung, p 68; Böckli, Aktienrecht, § 10 para 55; cf Nösberger, Wesentlichkeit, p 53 et seq.

<sup>1159</sup> Swiss GAAP FER, Conceptual Framework, 29; Böckli, Rechnungslegung, para 166; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 43 et seq.

<sup>1160</sup> Cf IFRS, Conceptual Framework, 31 et seq; Swiss GAAP FER, Conceptual Framework, 30; cf also HWP 2014, pp 21, 37; Behr/Leibfried, Rechnungslegung, pp 68, 83 et seq; Bermann/Knight, Financial Intelligence, p 31; Böckli, Aktienrecht, § 8 para 142 et seq, § 10 para 53; von der Crone, Aktienrecht, § 7 para 74; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 103; Handschin, Rechnungslegung, para 327 et seq; Koch, Handbuch, para 63.8; CHK-Lipp, Art 958c para 34; Madörin/Bertschinger, Accounting and Auditing in Switzerland, p 46 et seq, 50; Stoffel, Grundriss des Aktienrechts, para 1037.

<sup>1161</sup> HWP 2014, p 21; Behr/Leibfried, Rechnungslegung, p 68; Böckli, Aktienrecht, § 8 para 142; OFK-Dekker, Art 958c para 20 et seq; Handschin, Rechnungslegung, Glossar: Stetigkeit/Vergleichbarkeit, p LXXXI; Handschin, Rechnungslegung, para 327 et seq; Forstmoser/Meier-Hayoz/Nobel, § 51 para 47; Boemle/Lutz, Jahresabschluss, p 132; BK-Käfer, Art 959 para 466; Wirz, para 208.

- 356 Two financial reports are only comparable if they were prepared according to the same standard.<sup>1163</sup> Evidence suggests that, even if both preparers use the same standard, this does not necessarily mean that both will come to the same result in the same case. The reporters are influenced by their own domestic culture (cf for the influence of culture para 484; for influence on the term 'true and fair view' cf para 303 et seq).<sup>1164</sup>
- 357 Comparability can be understood as one entity's financial report compared to its previous reports (intertemporal comparability; cf Art 958d para 2 CO).<sup>1165</sup> Further, comparability can mean the possibility of comparing the financial reports of various entities among themselves. The latter definition is promoted explicitly by IFRS,<sup>1166</sup> although it was not introduced into the CO.<sup>1167</sup> Intertemporal comparability exists in every accounting standard because it is important for the report user to understand the differences between the current and previous reports. To fulfil this purpose, the preparer shall also apply the changes in his method to the previous report.<sup>1168</sup>

### III. Other Issues

- 358 The currency to be used in a financial report is normed in Art 958d CO.<sup>1169</sup> This norm was influenced by IAS 21.<sup>1170</sup> The doctrine<sup>1171</sup> uses the concept of the functional currency (*funktionale Währung*) to interpret the CO, as do the recognised standards. The verdict concerning the currency used in a financial report is mentioned above, in which the SFT decided in the sense of IFRS rather than the HWP (cf para 239 et seq).

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<sup>1162</sup> Böckli, Aktienrecht, § 8 para 142; Boemle/Lutz, Jahresabschluss, p 132; CHK-Lipp, Art 958c para 34; Wirz, para 207.

<sup>1163</sup> IFRS, Conceptual Framework, QC 20 et seq; Böckli Aktienrecht, § 10 para 54.

<sup>1164</sup> Wehrfritz/Haller, National Influence, p 197; cf also Haller/Wehrfritz, Impact, p 40.

<sup>1165</sup> Swiss GAAP FER, Conceptual Framework, 31; Handschin, Rechnungslegung, para 327 et seq.

<sup>1166</sup> IFRS, Conceptual Framework, QC 20 et seq; Böckli, Aktienrecht, § 10 para 54.

<sup>1167</sup> Botschaft 2007, p 1702; Böckli, Rechnungslegung, para 164.

<sup>1168</sup> Handschin, Rechnungslegung, para 330 et seq.

<sup>1169</sup> Cf Art 960 oCO.

<sup>1170</sup> Böckli, Rechnungslegung, para 146; Glanz/Pfaff, veb.ch Praxiskommentar, Art 958d para 26.

<sup>1171</sup> BGer Urteil from 30.09.2015, 2C\_560/2014, Consideration 3.3.3; Brülisauer/Mühlemann, Art 58 para 107; Buchmann/Dolente, ST 2012, p 890 et seq; OFK-Dekker, Art 957a para 20, Art 958d para 18; CHK-Lipp, Art 957a para 24, Art 958d para 12; Loser, EF 2016, p 724 et seq; BSK-Neuhaus/Schärer, Art 957a para 30; Rechsteiner/Scholl, p 418 et seq; Dell'Anna/De Haller/Schneider, EF 2015, p 619 et seq.

Before the revision, it was possible to capitalise the costs for start-up, capital increase, and organisation.<sup>1172</sup> These are administrative costs, meaning costs that arise from starting a business, increasing its capital, or other organisational issues. The new law<sup>1173</sup> does not allow this capitalisation, much like IFRS<sup>1174</sup> and Swiss GAAP FER.<sup>1175</sup>

Art 958f CO regulates the keeping and retaining of accounting records. Since the CO's wording is so brief, von Bhicknapahari<sup>1176</sup> refers to the recognised standards. However, he does not mean the recognised standards in the sense of the VASR (cf para 12); rather, he uses the term 'recognised standards' in a broader way, containing COSO<sup>1177</sup> and COBIT.<sup>1178</sup> To publish financial reports, there is a tendency to use XBRL,<sup>1179</sup> a means of transferring data electronically.<sup>1180</sup>

#### IV. Equity

Every position in the financial statement influences equity. 'The equity of a company results from its assets after deduction of its liabilities, determined according to the relevant accounting standards. It is basically composed of the capital of the company, the additional capital reserves paid in and the retained earnings.'<sup>1181</sup> In other words, equity is seen within the recognised standards as a residual value.<sup>1182</sup> The following explanations will point out only the specifics concerning shareholder capital. The first step enumerates conceptual differences. Then, concrete differences will be explained.

The CO and IFRS follow different concepts. Their application can lead to differences in terms of the reporting of positions influencing the entity's equity.

<sup>1172</sup> Art 664 oCO; cf Stoffel, Grundriss des Aktienrechts, para 1042.

<sup>1173</sup> Botschaft 2007, p 1705; Böckli, Aktienrecht, § 8 para 281; Böckli, Rechnungslegung, paras 405 et seq, 956 et seq; Gutsche, veb.ch Praxiskommentar, Art 959a para 94 et seq; Handschin, Rechnungslegung, para 696; Kleibold, ST 2012, p 870; CHK-Lipp, Art 959 para 33 et seq.

<sup>1174</sup> IAS 38.51 et seq, 38.69(a).

<sup>1175</sup> Swiss GAAP FER 2.32 et seq, 10.19; Kleibold, Ausschüttungsregulierung, p 70.

<sup>1176</sup> Von Bhicknapahari, veb.ch Praxiskommentar, Art 958f para 29.

<sup>1177</sup> Internal Control – Integrated Framework of the Committee of Sponsoring Organizations of the Treadway Commission, [www.coso.org](http://www.coso.org) (accessed on 18.10.2016).

<sup>1178</sup> Control Objectives for Information and Related Technologies, [www.isaca.org](http://www.isaca.org) (accessed on 18.10.2016).

<sup>1179</sup> Extensible Business Reporting Language For Switzerland cf <http://www.xbrl-ch.ch/> (accessed on 18.10.2016).

<sup>1180</sup> Von Bhicknapahari, veb.ch Praxiskommentar, Art 958f para 29.

<sup>1181</sup> Swiss GAAP FER 24.Introduction.

<sup>1182</sup> Kleibold, Ausschüttungsregulierung, p 121.

In the CO, the share capital serves as the basis from which to determine the amount of dividend payments contrary to the recognised standards.<sup>1183</sup> The purpose is to attribute the dividends to the shareholders. This is a legal attribution, because it is about assigning the dividends to their rightful owners. IFRS base their standards more on an economic than a legal perspective.<sup>1184</sup> Therefore, domestic norms do not have a significant impact on the report of equity under IFRS. IFRS<sup>1185</sup> foresee a report for the change in equity; the CO does not.<sup>1186</sup>

363 On a more concrete level, the equity under IFRS<sup>1187</sup> is divided in subscribed capital and reserves.<sup>1188</sup> The number of shares not yet paid can be capitalised under the CO, but not under IFRS<sup>1189, 1190</sup>. The CO's requirements are also important for measuring the entitlement to earnings (*Gewinnanspruch*). The CO balances between the protection of the shareholder receiving his dividend and the stakeholder (creditor) of getting the asset substratum diminished.<sup>1191</sup> The CO is more on the side of the stakeholder due to the promoted prudent view in Swiss commercial accounting law. This view is at the expense of the shareholder, who experiences a shortening of the profit from the fair presentation to the prudent view.<sup>1192</sup> The recognised standards place more weight on the future utilisation potential and permit the fair value presentation more often than the CO.<sup>1193</sup> Furthermore, the recognised standards only allow the report of provisions (cf para 399 et seq) and depreciation (cf para 402 et seq) to a narrower degree than the CO.<sup>1194</sup> The explained differences lead to the following result: since the recognised standards value assets differently to the CO, the entity's equity can be higher in the application of the recognised standards than under the CO.<sup>1195</sup>

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<sup>1183</sup> Behr/Leibfried, Rechnungslegung, p 172.

<sup>1184</sup> Behr/Leibfried, Rechnungslegung, p 473.

<sup>1185</sup> IAS 1.106 et seq; Swiss GAAP FER, Conceptual Framework, 7.

<sup>1186</sup> Böckli, Aktienrecht, § 8 para 300; CHK-Lipp, Art 958 para 15.

<sup>1187</sup> IAS 1.54; cf Swiss GAAP FER 24.7.

<sup>1188</sup> Behr/Leibfried, Rechnungslegung, p 474.

<sup>1189</sup> Cf IAS 1.19.

<sup>1190</sup> Glanzmann, SZW 2017, p 276; Gutsche, veb.ch Praxiskommentar, Art 959a para 183.

<sup>1191</sup> Kleibold, Ausschüttungsregulierung, p 150.

<sup>1192</sup> Cf Handschin, Rechnungslegung, para 13.

<sup>1193</sup> Kleibold, Ausschüttungsregulierung, p 173.

<sup>1194</sup> Kleibold, Ausschüttungsregulierung, p 173.

<sup>1195</sup> CHK-Lipp, Art 962 para 8; cf Handschin, Rechnungslegung, para 10.



## V. Minimum Structuring Requirements (*Mindestgliederung*)

The legislature<sup>1196</sup> and the doctrine<sup>1197</sup> acknowledge the connection between the 364 new minimum structuring requirements in the CO<sup>1198</sup> and IFRS' requirements. However, there are also differences. IFRS<sup>1199</sup> and Swiss GAAP FER<sup>1200</sup> demand a statement of changes in tangible fixed assets (*Sachanlagenpiegel*), whereas the CO does not.<sup>1201</sup> 'The financial statements shall disclose, for each class of property, plant and equipment.'<sup>1202</sup> The preparer of a statutory report can disclose a statement of changes in tangible fixed assets regardless of a provision in the CO. The new CO does not demand a statement of changes in equity (*Eigenkapitalveränderungsrechnung*), in contrast to the recognised standards<sup>1203, 1204</sup> but it is still permitted to report statement of changes in equity under the CO.<sup>1205</sup>

## B. Financial Report

### I. Financial Statement (Balance Sheet; *Bilanz*; Article 959 para 1, 959a CO)

The financial statement is the image of the entity's financials on a record day 365 (Art 959 para 1 CO).<sup>1206</sup> It shows the assets, liabilities, and owner's equity on a

<sup>1196</sup> Botschaft 2007, pp 1625, 1706.

<sup>1197</sup> Böckli, Aktienrecht, § 8 paras 41, 263; Böckli, Rechnungslegung, para 44; Böckli, ST 2012, p 821 et seq; Von der Crone, Aktienrecht, § 7 para 24; OFK-Dekker, Art 959a para 1; Gutsche, veb.ch Praxiskommentar, Art 959a paras 11, 181; Handschin, Rechnungslegung, 377; CHK-Lipp, Art 959a para 1; Müller/Lipp/Plüss, Der Verwaltungsrat, p 208; Rüdlinger, ST 2006, p 391; Zihler, veb.ch Praxiskommentar, Sicht des Gesetzgebers, para 22.

<sup>1198</sup> Art 959a et seq CO.

<sup>1199</sup> IAS 16.73 e), 38.118 e), Link: <https://www.dashoefer.de/dasfibuwissen/Anlagenspiegel-IFRS.html> (accessed on 16.10.18).

<sup>1200</sup> Swiss GAAP FER 18.15 et seq.

<sup>1201</sup> Böckli, Rechnungslegung, para 981.

<sup>1202</sup> IAS 16.73.

<sup>1203</sup> IAS 1.10 (c), 1.106 et seq; Swiss GAAP FER 3.4; 24.7 et seq.

<sup>1204</sup> Handschin, Rechnungslegung, para 462; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 73.

<sup>1205</sup> Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 73.

<sup>1206</sup> HWP 2014, p 34; Behr/Leibfried, Rechnungslegung, p 149; Böckli, Aktienrecht, § 8 para 252 et seq; von der Crone, Aktienrecht, § 7 para 43; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 105; Handschin, Rechnungslegung, Glossar: Bilanz, p LXXI; Handschin, Rechnungslegung, para 63; CHK-Lipp, Art 958 para 11; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 44; Stoffel, Grundriss des Aktienrechts, paras 1073, 1079h et seq.

specific date.<sup>1207</sup> The financial statement always balances the side of the actives with the passives on the other side (therefore, the term 'balance sheet' is also used).<sup>1208</sup> The requirements for the financial statement in the new CO<sup>1209</sup> are similar to the recognised standards.<sup>1210</sup> The legislature acknowledged this fact.<sup>1211</sup>

## II. Income Statement (*Erfolgsrechnung*; Article 959b CO)

366 The income statement shows the cost and income of an entity on the record day.<sup>1212</sup> The legislature admits to having consulted the recognised standards for the structuring requirements of the income statement.<sup>1213</sup> Thus, the new CO requirements<sup>1214</sup> resemble IFRS,<sup>1215</sup> but differ in the recognition<sup>1216</sup> of extraordinary income and expenses. In 2002, the IASB decided to eliminate the concept of extraordinary items and even forbid their use.<sup>1217</sup> The new CO<sup>1218</sup> allows the preparer to choose between the cost-of-sales method and the nature of expense format, like IFRS.<sup>1219</sup> Due to their similarities,

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<sup>1207</sup> Berman/Knight, Financial Intelligence, p 20.

<sup>1208</sup> Madörin/Bertschinger, Accounting and Auditing in Switzerland, p 68.

<sup>1209</sup> Art 959a CO.

<sup>1210</sup> IAS 1.54, IAS 32.33, IAS 37; IAS 39.AG97; Swiss GAAP FER 23, 24.2.

<sup>1211</sup> Begleitbericht zum Vorentwurf 2005, p 35, 103.

<sup>1212</sup> HWP 2014, p 34; Behr/Leibfried, Rechnungslegung, p 173; Berman/Knight, Financial Intelligence, p 6; Böckli, Aktienrecht, § 8 para 208 et seq; von der Crone, Aktienrecht, § 7 para 49; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 114; Handschin, Rechnungslegung, Glossar: Erfolgsrechnung, p LXXIII; Handschin, Rechnungslegung, paras 64, 391; CHK-Lipp, Art 958 para 12, Art 959b para 1; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 52; Stoffel, Grundriss des Aktienrechts, para 1069, 1079e et seq.

<sup>1213</sup> Begleitbericht zum Vorentwurf 2005, p 35, 103; cf for the doctrine OFK-Dekker, Art 958d para 10, Art 959b para 3; CHK-Lipp, Art 959b para 8; Müller, SZW 2008, p 406 et seq; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 56; Nösberger/Weingartner, EF 2016, p 716; Pfaff, veb.ch Praxiskommentar, Art 959b paras 2, 110.

<sup>1214</sup> Art 959b CO.

<sup>1215</sup> IFRS, Conceptual Framework, 4.25, IAS 1.27 et seq, IAS 1.81 et seq, IAS 1.97, IAS 1.102 et seq; cf also Swiss GAAP FER Conceptual Framework 11, Swiss GAAP FER 3.6 et seq.

<sup>1216</sup> Böckli, Aktienrecht, § 8 paras 50, 216 et seq; Böckli, Rechnungslegung, para 562 et seq; Brendt, Das neue Rechnungslegungsrecht, p 140; CHK-Lipp, Art 959b para 41; Müller/Lipp/Plüss, Der Verwaltungsrat, p 210; Pfaff, veb.ch Praxiskommentar, Art 959b para 114.

<sup>1217</sup> IAS BC1.61 et seq; cf also Böckli, Rechnungslegung, para 562 et seq.

<sup>1218</sup> Art 959b CO.

<sup>1219</sup> IAS 1.102 et seq; cf also Swiss GAAP FER 3.6; for the differences cf also Behr/Leibfried, Rechnungslegung, p 187 et seq; Handschin, Rechnungslegung, para 394 et seq; CHK-

IFRS can be utilised as an interpretation tool for the CO.<sup>1220</sup> The doctrine<sup>1221</sup> interprets income with the help of recognised standards.

### III. Cash Flow Statement (*Geldflussrechnung*; Article 961 et seq CO)

The cash flow statement describes the cash flow of an entity.<sup>1222</sup> The cash flow statement was newly introduced with the CO's revision in following the recognised standards.<sup>1223</sup> In Switzerland, only large entities must report a cash flow statement (Art 961 fig 2 CO). The recognition of cash flow is similar under the CO<sup>1224</sup> to the recognised standards<sup>1225, 1226</sup>. If the entity's group consolidates according to a recognised standard, it can dispense with the cash flow statement in the individual financial statement (Art 961d para 1 CO).

### IV. Notes (*Anhang*; Article 959c CO)

The notes complement and explain the financial statement.<sup>1227</sup> They show the largest discrepancy between the recognised standards<sup>1228</sup> and the CO.<sup>1229</sup> The main difference is the greater quantity of demanded information in

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Lipp, Art 959b para 11; for a comparison between the income statement in the CO, Swiss GAAP FER and IFRS cf Behr/Leibfried, Rechnungslegung, p 201 et seq.

<sup>1220</sup> Cf HWP 2014, p 274; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 53; cf also Müller, SZW 2008, p 406 et seq; Müller, AJP 2008, p 531 et seq.

<sup>1221</sup> BSK-Neuhaus/Gerber, Art 959b para 8.

<sup>1222</sup> Behr/Leibfried, Rechnungslegung, p 229; Böckli, Aktienrecht, § 8 paras 106, 439 et seq; von der Crone, Aktienrecht, § 7 para 51; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 121; Handschin, Rechnungslegung, Glossar: Geldflussrechnung, p LXXV; CHK-Lipp, Art 958 para 14, Art 961b para 2; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 62; Simoniello, SJZ 2017, p 543.

<sup>1223</sup> Cf Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 60.

<sup>1224</sup> Art 961b CO.

<sup>1225</sup> IAS 1.20, 7; Swiss GAAP FER 4, 21.13.

<sup>1226</sup> Cf HWP 2014, p 277 et seq; Behr/Leibfried, Rechnungslegung, p 246; Böckli, Rechnungslegung, para 782 et seq; Boemle/Lutz, Jahresabschluss, p 503; Behr/Leibfried, Rechnungslegung, p 246; OFK-Dekker, Art 961b para 9; Handschin, Jusletter 21<sup>st</sup> October 2013, para 10; Handschin, Rechnungslegung, para 437; Glanz/Kientsch, veb.ch Praxiskommentar, Art 961b para 6; CHK-Lipp, Art 961b para 13 et seq; Simoniello, SJZ 2017, p 543.

<sup>1227</sup> Begleitbericht zum Vorentwurf 2005, p 104; HWP 2014, p 34; Behr/Leibfried, Rechnungslegung, p 205; Böckli, Aktienrecht, § 8 para 360 et seq; Böckli, Rechnungslegung, para 610 et seq; von der Crone, Aktienrecht, § 7 para 53; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 119; Handschin, Rechnungslegung, Glossar: Anhang, p LXX; CHK-Lipp, Art 958 para 13, Art 959c para 1; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 58; Stoffel, Grundriss des Aktienrechts, para 1076, 1079j et seq; Suter/Suter, EF 2015, p 987.

the recognised standards.<sup>1230</sup> However, the legislature<sup>1231</sup> still considered the recognised standards while drafting the norms regulating the notes.<sup>1232</sup> A trend can be observed with IFRS as the point of origin for the construction of the notes as an instrument of the individualisation of systematic details being made in the traditional financial report.<sup>1233</sup>

369 Böckli<sup>1234</sup> does not allow all the disclosure requirements of IFRS to be interpreted into Art 959c para 1 fig 1 CO. Nevertheless, he wants to make sure that certain cases are still mentioned in the notes.<sup>1235</sup> For example, the CO does not demand an asset schedule, but Böckli<sup>1236</sup> expects the entity to disclose one to fulfil the sense of a reliable presentation (Art 958 para 1 CO), similar to Swiss GAAP FER.<sup>1237</sup> According to the recognised standards,<sup>1238</sup> it is also mandatory to report the change in equity, but the CO does not mention such a duty.<sup>1239</sup> For the report user, the change in equity presents a valuable overview of the change in equity during the previous period.<sup>1240</sup>

370 Another useful tool for a reliable presentation is the reporting of the operating segments. This presentation is expected in the recognised standards.<sup>1241</sup> The CO does not foresee this type of presentation, but the prevailing doctrine<sup>1242</sup> points out the inevitability for large entities to disclose one. Although the CO does not demand as much information as the recognised standard, a report containing this higher quantity of informations does still fulfil the CO norms.<sup>1243</sup>

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<sup>1228</sup> Swiss GAAP FER 6.2 et seq; in IFRS, the disclosure requirements are distributed on the single standards.

<sup>1229</sup> Böckli, Rechnungslegung, paras 611, 1137; Handschin, Rechnungslegung, para 40; cf also Kessler, veb.ch Praxiskommentar, Art 959c para 108; for the divergences between the notes in the CO, Swiss GAAP FER and IFRS cf Suter/Suter, EF 2015, p 987 et seq.

<sup>1230</sup> BSK-Neuhaus/Gerber, Art 959c para 79.

<sup>1231</sup> Botschaft 2007, p 1706.

<sup>1232</sup> Nösberger/Weingartner, EF 2016, p 717.

<sup>1233</sup> Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 120.

<sup>1234</sup> Böckli, Rechnungslegung, para 622.

<sup>1235</sup> Böckli, Rechnungslegung, para 746 et seq.

<sup>1236</sup> Böckli, Rechnungslegung, para 768.

<sup>1237</sup> Swiss GAAP FER 18.15, 18.25.

<sup>1238</sup> IAS 1.106 et seq; Swiss GAAP FER 3.4, 24.7 et seq.

<sup>1239</sup> Böckli, Rechnungslegung, para 448.

<sup>1240</sup> Böckli, Rechnungslegung, para 769 et seq; Handschin, Rechnungslegung, para 424 et seq.

<sup>1241</sup> IFRS 8; Swiss GAAP FER 30.42, 30.71, 31.8.

<sup>1242</sup> Böckli, Rechnungslegung, para 772; Boemle/Lutz, Jahresabschluss, p 482; cf Behr/Leibfried, Rechnungslegung, p 488 et seq; Handschin, Rechnungslegung, 1067.

<sup>1243</sup> Handschin, Rechnungslegung, para 40.

## V. Status Report (*Lagebericht*; Art 961c CO)

The status report is a verbal explanation of the entity's financial situation.<sup>1244</sup> A status report was already mandatory under the oCO.<sup>1245</sup> Only entities required to complete an ordinary audit must prepare a status report.<sup>1246</sup> The differences between the oCO and the CO are the more detailed paraphrases in the new law,<sup>1247</sup> much like the requirements in the recognised standards.<sup>1248</sup> A status report is not obligatory in either IFRS or Swiss GAAP FER.<sup>1249</sup> The doctrine<sup>1250</sup> sees a connection between the content requirements of the recognised standards and those in the CO.

## VI. Compensation Report (*Vergütungsbericht*)

The compensation report<sup>1251</sup> is a novelty in Swiss law. It goes back to the 'Minder-Initiative', which was adopted in a popular vote during spring 2013.<sup>1252</sup> The adoption led to the introduction of the VegüV (*Vergütungsverordnung*) to regulate the compensation and its disclosure in an entity. Only listed entities are obliged to disclose a compensation report (Art 1 para 1 VegüV). Although the recognised standards do not demand extra disclosure of information concerning the entity's compensation, it is possible to attach a compensation report to the financial report according to a recognised standard.

<sup>1244</sup> Botschaft 2007, p 1717; Balmer-Fröhlich/Gehrig, ST 2013, p 362 et seq; Behr/Leibfried, Rechnungslegung, p 629; Böckli, Aktienrecht, § 8 para 715 et seq; Böckli, Rechnungslegung, para 800 et seq; von der Crone, Aktienrecht, § 7 para 55 et seq; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 211 et seq; BSK OR II-Neuhaus/Inauen, Art 961c para 9; Glanz/Pfaff, veb.ch Praxiskommentar, Art 961c paras 50, 75 et seq; CHK-Lipp, Art 961c para 10; Handschin, Rechnungslegung, Glossar: Lagebericht, p LXXVIII; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 67 et seq; Stoffel, Grundriss des Aktienrechts, para 1079m et seq.

<sup>1245</sup> Art 663d oCO.

<sup>1246</sup> Art 961 fig 3 icw Art 727 CO.

<sup>1247</sup> Cf Art 961c CO.

<sup>1248</sup> IAS 1.13 et seq; Swiss GAAP FER Conceptual Framework 34.

<sup>1249</sup> Böckli, Rechnungslegung, para 1260.

<sup>1250</sup> Handschin, Rechnungslegung, para 565.

<sup>1251</sup> In-depth Handschin, Rechnungslegung, para 574a et seq; cf also Buchmann/Canipa-Valdez, EF 2016, p 934; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 86 et seq.

<sup>1252</sup> Böckli, Aktienrecht, § 8 para 482; Handschin, Rechnungslegung, para 574a.

## VII. Assets (*Aktivenbegriff*; Article 959 Para 1 CO)

- 373 The valuation of assets is of enormous importance for an entity because it defines the equity. The valuation of assets has effects on the overindebtedness of the entity (Art 725 CO). The book value of assets is determined by legal and economic attributes. According to Barker, 'the book value of an asset consists of the following sequence of steps. (1) Do there exist legal (or de facto) property rights by which economic benefits can be appropriated? (ie is there an asset?) (2) Can value be measured and attributed to these legal (or de facto) property rights? (ie can the value of the asset be measured?) (3) Are these legal (or de facto) property rights controlled by the entity? (ie does the asset belong to the reporting entity?)'.<sup>1253</sup> Thus, the legal attribute influences the value of the entity.
- 374 The doctrine<sup>1254</sup> recognises the orientation of the Swiss asset definition (Art 959 para 2 CO)<sup>1255</sup> in IFRS.<sup>1256</sup> Unfortunately, due to the legislature waiving further explanations, there is room for interpretation.<sup>1257</sup> The oCO did not have a definition of assets.<sup>1258</sup> The first approximation of the CO's definition of assets towards the recognised standards can be found in the predraft of the RRG (Bundesgesetz über die Rechnungslegung und Revision) of 1998.<sup>1259</sup> 'If there are specific indications that assets have been over-valued or that provisions are too low, the values must be reviewed and adjusted if necessary' (Art 960 para 3 CO). The legislature formed this norm in accordance with the recognised standards<sup>1260</sup> and used their impairment

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<sup>1253</sup> Barker, Accounting and Business Research 2015, p 524.

<sup>1254</sup> Behr/Leibfried, Rechnungslegung, p 171; Behr, Stille Reserven, p 599; Böckli, Aktienrecht, § 8 para 340; Böckli, Rechnungslegung, para 321; Brendt, Das neue Rechnungslegungsrecht, p 144; OFK-Dekker, Art 959 para 4 et seq; Gutsche, veb.ch Praxiskommentar, Art 959a paras 12, 23; BankG Komm-Handschin, Art 6 para 129 et seq; Handschin, Rechnungslegung, Glossar: Aktiven, p LXIX; Handschin, Rechnungslegung, paras 575a, 602b et seq; Kleibold, Ausschüttungsregulierung, p 22 n 60, pp 50, 65 et seq, 217; CHK-Lipp, Art 959 para 12; Müller, SZW 2008, p 400 et seq; Müller/Lipp/Plüss, Der Verwaltungsrat, p 208; BSK-Neuhaus/Gerber, Art 959 para 15; Nösberger/Boemle, ST 2014, p 14; Stefani, veb.ch Praxiskommentar, Art 959 para 15; cf also HWP 2014, p 57.

<sup>1255</sup> In the oCO no such definition can be found.

<sup>1256</sup> IFRS, Conceptual Framework, 4.4(a), 4.38, 4.44, IAS 1.54; cf also Swiss GAAP FER, Conceptual Framework, 15.

<sup>1257</sup> Brendt, Das neue Rechnungslegungsrecht, p 144.

<sup>1258</sup> Kleibold, Ausschüttungsregulierung, p 117.

<sup>1259</sup> Art 15 predraft RRG 1998; cf Begleitbericht 1998; Behr, Festschrift Druey 2002, p 33 et seq.

<sup>1260</sup> IAS 36.12; Swiss GAAP FER 2.16, 20.10 et seq; cf Kleibold, Ausschüttungsregulierung, p 89 et seq.

indicators.<sup>1261</sup> The doctrine<sup>1262</sup> refers to these indicators<sup>1263</sup> for the CO report as well.

### 1. Carrying Amount of Property, Plant, and Equipment (*Sachanlagen*; Article 960a et seq CO)

Under IFRS,<sup>1264</sup> an entity can choose which measurement method to use, either 375 the cost or the revaluation model. The historical or production and acquisition cost (*Anschaffungs- und Herstellungskosten*) is the price a company paid for an asset or the expense incurred by the entity in the creation of the item.<sup>1265</sup> There are no differences between IFRS<sup>1266</sup> and the CO.<sup>1267</sup> An entity can also choose the revaluation model (IAS 16.31). Additionally, the CO<sup>1268</sup> promotes the ability to revalue an asset to its real value if certain conditions are met.<sup>1269</sup> The revaluation model is only allowed for ‘assets with a stock exchange price or another observable market price in an active market’ (Art 960b para 1 CO) and Art 670 CO. This article allows the entity to appreciate ‘land, buildings or equity participations whose real value’ is higher than their book values, but only if the ‘company’s capital cover falls below one-half of the share capital and the legal reserves’.<sup>1270</sup> The doctrine<sup>1271</sup> uses IFRS<sup>1272</sup> to define the term ‘active market’. The term ‘another observable market price in an active market’ refers to OTC (Over the Counter) transactions.<sup>1273</sup> Zihler<sup>1274</sup> shows that the legislature created

<sup>1261</sup> Bockli, Rechnungslegung, para 876 et seq; Koch, Handbuch, para 63.24; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 960 paras 32 et seq, 58.

<sup>1262</sup> Bockli, Aktienrecht, § 8 para 130 et seq; Bockli, Rechnungslegung, para 881 et seq; Kleibold, Ausschüttungsregulierung, p 52; Koch, Handbuch, para 63.25 et seq; CHK-Lipp, Art 960 para 20; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 960 para 35.

<sup>1263</sup> IAS 12, 36.9, 36.12; Swiss GAAP FER 20.12.

<sup>1264</sup> IAS 16.29.

<sup>1265</sup> Bermann/Knight, Financial Intelligence, p 30; Bockli, Rechnungslegung, para 897 et seq; Handschin, Rechnungslegung, para 586; Kleibold, Ausschüttungsregulierung, p 123.

<sup>1266</sup> See IAS 16.30.

<sup>1267</sup> Hüttche, veb.ch Praxiskommentar, Art 960a para 118; cf HWP 2014, p 7.

<sup>1268</sup> Art 960b CO.

<sup>1269</sup> HWP 2014, pp 7, 62; Handschin, Rechnungslegung, paras 669 et seq; Kleibold, ST 2012, p 872; Simon, paras 104 et seq, 264 et seq.

<sup>1270</sup> Art 670 para 1 CO.

<sup>1271</sup> Kleibold, ST 2012, p 872; BSK-Neuhaus/Haag, Art 960b para 9; cf OFK-Dekker, Art 960b para 7.

<sup>1272</sup> IAS 36.6, 38.8.

<sup>1273</sup> Cf Zihler, ST 2011a, p 44.

<sup>1274</sup> Zihler, ST 85 2011a, p 44.

this open wording intentionally and rightfully points out that it is unclear how many cases the wording includes.

376 The tendency to report fair value can be observed worldwide due to IFRS.<sup>1275</sup> The difference between the carrying amount and the fair value should be recognised as a revaluation surplus (*Neubewertungsreserve*). Thus, this difference cannot be distributed as a dividend, because the elevation in value is not reported in the income statement.<sup>1276</sup> The CO uses the same security mechanism in Art 670 CO, but allows room in Art 960b CO for the entity to appreciate an asset without building a revaluation surplus.

377 Article 58 para 1 lit b fig 3 DBG tries to include the total amount of profit an entity makes in a period.<sup>1277</sup> The same principle holds up under IFRS with IAS 16.42, which states that the changes 'resulting from the revaluation have to be recognised and disclosed in accordance with IAS 12 Income Taxes'. In other words, the revaluation influences taxation, although it is not recognised in the income statement.<sup>1278</sup> As soon as the revaluation surplus is diminished due to the decrease in value, the surplus must be reversed (IAS 16.40 et seq). IFRS<sup>1279</sup> do not allow dissolving depreciation or impairment affecting net income (*erfolgswirksam*), contrary to the CO<sup>1280, 1281</sup>. In this aspect, IFRS are more prudent than the CO (cf para 303 et seq).

## 2. Inventories (*Vorräte*; Article 960c CO)

378 The doctrine uses recognised standards to interpret Article 960c CO, which regulates inventories and non-invoiced services.<sup>1282</sup> It is best practice,<sup>1283</sup> and in the sense of the CO (Art 959c para 1 fig 1 and 2 CO), to disclose the differences in the inventories by listing the raw materials, the semi-finished products, the finished products, and the trading goods separately in the notes.<sup>1284</sup>

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<sup>1275</sup> Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 144.

<sup>1276</sup> Handschin, Rechnungslegung, paras 669 et seq; Pezzotta/Passardi, p 183; Simon, paras 104 et seq, 264 et seq.

<sup>1277</sup> Cf Brülisauer/Mühlemann, Art 58 para 2.

<sup>1278</sup> Cf Pezzotta/Passardi, p 183.

<sup>1279</sup> IAS 36.110, 36.117.

<sup>1280</sup> Art 960a para 4 CO.

<sup>1281</sup> Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 960 paras 116, 121; cf also Behr/Leibfried, Rechnungslegung, p 341.

<sup>1282</sup> Swiss GAAP FER 17.1; Boemle/Lutz, Jahresabschluss, p 313; Handschin, Rechnungslegung, para 623 et seq; CHK-Lipp, Art 960c para 19 et seq and 28; Wirz, para 334 n 734.

<sup>1283</sup> Swiss GAAP FER 17.1, 17.6 et seq, 17.28.

<sup>1284</sup> Behr/Leibfried, Rechnungslegung, p 283; Böckli, Rechnungslegung, paras 358, 896; Handschin, Rechnungslegung, para 623; Hüttche, veb.ch Praxiskommentar, Art 960c para 6;



When the value of an asset drops below the cost of purchase, the asset must 379  
be depreciated. If the value increases again, this change must be recognised  
(IAS 2.34). Under Swiss law, only the first step is mandatory (Article 960a  
para 3 CO), and the second step is optional (Article 960c para 1 icw 960a para 4  
CO). This leads to a bigger tax load according to IFRS than to the CO.<sup>1285</sup>  
However, according to Article 58 Para 1 lit b DBG, the federal taxation agency  
(ESTV) will not recognise impairments if they are not commercially justified  
(*geschäftsmässig begründet*).

The Swiss taxation agency grants impairment of one third of the inventories' 380  
value after the commercially justified depreciations (= *Warendrittel*).<sup>1286</sup> IFRS  
do not allow an impairment without any cause. Thus, this would lead to a  
higher taxation in the case of an IFRS report as the tax base.<sup>1287</sup> Taxation under  
IFRS is anticipated, while under Swiss law, taxation is postponed until the entity  
releases the asset through selling. This is when the entity must pay the taxes for  
the value increase. Thus, the only difference is the point in time that leads to the  
taxation.

### 3. Revenue from Contracts with Customers

The question is whether or not semi-finished products can be capitalised. 381  
Generally, an item or service shall be capitalised if the claim in rem (*dinglicher  
Anspruch*) arises.<sup>1288</sup> The recognised standards<sup>1289</sup> promote the percentage of  
completion (POC) method.<sup>1290</sup> The CO does not include a norm to regulate this  
question. Thus, the doctrine is needed to interpret the CO to find an answer. The  
HWP<sup>1291</sup> and others<sup>1292</sup> allow the recognition according to the POC method  
under the CO. Böckli<sup>1293</sup> forbids the application of the POC method under the  
CO due to the breach of the realisation principle (cf para 311).

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cf also Berman/Knight, Financial Intelligence, p 97; Kleibold, Ausschüttungsregulierung,  
p 86; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 81 et seq.

<sup>1285</sup> Simon, para 383.

<sup>1286</sup> Böckli, Rechnungslegung, paras 359, 899 et seq; OFK-Dekker, Art 960d para 21.

<sup>1287</sup> Simon, para 384.

<sup>1288</sup> Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958b para 19.

<sup>1289</sup> IFRS 15; Swiss GAAP FER 22.2; cf to that Kleibold, Ausschüttungsregulierung, p 87 et  
seq.

<sup>1290</sup> Handschin, Rechnungslegung, para 635.

<sup>1291</sup> HWP 2014, IV.2.10.3.6, p 169.

<sup>1292</sup> Behr/Leibfried, Rechnungslegung, p 311; OFK-Dekker, Art 960d para 18; CHK-Lipp,  
Art 960c para 19 et seq; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958b  
para 17 et seq; Kleibold, Ausschüttungsregulierung, p 137; Handschin allows the POC-  
method only if certain conditions are met, Handschin, Rechnungslegung, para 631 et seq.

<sup>1293</sup> Böckli, Rechnungslegung, paras 177 et seq, 596.

382 The revenue recognition from contracts with customers is the subject of IFRS 15.<sup>1294</sup> Thereby, the book value is only the value 'that has been appropriated, in the sense that the entity has an enforceable claim and, thereby, an economic resource'.<sup>1295</sup> The CO does not regulate this issue specifically. However, with the application of the prudence principle, it becomes clear that future income cannot be recognised before it is realised.<sup>1296</sup> This may lead to discrepancies between the CO and IFRS.

383 At first glance, the two regulations are different. The recognition of revenues from contracts is tied to conditions.<sup>1297</sup> The recognition is only possible if the contract results in enforceable rights. These are influenced by the legal jurisdiction.<sup>1298</sup> The recognition shall only succeed when the entity satisfies an obligation. The revenues can only be recognised if the good or the service has been transferred.<sup>1299</sup> If these conditions are met, a capitalisation under the CO should also be allowed.<sup>1300</sup> The problem with capitalising future profits is that they can be paid out in the period of their capitalisation before they are even realised. During this proceeding, it is critical to continue to protect the stakeholder.<sup>1301</sup>

#### 4. Current Assets

384 The definition of current assets can be found in Art 959 para 3 CO.<sup>1302</sup> The oCO<sup>1303</sup> also defined current assets but only listed the different posts (such as cash, accounts receivable trade and services, and inventories). In the revision, the legislature consulted the recognised standards<sup>1304</sup> and orientated the new definition according to them.<sup>1305</sup> Cash 'means debt securities that are very liquid, very low-risk, and very short-term'.<sup>1306</sup> However, cash and cash equivalents under IFRS<sup>1307</sup> are only positions that can be liquidated in three

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<sup>1294</sup> Cf also Swiss GAAP FER 22.

<sup>1295</sup> Barker, Accounting and Business Research 2015, p 526.

<sup>1296</sup> Handschin, Rechnungslegung, para 634.

<sup>1297</sup> IFRS 15.9.

<sup>1298</sup> IFRS 15.10.

<sup>1299</sup> IFRS 15.22.

<sup>1300</sup> HWP 2014, p 169; Handschin, Rechnungslegung, para 631.

<sup>1301</sup> Kleibold, Ausschüttungsregulierung, p 137.

<sup>1302</sup> Böckli, Rechnungslegung, para 339.

<sup>1303</sup> Art 663a para 2 oCO.

<sup>1304</sup> Cf IAS 1.66; Swiss GAAP FER, Conceptual Framework, 16 et seq; cf Kleibold, Ausschüttungsregulierung, p 76.

<sup>1305</sup> Cf Gutsche, veb.ch Praxiskommentar, Art 959a para 24; Handschin, Rechnungslegung, para 603 et seq; Stefani, veb.ch Praxiskommentar, Art 959 para 74; cf HWP 2014, p 57.

<sup>1306</sup> Welch, Corporate Finance, p 157.

<sup>1307</sup> IAS 7.7.

months. For the CO, a part of the doctrine<sup>1308</sup> permits a liquidation period of twelve months, which is considerably longer. Another part of the doctrine follows the recognised standards with three months.<sup>1309</sup>

## 5. Non-Current Assets Held for Sale and Discontinued Operations

Non-current assets are assets held for more than twelve months (Art 960d para 1 and 2 CO).<sup>1310</sup> According to IFRS, the lower value of the following is significant for the measurement of non-current assets held for sale: the carrying amount or the fair value (IFRS 5.15). Every increase or decrease must be reported. However, an increase is only possible up to the acquisition costs (IFRS 5.21). Under Swiss law, the increase cannot be recognised in general; thus, an entity builds hidden reserves (for the possibilities of value recovery cf para 403).<sup>1311</sup> Berman and Knight point out that ‘it seems strange that the same assets can be presented differently, depending on an organization’s intentions’.<sup>1312</sup> In my view, the intention of holding an asset can make a difference. This is also in line with the premise of going concern (cf para 352). The entity can only report assets as a going concern if the undertaking will remain (Art 958a para 1 CO).

## 6. Financial Instruments

The HWP<sup>1313</sup> also uses Swiss GAAP FER’s definition<sup>1314</sup> for the CO. A definition for market prices cannot be found in the law. Therefore, the doctrine uses the method of IFRS to determine the market, as shown earlier (cf para 373 et seq).<sup>1315</sup> IFRS foresees three levels.<sup>1316</sup> ‘Level 1 inputs are quoted prices (unadjusted) in active markets for identical assets or liabilities that the entity can access at the measurement date.’<sup>1317</sup> ‘Level 2 inputs are inputs other than quoted prices included within Level 1 that are observable for the asset or

<sup>1308</sup> Gutsche, veb.ch Praxiskommentar, Art 959a para 183.

<sup>1309</sup> HWP 2014, p 125; OFK-Dekker, Art 959a para 7; Handschin, Rechnungslegung, para 606.

<sup>1310</sup> Böckli, Rechnungslegung, para 340; Handschin, Rechnungslegung, para 643; Hüttche, veb.ch Praxiskommentar, Art 960d para 4.

<sup>1311</sup> Simon, para 394 et seq

<sup>1312</sup> Berman/Knight, Financial Intelligence, p 105.

<sup>1313</sup> HWP 2014, p 133.

<sup>1314</sup> Swiss GAAP FER 27.1; cf also for financial instruments Kleibold, Ausschüttungsregulierung, p 139 et seq.

<sup>1315</sup> Handschin, Rechnungslegung, para 613b et seq; BankG Komm-Handschin, Art 6 para 148.

<sup>1316</sup> Cf also Bosch/Imhof/Wallmeier, ST 2013, p 458 et seq.

<sup>1317</sup> IFRS 13.76.

liability, either directly or indirectly.’<sup>1318</sup> ‘Level 3 inputs are unobservable inputs for the asset or liability.’<sup>1319</sup> The doctrine<sup>1320</sup> argues that Level 1 is in line with the CO; Level 2 is possibly in line, but not Level 3.<sup>1321</sup> Additionally, Swiss GAAP FER can be consulted for the CO’s interpretation.<sup>1322</sup>

387 Every increase or decrease must be reported.<sup>1323</sup> With Article 960b CO, Swiss law gives the entity the ability to measure the assets with an observable market price to the value of those prices (also called ‘mark to market’<sup>1324</sup>). The doctrine<sup>1325</sup> uses the recognised standards for the assessment with market values. The entity can also choose to build a revaluation surplus (*Neubewertungsreserve*),<sup>1326</sup> which has no impact on profits or losses, or it can choose not to, which does have an impact. The latter option corresponds with IFRS.<sup>1327</sup> Since the method of the recognised standards is more prudent than not reporting a revaluation surplus, it is advisable to choose to report one also under the CO. Although the CO permits the possibility of not reporting a revaluation surplus, a part of the doctrine<sup>1328</sup> urges the entity to report one. Another part<sup>1329</sup> allows the entity to choose whether to build a revaluation surplus.

388 The recognition of financial instruments is not specifically normed in the CO, apart from the general norm of Art 960b CO. Thus, the preparer must consult the doctrine.<sup>1330</sup> The doctrine<sup>1331</sup> applies a similar recognition to the recognised standards,<sup>1332</sup> being aware of the conceptual differences. Similar

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<sup>1318</sup> IFRS 13.81.

<sup>1319</sup> IFRS 13.86.

<sup>1320</sup> Treuhandkammer, *Ausgewählte Fragen und Antworten*, p 23; Handschin, *Rechnungslegung*, para 613b et seq; BankG Komm-Handschin, Art 6 para 148 et seq; BSK-Neuhaus/Haag, Art 960b para 12; Wyss/Mittelsteadt, ST 2012, p 885 et seq.

<sup>1321</sup> Cf for the use of the different stages Schildbach, ST 2004, p 159 et seq.

<sup>1322</sup> Cf HWP 2014, p 138; cf Guidoum, EF 8/18, p 540 et seq.

<sup>1323</sup> Cf Simon, paras 396 et seq.

<sup>1324</sup> Behr/Leibfried, *Rechnungslegung*, p 360; Berman/Knight, *Financial Intelligence*, pp 98 et seq, 104 et seq.

<sup>1325</sup> CHK-Lipp, Art 960 para 21 et seq; BankG Komm-Handschin, Art 6 para 129 et seq; Handschin, *Rechnungslegung*, para 612 et seq.

<sup>1326</sup> Cf Hüttche, *veb.ch Praxiskommentar*, Art 960b para 27 et seq.

<sup>1327</sup> IFRS 9.

<sup>1328</sup> HWP, II.4.3.3, p 62 et seq; Handschin, *Rechnungslegung*, para 656; CHK-Lipp, Art 960b para 35.

<sup>1329</sup> HWP, IV.1.14.3.1, p 192; Hüttche, *veb.ch Praxiskommentar*, Art 960b para 15 et seq.

<sup>1330</sup> Böckli, *Rechnungslegung*, para 773.

<sup>1331</sup> Boemle/Lutz, *Jahresabschluss*, p 4 et seq; Behr/Leibfried, *Rechnungslegung*, p 343 et seq; BankG Komm-Handschin, Art 6 para 120 et seq; Handschin, *Rechnungslegung*, 639 et seq; Hüttche, *veb.ch Praxiskommentar*, Art 960b para 6.

<sup>1332</sup> IFRS 7, 9, 13 IAS 32, 39; Swiss GAAP FER 27.4 et seq.

terms in the CO and IFRS can be interpreted identically.<sup>1333</sup> The doctrine promotes the possibility for hedge accounting in the same fashion as IFRS<sup>1334</sup> under the CO.<sup>1335</sup>

## 7. Intangible Assets (*Immaterielle Vermögenswerte*)

Intangible assets are assets that are neither things nor claims.<sup>1336</sup> These are assets 389 that cannot be touched or spent.<sup>1337</sup> Examples are skills, customer lists, proprietary knowledge, patents, brand names, and so on.<sup>1338</sup> Intangible assets are mentioned only in the CO's listing of assets.<sup>1339</sup> Therefore, the CO's wording is unclear regarding the question of under which conditions intangible assets can be capitalised. The doctrine<sup>1340</sup> uses recognised standards<sup>1341</sup> to interpret the CO in relation to intangible assets.

IFRS allow the preparer to choose whether he wants to use the revaluation 390 model.<sup>1342</sup> If the cost model is chosen, then a reversal of impairment loss shall only be recognised up to the initial carrying amount.<sup>1343</sup> The same applies to the CO.<sup>1344</sup> Since the changes in the value must be reported, there is no possibility to build hidden reserves. Under the revaluation model, 'an intangible asset shall be carried at a revalued amount [... and] measured by reference to an active market'. These increases do not have an impact on profits or losses, because a revaluation surplus must be reported.<sup>1345</sup>

However, it is not easy in any case to determine in a prudent fashion whether 391 or not an intangible asset brings any value. Therefore, a distinction must be made between purchased and self-created intangible assets. Pezzotta and

<sup>1333</sup> Hüttche, veb.ch Praxiskommentar, Art 960b para 6.

<sup>1334</sup> IAS 39.88.

<sup>1335</sup> HWP 2009, Band 1, p 475 et seq; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 960 para 16; Kleibold, Ausschüttungsregulierung, p 145.

<sup>1336</sup> Handschin, Rechnungslegung, Glossar: Immaterielle Werte, p LXXVI.

<sup>1337</sup> Berman/Knight, Financial Intelligence, p 100.

<sup>1338</sup> Berman/Knight, Financial Intelligence, p 100.

<sup>1339</sup> Art 959a para 1 fig 2 lit d CO.

<sup>1340</sup> HWP 2014, p 200; Behr/Leibfried, Rechnungslegung, pp 365 et seq, 388; Böckli, Rechnungslegung, para 371 et seq; Boemle/Lutz, Jahresabschluss, p 338; Gutsche, veb.ch Praxiskommentar, Art 959a para 92; Handschin, Rechnungslegung, para 683 et seq; Kleibold, ST 2012, p 870 et seq; CHK-Lipp, Art 959a para 19 et seq; Wirz, para 338 et seq.

<sup>1341</sup> IAS 38, especially 38.57; Swiss GAAP FER 2 and 10, especially 2.34.

<sup>1342</sup> IAS 38.72.

<sup>1343</sup> IAS 38.74; cf also IAS 36.117.

<sup>1344</sup> Handschin, Rechnungslegung, Glossar: Immaterielle Werte, p LXXVII, however not for Swiss GAAP FER 10.7; cf Handschin, Rechnungslegung, para 690.

<sup>1345</sup> IAS 38.85; Simon, para 399 et seq.

Passardi<sup>1346</sup> seem to refer to self-created intangible assets because they are treated differently than purchased intangible assets. These differences are founded by the duty to report prudently according to the CO. If an intangible asset is bought, this price is the foundation for the estimation of the asset. If the intangible asset is created internally, it is more difficult to put a value on the asset; therefore, two conditions must be met in order to ensure a prudent report. The following conditions must be fulfilled for the internally created intangible asset to be recognised:<sup>1347</sup> 'The intangible assets generated internally are identifiable and are controlled by the organisation; The intangible assets generated internally will yield a measurable benefit for the organisation over several years; The expenses which arise from the creation of the intangible assets generated internally can be recognised and measured separately; It is likely that the resources needed to complete and sell or to use the intangible assets for own purposes are available or will be made available'.

392 The doctrine is split on the question of which self-created values can be reported and which cannot.<sup>1348</sup> If self-created intangible assets are capitalised under the CO, the entity shall disclose the recognised standards<sup>1349</sup> like the useful life and the method of depreciation.<sup>1350</sup> The CO and Swiss GAAP FER permit capitalisation sooner than IFRS because they only allow assets to be capitalised, not brands or lists of customers.<sup>1351</sup>

393 Neglecting the possibility to capitalise self-created intangible assets leads to an unequal treatment compared to the intangible assets the entity bought. The doctrine<sup>1352</sup> believes that self-created intangible assets can be capitalised, but they do not have to be, which is contrary to the CO's wording (Art 959 para 2 CO), by following the conditions set in the recognised standards.

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<sup>1346</sup> Pezzotta/Passardi, p 183 et seq; cf also Handschin, Rechnungslegung, para 683.

<sup>1347</sup> Swiss GAAP FER 10.4; Handschin, Rechnungslegung, para 687.

<sup>1348</sup> Pro capitalisation: OFK-Dekker, Art 960d para 25; BankG Komm-Handschin, Art 6 para 274 et seq; Handschin, Rechnungslegung, para 684 et seq; cf Gutsche, veb.ch Praxiskommentar, Art 959a para 92; Kleibold, Ausschüttungsregulierung, p 62; CHK-Lipp, Art 959 para 34; FINMA-RS 15/1, para 450 et seq; contra capitalisation: Böckli, Aktienrecht, § 8 para 758; Böckli, Rechnungslegung, para 946 et seq.

<sup>1349</sup> IAS 38.63 et seq; Swiss GAAP FER 10.4, 10.12, 10.17 et seq.

<sup>1350</sup> Böckli, Rechnungslegung, paras 741, 941; OFK-Dekker, Art 960d para 25.

<sup>1351</sup> Böckli, Rechnungslegung, para 945 n 1634.

<sup>1352</sup> Böckli, Rechnungslegung, para 955; cf HWP 2014, p 200; HWP 2009, Band 1, p 208 et seq; Gutsche, veb.ch Praxiskommentar, Art 959a para 92; CHK-Lipp, Art 959a para 20; Swiss GAAP FER 10.4; to that cf Kleibold, Ausschüttungsregulierung, p 128.

## 8. Development Costs

Development costs can be capitalised contrary to research costs, if certain conditions are met. Since this issue is not normed by the CO, judges<sup>1353</sup> and the doctrine<sup>1354</sup> interpret the definition of assets with the help of the recognised standards.<sup>1355</sup> The capitalisation is only possible by putting substance over form (cf para 475 et seq).<sup>1356</sup>

## 9. Leasing

Leasing appears in the CO only in the norms concerning the notes (Art 959c para 2 fig 6 CO). Other than in IFRS<sup>1357</sup> and Swiss GAAP FER,<sup>1358</sup> no norm can be found to explain the possibility of capitalising leased goods. 'Lease obligations are widely considered to be a significant source of off balance sheet financing.'<sup>1359</sup> Two types of lease occur: operational and financial. Operational leasing creates a rental relationship between the lessor and the lessee.<sup>1360</sup> A financial lease consists of a determined non-terminable rent with a buy option at the end.<sup>1361</sup> The doctrine<sup>1362</sup> gives the ability to capitalise financial leasing as fully compatible with the CO in accordance with the recognised standards. It bases its interpretation on the CO's asset definition (Art 959 para 2 CO). However, one condition is the disposability of the item. From a legal perspective, the disposability remains with the leasing company, which is the legal owner.<sup>1363</sup> The lessee is the owner from the economic perspective; thus, the capitalisation shall be allowed under the

<sup>1353</sup> BGer 4A\_91/2011, Consideration 3.5.

<sup>1354</sup> HWP 2014, p 200; Böckli, Rechnungslegung, para 944 et seq; Gutsche, veb.ch Praxiskommentar, Art 959a para 92; Handschin, Rechnungslegung, para 685 et seq; Hüttche, ST 2013, p 667 also shows other possibilities to report development costs; Hüttche/Teitler-Feinberg, EF 2016, p 732; Kleibold, Ausschüttungsregulierung, p 62; Kleibold, ST 2012, p 871; CHK-Lipp, Art 959 para 34, Art 959a para 20; Nösberger/Boemle, ST 2014, p 167 et seq; cf IAS 38.8, 38.54, 39.47.

<sup>1355</sup> IAS 38.8, 38.54, 39.47.

<sup>1356</sup> Kleibold, Ausschüttungsregulierung, p 62.

<sup>1357</sup> IAS 17, especially 17.7 et seq.

<sup>1358</sup> Swiss GAAP FER 13, especially 13.3, 13.8.

<sup>1359</sup> IASB and FASB, Update 2013, p 4.

<sup>1360</sup> Instead of many Schachtner, Internationalisierung, p 56.

<sup>1361</sup> Instead of many Schachtner, Internationalisierung, p 57.

<sup>1362</sup> HWP 2014, p 195 et seq; Behr, Festschrift Druey 2002, p 39 et seq; Behr/Leibfried, Rechnungslegung, pp 417 et seq, 431; Böckli, Rechnungslegung, para 401 et seq; Handschin, Rechnungslegung, para 678; Hüttche/Teitler-Feinberg, EF 2016, p 731; BK-Käfer, Art 958 para 414; Gutsche, veb.ch Praxiskommentar, Art 959a paras 13, 84 et seq; cf Nösberger/Boemle, ST 2014, p 170; Stefani, veb.ch Praxiskommentar, Art 959 para 18.

<sup>1363</sup> Böckli, Rechnungslegung, paras 403, 654; Handschin, Rechnungslegung, para 678.

CO.<sup>1364</sup> In addition, the doctrine<sup>1365</sup> falls back to the recognised standards for the distinction between financial and operating leasing.<sup>1366</sup> However, the lessee is not free in the use of the asset since he must disclose his position as a lessee in the notes.<sup>1367</sup>

## VIII. Liabilities

396 Like the old definition of assets, the liability's old definition<sup>1368</sup> consisted only of a list of which posts count as liabilities. The oCO definition of liabilities ('*Schulden*') has been replaced and corresponds now to that in the recognised standards.<sup>1369</sup> The wording<sup>1370</sup> was adopted verbatim into the CO.<sup>1371</sup> A liability includes contingent liabilities, provisions, and liabilities in a narrower sense.<sup>1372</sup> There are three different approaches in the doctrine to distinguish these kinds of liability from each other. One part of the doctrine<sup>1373</sup> bases its interpretation on IFRS<sup>1374</sup> and reports a provision to the full extent if the event is more likely than not to occur. Another part of the doctrine<sup>1375</sup> does not consider the probability and forms a provision only if the

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<sup>1364</sup> HWP 2014, p 195 et seq; Böckli, Rechnungslegung, para 654; Boemle/Lutz, Jahresabschluss, p 332; Behr/Leibfried, Rechnungslegung, p 415 et seq; Handschin, Rechnungslegung, paras 350, 676 et seq; Kleibold, Ausschüttungsregulierung, p 104 et seq; cf also Swiss GAAP FER 13.7.

<sup>1365</sup> HWP 2014, p 195 et seq; Behr/Leibfried, Rechnungslegung, pp 420 et seq, 431; Böckli, Rechnungslegung, paras 404, 653; Gutsche, veb.ch Praxiskommentar, Art 959a para 85; Handschin, Rechnungslegung, para 677.

<sup>1366</sup> IAS 17.10; Swiss GAAP FER 13.5, 13.9.

<sup>1367</sup> Böckli, Aktienrecht, § 8 para 174; Handschin, Rechnungslegung, para 351.

<sup>1368</sup> Art 663a para 2 oCO.

<sup>1369</sup> Behr/Leibfried, Rechnungslegung, p 171; Böckli, Aktienrecht, § 8 para 349; Böckli, Rechnungslegung, para 342; Brendt, Das neue Rechnungslegungsrecht, p 148; Gutsche, veb.ch Praxiskommentar, Art 959a paras 12, 23; Kleibold, Ausschüttungsregulierung, p 50; Kleibold, ST 2012, p 871; CHK-Lipp, Art 959 para 14; Müller/Lipp/Plüss, Der Verwaltungsrat, p 208; BSK-Neuhaus/Gerber, Art 959a para 34; Nösberger/Boemle, ST 2014, p 14; Riederer, Rückstellungen, para 76 et seq; cf Behr, Stille Reserven, p 599; Stefani, veb.ch Praxiskommentar, Art 959 para 70; cf HWP 2014, p 57.

<sup>1370</sup> IFRS, Conceptual Framework, 4.4 lit b, IFRS, Conceptual Framework, 4.46; Swiss GAAP FER, Conceptual Framework, 15, 17; cf Kleibold, Ausschüttungsregulierung, p 66.

<sup>1371</sup> Art 959 para 5 CO.

<sup>1372</sup> Riederer, Rückstellungen, para 80 et seq.

<sup>1373</sup> Boemle/Lutz, Jahresabschluss, p 373 et seq; Handschin, Rechnungslegung, para 775; Rentsch/Zöbeli, Praktiker, p 11 et seq; Rentsch/Zöbeli, Umsetzung, p 181; in depth Riederer, Rechnungslegung, para 193 et seq.

<sup>1374</sup> IAS 37.23.

<sup>1375</sup> Benz, Grundsätze, p 127; Stoll, p 158.



amount of the risk is not measurable.<sup>1376</sup> Böckli<sup>1377</sup> promotes another method by dividing the spectre of probability in quarters. A contingent liability must be recognised with a probability up to 25 per cent. A proportional provision is reported for a probability of 25 to 75 per cent and up to 100 per cent for a liability.

Concerning liabilities, a further difference can be found between the CO and 397 the recognised standards. Tax liabilities must be reported separately in the recognised standards,<sup>1378</sup> but not in the CO.<sup>1379</sup> This does not mean that they cannot be listed separately, however.

## 1. Contingent Liabilities (*Eventualverbindlichkeiten*)

A contingent liability is a possible obligation whereby the outflow of 398 resources is not probable or the amount is not measurable.<sup>1380</sup> A contingent liability must be reported if the entity is liable for third parties or if the entity can become liable for events not in the power of the entity to influence.<sup>1381</sup> Similar to the recognised standards,<sup>1382</sup> contingent liabilities are listed according to the CO in the notes (Art 959c para 2 fig 10 CO).<sup>1383</sup> There is no consensus concerning the grade of probability for recognising a contingent liability. The disagreement has to do with the more important question of when a provision must be recognised (cf para 399 et seq). Böckli,<sup>1384</sup> therefore, qualifies a contingent liability for events with a probability of occurring of up to 25 per cent. The part of the doctrine<sup>1385</sup> following the recognised standards in the interpretation of the CO reports a contingent

<sup>1376</sup> Zöbeli considers the probability but sets the entry limit of reporting a provision at 70 per cent, Zöbeli, p 89.

<sup>1377</sup> Böckli, Rechnungslegung, para 1025 et seq.

<sup>1378</sup> IAS 12; Swiss GAAP FER 11.4.

<sup>1379</sup> Böckli, Rechnungslegung, para 417.

<sup>1380</sup> IAS 37.10; cf Behr/Leibfried, Rechnungslegung, p 621; Gutsche, veb.ch Praxiskommentar, Art 959a para 123; Handschin, Rechnungslegung, para 752 et seq; CHK-Lipp, Art 959 para 54, Art 959a para 37, Art 959c para 74; Stefani, veb.ch Praxiskommentar, Art 959 para 50.

<sup>1381</sup> Handschin, Rechnungslegung, para 747; cf CHK-Lipp, Art 959 para 73 et seq; Stefani, veb.ch Praxiskommentar, Art 959 para 51; Kessler, veb.ch Praxiskommentar, Art 959c para 78; CHK-Lipp, Art 959c para 64.

<sup>1382</sup> IAS 37.27 et seq; Swiss GAAP FER Conceptual Framework, 20.

<sup>1383</sup> HWP 2014, p 138.

<sup>1384</sup> Böckli, Rechnungslegung, paras 672, 1025 et seq.

<sup>1385</sup> Boemle/Lutz, Jahresabschluss, p 373 et seq; Handschin, Rechnungslegung, para 775; Rentsch/Zöbeli, Praktiker, p 11 et seq; Rentsch/Zöbeli, Umsetzung, p 181; Riederer, Rechnungslegung, para 70 et seq.

liability if no provision is made because the event is not likely<sup>1386</sup> to occur or the amount is not measurable.<sup>1387</sup>

## 2. Provisions (*Rückstellungen*; Article 960e CO)

399 'A Provision is a liability of uncertain timing or amount.'<sup>1388</sup> In the revision of the CO, the law's wording describing the provisions was created according to the recognised standards<sup>1389</sup>.<sup>1390</sup> Different methods are under the CO: the threshold method and the proportional method.<sup>1391</sup> The recognised standards permit only the former.<sup>1392</sup> The threshold method holds that a provision must be reported if the risk surpasses a certain threshold; most often it is 50 per cent. There is controversy regarding the 50 per cent method being applicable to the recognition of provisions according to the CO.<sup>1393</sup> Recently, it was shown that this method is more prudent than any other in particular in the event of multiple risks.<sup>1394</sup> Thus, it can be used also to report a provision according to the CO.

400 In the CO,<sup>1395</sup> it is possible to report a provision for reasons that are not accepted by the recognised standards.<sup>1396</sup> The CO<sup>1397</sup> also allows the report preparer to choose whether or not he wants to dissolve the provision after the event has not come true, which is in contrast to the recognised standards.<sup>1398</sup> The preparer can also report a provision according to IFRS without violating the CO.<sup>1399</sup> Additionally, under IFRS, differences be found. It can be shown empirically that cultural differences lead to a different understanding of the

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<sup>1386</sup> In numbers: < 50 %.

<sup>1387</sup> A few authors have their own view when to report a provision, cf also paras 449, 455 et seq, 465 et seq, 473.

<sup>1388</sup> IAS 37.10; cf also Handschin, Rechnungslegung, Glossar: Rückstellung, p LXXXI.

<sup>1389</sup> IAS 37; Swiss GAAP FER 23; to that cf Kleibold, Ausschüttungsregulierung, p 146 et seq.

<sup>1390</sup> Cf Behr/Leibfried, Rechnungslegung, p 451; Böckli, Aktienrecht, § 8 para 879; Böckli, Rechnungslegung, para 421; Kleibold, ST 2012, p 871; CHK-Lipp, Art 959 para 50, Art 960e para 15; Riederer, Rückstellungen, para 50 et seq; Stenz, veb.ch Praxis-kommentar, Art 960e paras 14, 53; Wirz, para 344; cf also von der Crone, Aktienrecht, § 7 para 87.

<sup>1391</sup> Riederer, Rückstellungen, para 191 et seq.

<sup>1392</sup> IAS 37; Swiss GAAP FER 23.

<sup>1393</sup> Böckli, Rechnungslegung, para 1023 et seq; BSK-Neuhaus/Haag, Art 960e para 12.

<sup>1394</sup> Handschin, Rechnungslegung, para 775; in-depth Riederer, Rückstellungen, para 191 et seq.

<sup>1395</sup> Art 960e para 3 CO.

<sup>1396</sup> Cf Böckli, Rechnungslegung, para 1065.

<sup>1397</sup> Art 960e para 4 CO.

<sup>1398</sup> IAS 37.59; Swiss GAAP FER 23.8.

<sup>1399</sup> Riederer, Rückstellungen, para 191 et seq.

terms ‘probably’, ‘likely’ and ‘remote’.<sup>1400</sup> The results are different provisions for the same risks, depending on the cultural background of the preparer.

### 3. Liabilities in a Narrower Sense (*Verbindlichkeiten*)

Liabilities are obligations that must be paid in the future. In my view, this does not allow any leeway to factor in an element of probability.<sup>1401</sup> We can also find similarities between the recognised standards and the CO. The difference between current and non-current liabilities from the recognised standards<sup>1402</sup> was replicated in the CO<sup>1403, 1404</sup>.

## IX. Depreciation and Impairment

‘Depreciation is the method accountants use to allocate the cost of equipment and other assets to the total cost of products and services as shown on the income statement.’<sup>1405</sup> As in the oCO,<sup>1406</sup> the new<sup>1407</sup> CO refers to the generally recognised commercial principles (*allgemein anerkannte kaufmännische Grundsätze*) for the depreciation (*Abschreibung*). According to Böckli,<sup>1408</sup> Swiss GAAP FER<sup>1409</sup> are the incorporation of the Swiss generally recognised commercial principles (cf also para 353 et seq). Depreciation is influenced by culture (cf also para 484 et seq). In Switzerland, the ESTV issued a circular letter<sup>1410</sup> describing the depreciation rates generally accepted by the tax authority. The preparer of the report will comply with this letter even though he could depreciate more than necessary, leading to a biased view of the entity’s financial status.<sup>1411</sup>

<sup>1400</sup> Evans/Baskerville/Nara, *Language*, p 5.

<sup>1401</sup> Riederer, *Rückstellungen*,

<sup>1402</sup> IAS 1.60 et seq; Swiss GAAP FER, *Conceptual Framework*, 18.

<sup>1403</sup> Art 959a para 2 fig 1 and 2 CO.

<sup>1404</sup> Cf Botschaft 2007, p 1705; Behr/Leibfried, *Rechnungslegung*, p 405; Böckli, *Aktienrecht*, § 8 para 289.

<sup>1405</sup> Berman/Knight, *Financial Intelligence*, p 13.

<sup>1406</sup> Art 662a para 4 oCO.

<sup>1407</sup> Art 960a para 3 CO.

<sup>1408</sup> Böckli, *Rechnungslegung*, para 962 n 1660.

<sup>1409</sup> Swiss GAAP FER 2.22, 18.9, 18.24.

<sup>1410</sup> ESTV-Merkblatt A 1995; cf Böckli, *Aktienrecht*, § 8 para 816.

<sup>1411</sup> Cf also Berman/Knight, *Financial Intelligence*, p 5; Kleibold, *Ausschüttungsregulierung*, p 167.

403 Additionally, the impairment (*Wertberichtigung*) is similar in the new CO<sup>1412</sup> to the recognised standards<sup>1413</sup>.<sup>1414</sup> However, the CO does not demand a value recovery (*Wertaufholung*), in contrast to the recognised standards<sup>1415</sup>.<sup>1416</sup> Handschin<sup>1417</sup> expects the preparer to report a revaluation reserve according to the CO. In the subsequent measurement, the standards<sup>1418</sup> demand the report of a revaluation surplus (in the revaluation model). This approach encourages transparency and is prudent at the same time because the surplus cannot be distributed.<sup>1419</sup>

## X. Own Shares

404 'Own shares' is the phrase used for a situation in which an entity holds its own shares. Before the revision, own shares were considered as equity. However, the acquisition of own shares is a repayment of paid-up capital to the shareholders.<sup>1420</sup> In Switzerland, own shares were long perceived as value, but this perception rightfully changed to the perception of repayment of paid-up capital.<sup>1421</sup> This means that own shares can no longer be capitalised as an asset.<sup>1422</sup> This view was influenced by IFRS.<sup>1423</sup> Now, own shares must be recognised under the CO as a negative post in the liabilities.<sup>1424</sup>

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<sup>1412</sup> Art 960a para 3 CO.

<sup>1413</sup> IAS 36; Swiss GAAP FER 20.

<sup>1414</sup> Boemle/Lutz, Jahresabschluss, p 231; Handschin, Rechnungslegung, para 731 et seq.

<sup>1415</sup> IAS 36.110; Swiss GAAP FER 20.15 et seq; cf Simon, para 372 et seq.

<sup>1416</sup> HWP, IV.2.17.4, p 204; Böckli, Rechnungslegung, para 998; Handschin, Rechnungslegung, para 731.

<sup>1417</sup> Handschin, Rechnungslegung, para 736.

<sup>1418</sup> IAS 16.39.

<sup>1419</sup> Handschin, Rechnungslegung, para 4.

<sup>1420</sup> Handschin, Rechnungslegung, Glossar: Eigene Aktien, p LXXII; Handschin, Rechnungslegung, para 911; ZK-Handschin, Art 659–659b para 1; BSK OR II-Neuhaus/Balkanyi, Art 671a para 2.

<sup>1421</sup> Handschin, Rechnungslegung, para 912a; ZK-Handschin, Art 659–659b para 3.

<sup>1422</sup> Handschin, Rechnungslegung, para 911 et seq.

<sup>1423</sup> In IAS 39.AG97; also in IFRS 7, 9 and IAS 31; cf Böckli, Rechnungslegung, paras 436, 478; Brülisauer/Mühlemann, Art 58 para 109; OFK-Dekker, Art 959a para 104; Handschin, Jusletter 21<sup>st</sup> October 2013, para 25 et seq; Handschin, Rechnungslegung, para 911 et seq; Stefani, veb.ch Praxiskommentar, Art 959 para 66.

<sup>1424</sup> Art 959a para 2 fig 3 lite CO; cf also Handschin, Rechnungslegung, para 918; ZK-Handschin, Art 659–659b para 20; CHK-Lipp, Art 959a para 55; Böckli, Aktienrecht, § 8 para 271 et seq.

## XI. Employee Benefits

Swiss pensions are benefit plans in the classification of IFRS.<sup>1425</sup> IFRS<sup>1426</sup> 405 define them as post-employment plans that are not contribution plans. ‘Defined contribution plans are post-employment benefit plans under which an entity pays fixed contributions into a separate entity (a fund) and will have no legal or constructive obligation to pay further contributions if the fund does not hold sufficient assets to pay all employee benefits relating to employee service in the current and prior periods.’<sup>1427</sup>

The CO shows another similarity to the recognised standards. Under the CO, 406 as in the recognised standards,<sup>1428</sup> the employer contribution reserves (*Arbeitgeberbeitragsreserven*) can be capitalised,<sup>1429</sup> even though the CO’s asset definition only allows items to be capitalised that are at the entity’s disposal (Art 959 para 2 CO).<sup>1430</sup>

Müller<sup>1431</sup> compares Swiss law concerning employee benefits to IAS 19.<sup>1432</sup> 407 He finds many similarities between the two systems; thus, the IAS can be applied to Switzerland. Another argument is based on the fact that a number of Swiss entities sent a Comment Letter for the Exposure Draft 2010 of IAS 19.<sup>1433</sup> Just because these entities use IFRS in order to report employee benefits does not mean that they should. In other words, just because someone in practice does something a certain way, this does not automatically make it right.

A similar example can be found. The allocation of participation rights 408 (*Beteiligungsrechten*) and options on shares shall be reported as personnel costs under IFRS.<sup>1434</sup> On the other hand, in the CO, this allocation appears only in the notes (Art 959b para 5 CO). Böckli<sup>1435</sup> argues that the recognition as personnel costs shall also be applied under the CO in accordance with IFRS.

Pension funds can experience deficits. They must be independent from 409 the entity and, therefore, carry the loss on their own.<sup>1436</sup> However, the entity has a limited obligation to come up with payments to cover a part of the

<sup>1425</sup> Kleibold, Ausschüttungsregulierung, p 93.

<sup>1426</sup> IAS 19.8.

<sup>1427</sup> IAS 19.8.

<sup>1428</sup> IAS 19; Swiss GAAP FER 16.

<sup>1429</sup> Kleibold, Ausschüttungsregulierung, p 217; cf Handschin, Rechnungslegung, para 696a et seq; dissenting Böckli, Rechnungslegung, para 500.

<sup>1430</sup> Kleibold, Ausschüttungsregulierung, p 217.

<sup>1431</sup> Müller, Risk-Sharing, p 87 et seq.

<sup>1432</sup> Cf also Welser/Wick, ST 2014, p 25 et seq.

<sup>1433</sup> Müller, Risk-Sharing, p 87 n 326.

<sup>1434</sup> IFRS 2.

<sup>1435</sup> Böckli, Rechnungslegung, para 606.

<sup>1436</sup> Böckli, Rechnungslegung, para 661.

loss.<sup>1437</sup> Public pressure can also lead to a constructive liability for the entity to cover more than it is obliged to, resulting in the report of a liability.<sup>1438</sup>

## **XII. Related Parties**

- 410 The CO<sup>1439</sup> focuses only on the ownership structure to determine the related parties. The recognised standards<sup>1440</sup> broaden the spectrum to the possibility of taking influence.<sup>1441</sup>

## **XIII. Consolidated Statement**

- 411 The purpose of a consolidated statement is to give an image of a concern as an economic unity.<sup>1442</sup> The consolidated statement has only an informative purpose and cannot be utilised as a basis for profit distribution, nor to determine the taxable net income.<sup>1443</sup> The function of the statutory and the report according to recognised standards is, in this case, the same.<sup>1444</sup> Here, the term 'control' is of significance. This is due to the fact that, if another corporation controls the entity, it must be consolidated in such a way that financial report users understand the economic unity. The old law<sup>1445</sup> used the term 'common management' (*einheitliche Leitung*).<sup>1446</sup> The new law<sup>1447</sup> uses the term 'control', as do the recognised standards<sup>1448</sup>.<sup>1449</sup> The doctrine<sup>1450</sup> applies the new IFRS<sup>1451</sup>

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<sup>1437</sup> Art 65d para 3 lit a BVG; Art 44 BVV 2; Kleibold, Ausschüttungsregulierung, p 93; CHK-Lipp, Art 959c para 62.

<sup>1438</sup> Swiss GAAP FER 16, 23.1; Böckli, Rechnungslegung, para 661; Kleibold, Ausschüttungsregulierung, p 93 n 421.

<sup>1439</sup> Art 959a para 4 CO.

<sup>1440</sup> IAS 24; Swiss GAAP FER 15.

<sup>1441</sup> HWP 2014, p 149 et seq; cf also Spadin, Nahestehende Personen, *passim*.

<sup>1442</sup> Handschin, Rechnungslegung, Glossar: Konsolidierung, p LXXVII; for the application of PS 600 cf Haldimann, ST 2013, p 295 et seq.

<sup>1443</sup> Cf Hohl, Private Standardsetzung, p 128 et seq.

<sup>1444</sup> Hohl, Private Standardsetzung, p 128 et seq.

<sup>1445</sup> Art 663e oCO.

<sup>1446</sup> Glanz/Zihler, veb.ch Praxiskommentar, Art 963 para 12; Handschin, Rechnungslegung, para 937; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 83.

<sup>1447</sup> Art 963 para 2 CO.

<sup>1448</sup> IAS 27 (old); IFRS 10; Swiss GAAP FER 30.

<sup>1449</sup> Böckli, Rechnungslegung, para 1199; Glanz/Zihler, veb.ch Praxiskommentar, Art 963 paras 15 et seq, 28 et seq, 82 et seq; Handschin, Rechnungslegung, para 938 et seq.

<sup>1450</sup> Böckli, Rechnungslegung, para 1200; Handschin, Rechnungslegung, para 938 et seq; CHK-Lipp, Art 963 paras 25, 30 et seq; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 80 et seq; cf Böckli, Aktienrecht, § 9 para 19 et seq.

<sup>1451</sup> IFRS 10.

to the CO, although the legislature copied the definition of the old IFRS.<sup>1452</sup> This makes sense because the legislature aims to minimise contradictions between the CO and the recognised standards.<sup>1453</sup>

‘[Goodwill] is the difference between the net assets acquired (that is, the fair market value of the assets less the assumed liabilities) and the amount of money the acquiring company pays for them.’<sup>1454</sup> IFRS<sup>1455</sup> report goodwill separately in the consolidated report and in cases in which an entity merges with another. In the CO, the goodwill in a share purchase is part of the transfer price.<sup>1456</sup> The reader has more information with the separate report. However, the CO’s asset definition (cf para 373 et seq) does not fit for goodwill because the entity cannot dispose of goodwill freely. Under the oCO, the preparer could choose whether he wished to capitalise the goodwill on top of the purchase price.<sup>1457</sup> Böckli,<sup>1458</sup> contrary to Handschin,<sup>1459</sup> makes a distinction between Swiss GAAP FER and the CO<sup>1460</sup> by stating the importance of only capitalising assets and not just utilisation potential. According to Böckli,<sup>1461</sup> self-created goodwill cannot be capitalised under the CO.

## C. Interim Conclusion

The influence of recognised standards manifests itself in various ways. 412 However, the content of this chapter is limited to the results from the recognised standards only. In addition, this chapter has analysed the different actors using recognised standards in the application of Swiss commercial accounting law. This group of actors consists of the legislature, judges, and the doctrine. The Swiss legislature consulted IFRS in the revision of the CO. The doctrine and the SFT considered recognised standards in the application of Swiss commercial accounting rules. Numerous examples show how recognised

<sup>1452</sup> IAS 27.

<sup>1453</sup> Botschaft 2007, p 1724.

<sup>1454</sup> Berman/Knight, *Financial Intelligence*, p 19; cf Botschaft 2007, p 1706; Böckli, *Rechnungslegung*, para 937, 947; Gutsche, *veb.ch Praxiskommentar*, Art 959a para 93.

<sup>1455</sup> IFRS 3.10, 3.32; cf also Swiss GAAP FER 10; to that Kleibold, *Ausschüttungsregulierung*, p 84.

<sup>1456</sup> Böckli, *Rechnungslegung*, paras 937, 992; Gutsche, *veb.ch Praxiskommentar*, Art 959a para 93; cf Stefani, *veb.ch Praxiskommentar*, Art 959 para 21; diverging Nösberger/Boemle, *ST* 2014, p 168.

<sup>1457</sup> HWP 2009, Band 1, p 209; Kleibold, *Ausschüttungsregulierung*, p 130.

<sup>1458</sup> Böckli, *Rechnungslegung*, para 945.

<sup>1459</sup> Handschin, *Rechnungslegung*, para 684 et seq.

<sup>1460</sup> Art 959 para 2 CO.

<sup>1461</sup> Böckli, *Rechnungslegung*, para 947.

standards are used to create and apply the norms in the CO. Whenever IFRS demand a separate report of an item, the same should be allowed under the CO because this process leads to more information in the financial report. However, the application of IFRS must be compatible with the CO's requirements.

413 The applier of the CO profits from other sources, either as the standard setter or as its interpreter. This is of particularly high value, because the Swiss commercial accounting rules are limited to approximately 20 pages, leaving a lot of questions unanswered. The consideration of foreign norms also leads to the possibility of overthinking the reporting of certain items. The report of own shares is a perfect example of this benefit. Before the revision, it was possible for the entity to capitalise own shares. Now, own shares must be reported as a negative item in the financial report, as is found in the recognised standards (cf para 404 et seq).

414 In other cases, the legislature considered the definition of certain items, such as the definition of assets (cf para 373 et seq) or provisions (cf para 399 et seq). The following question arises: if the legislature used recognised standards, is it possible for the interpreter to use them also? This question will be answered in the final chapter (cf para 417 et seq).

415 The result of the recognised standards' influence is an alignment of international informal norms with national formal norms. Unfortunately, there are problems associated with this effect. Only the national legislature is sovereign to set enforceable norms. The people and, with their power, the national legislators are democratically legitimised to set the legal order, not privates. However, through the use of private standards in the national norm-setting process or the interpretation of formal norms with the help of informal norms, the private standard setters gain indirect influence on domestic legal orders. The danger, here, is that the people's will is bypassed, and the democracy is undermined. Instead of the people, experts now set the law. The following chapters will provide answers to this problem (cf para 264 et seq).

416 Another problem is the potential conflict between the different principles used in the CO compared to the recognised standards. Most problematic is the prudence principle in relation to the true and fair view. If the conflict holds up, the recognised standards can only be used very carefully as an interpretation tool. Introducing foreign objects into another legal system can lead to a systemic break. Therefore, the introduction of foreign objects must be handled with care. However, this problem only exists if the two systems are really altogether different. This question was addressed in § 9 (cf para 303 et seq).



## § 11 Interpretation of Domestic Accounting Rules

This chapter shows how those who apply Swiss commercial accounting rules 417 should use IFRS in the interpretation of the CO. Words originate from thoughts, and language is used to transport these thoughts; in order to relate the thoughts to the words, they must be interpreted. The interpretation brings the thoughts back to the norm. Thus, words are transformed thoughts. In this transformation process, errors can occur. For this reason, language is a limited tool and is open to interpretation.<sup>1462</sup> This is especially the case where the legislature intentionally uses open wording in laws to ensure flexible interpretations, which can adapt over time.<sup>1463</sup> Each law system has its own vocabulary, concepts, rules, and techniques for the creation of norms. These interpretations shape society, and society shapes interpretations.<sup>1464</sup>

The danger of interpretation lies in the possibility of undermining the norm. 418 At the same time, interpretation is an important tool for developing the law (*Rechtsfortbildung*).<sup>1465</sup> The Swiss legislature created Art 2 para 2 CC (prohibition of the abuse of rights; *Rechtsmissbrauchsverbot*) to prevent the undermining of norms: ‘The manifest abuse of a right is not protected by law’.

Interpretation is not only an instrument that can be used to reproduce the 419 legislature’s opinion; it also incorporates creative elements.<sup>1466</sup> The creative part of the interpretation is limited by the value judgements (*Wertentscheidungen*) of the legislature.<sup>1467</sup> It is important in financial regulation to apply the recognised financial reporting principles (cf para 353 et seq) in the pursuit of the purpose of the law (cf para 306 et seq) while interpreting the single norms.

The interpretation process is divided into two parts: first, a suitable norm has 420 to be found and interpreted (cf para 430 et seq); second, the result must be verified according to its compliance with the underlying principles of the applicable structure of norms (*Normgefüge*; cf para 507). This dualism results from the prohibition of the abuse of rights and the possibility to fill improper lacunae with proper meaning (cf para 507).

§ 11 shows in step one the legal methodology behind interpretation. It 421 consists of four different interpretation methods: the linguistical-grammatical (cf para 423 et seq), the systematic (cf para 465 et seq), the historic (cf para 467

<sup>1462</sup> Häfelin/Haller/Keller/Thurnherr, Schweizerisches Bundesstaatsrecht, para 76.

<sup>1463</sup> Leupold, recht 2008, p 64; Boemle, ST 2006, p 8 et seq.

<sup>1464</sup> Evans/Baskerville/Nara, Language, p 9.

<sup>1465</sup> Häfelin/Haller/Keller/Thurnherr, Schweizerisches Bundesstaatsrecht, para 82 et seq.

<sup>1466</sup> Häfelin/Haller/Keller/Thurnherr, Schweizerisches Bundesstaatsrecht, para 86.

<sup>1467</sup> Häfelin/Haller/Keller/Thurnherr, Schweizerisches Bundesstaatsrecht, para 88.

et seq), and the teleological (cf para 450 et seq). After the explanations of each method, the theory is applied to an example of when (probability of occurrence) to report a provision according to the CO (cf paras 449, 455, 465, 473 et seq). The focus is on the similarities (wording) between different standards, and the resulting possibility of interpreting one standard with the help of another, similar standard (cf para 430 et seq). Step two covers the verification of the result (cf para 507).

## A. Methods of Interpretation

- 422 As in other German-speaking European states,<sup>1468</sup> Switzerland uses the methods characterised by Savigny<sup>1469</sup>.<sup>1470</sup> The methods mentioned above interact with one another in the form of a method pluralism, meaning that each method of interpretation has the same value.<sup>1471</sup> The interpreting party shall evaluate each interpretation's outcome with each of the others. The solution should be just.<sup>1472</sup> The linguistic-grammatical interpretation is superior in all cases, where the wording is clear.<sup>1473</sup>

## I. Linguistic/Grammatical Interpretation (*Sprachlich-grammatikalische Interpretation*)

- 423 The starting point of each interpretation is the wording.<sup>1474</sup> The literal sense of wording (*Wortsinn*) is the starting point of interpreting a norm<sup>1475</sup> and also sets

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<sup>1468</sup> Austria; Germany; Liechtenstein; and a part of Switzerland.

<sup>1469</sup> Von Savigny, System, p 212 et seq.

<sup>1470</sup> Cf instead of many others, BGE 140 IV 5, Consideration 3.1; Immenhauser, FS Bucher, p 302; Kramer, Methodenlehre, p 58; cf Kunz, AJP 2015, p 414.

<sup>1471</sup> BGE 134 II 249, Consideration 2, 141 III 155, Consideration 4.2; Kantonsgericht Zug, decision of 27<sup>th</sup> October 2016, A3 2015 27, Consideration 4.3; Häfelin/Haller/Keller/Thurnherr, Schweizerisches Bundesstaatsrecht, para 130; Häfelin/Müller/Uhlmann, Allgemeines Verwaltungsrecht, para 178; ZK-Egger, Art 1 para 10; Kramer, Methodenlehre, p 126 et seq; Traub, FS Richli, p 812 et seq.

<sup>1472</sup> ZK-Egger, Art 1 para 10.

<sup>1473</sup> ZK-Egger, Art 1 para 11.

<sup>1474</sup> BGE 126 V 435 Consideration 3; Kantonsgericht Zug, decision of 27<sup>th</sup> October 2016, A3 2015 27, Consideration 4.4; Evans/Baskerville/Nara, Language, p 10; Häfelin/Haller/Keller/Thurnherr, Schweizerisches Bundesstaatsrecht, para 91; BSK ZGB-Honsell, Art 1 para 1; BK-Käfer, Art 957 para 6.133 et seq; Kramer, p 59 et seq; Wojcik, IFRS als europäisches Recht, p 268; for the interpretation of EU directives cf Wiegand, Jusletter 17<sup>th</sup> June 2002, para 17.

<sup>1475</sup> Kramer, Methodenlehre, p 59; cf also ZK-Dürr, Art 1 paras 65 et seq, 147 et seq; ZK-Egger, Art 1 para 11.

the limits of the interpretation.<sup>1476</sup> These limits can only be breached in cases in which the application of the norm leads to unreasonable results (improper lacunae; cf para 507), or when the norm is used in the abuse of rights. The clear and precise wording can be neglected only if the wording does not represent the true meaning of the norm. In these cases, the legal sense derived from the methodology is more important than the clear wording.<sup>1477</sup>

With the wording, language is important. The official languages in Swiss law are German, French, and Italian (Art 70 para 1 BV).<sup>1478</sup> Every part of Swiss legislation is issued in these three languages and all have the same rank concerning interpretation (Art 14 para 1 sentence 2 PubLG).<sup>1479</sup> The use of different languages helps to overcome doubts in the interpretation.<sup>1480</sup> The interpretation must be based first on the wording, not on the *ratio*.<sup>1481</sup> Marginal notes also count as a part of legislation. These are added to articles for support and have the same importance as the articles themselves.<sup>1482</sup>

Points of orientation are found in the interpretation of case law, doctrine, comparative law, and outside the law.<sup>1483</sup> In this sense, foreign ideas are often integrated into other fields or jurisdictions. This process is called ‘reception’ (cf para 157 et seq).<sup>1484</sup> Art 1 para 3 CC demands that the law operator follows the established doctrine and case law whenever the law does not give an explicit answer to a question.<sup>1485</sup>

## 1. References in a Broader Sense

Direct references are references to a specific topic or norm.<sup>1486</sup> In all such cases, the reference is indisputable. The reference can be dynamic or static:<sup>1487</sup> a static reference restricts the reference to a specified source (most often with a

<sup>1476</sup> BSK ZGB-Honsell, Art 1 para 3; BGE 128 I 34 Consideration 3b.

<sup>1477</sup> Kantonsgericht Zug, decision of 27<sup>th</sup> October 2016, A3 2015 27, Consideration 4.4.1.

<sup>1478</sup> All of these are also national languages in addition to Rhaeto-Romanic (Art 4 BV).

<sup>1479</sup> Häfelin/Haller/Keller/Thurnherr, Schweizerisches Bundesstaatsrecht, para 95; BSK ZGB-Honsell, Art 1 para 9; for European law Wojcik, IFRS als europäisches Recht, p 268.

<sup>1480</sup> Wiegand, Jusletter 17<sup>th</sup> June 2002, para 17.

<sup>1481</sup> BGE 141 III 155, Consideration 4.2; BK-Käfer, Art 957 para 6.134.

<sup>1482</sup> For further reference BK-Käfer, Art 957 para 6.137.

<sup>1483</sup> Cf Kramer, p 255 et seq; Kleibold, Ausschüttungsregulierung, p 56.

<sup>1484</sup> Wiegand, Am J Comp Law 1991, p 229; cf Kunz, FS Bucher, p 457; Kunz, recht 2006, p 39; Kunz, recht 2012, p 38; Schreiber, International Standards, p 151 et seq; Wiegand, Jusletter 25. Februar 2002, para 9 et seq; Wiegand, Legal Culture and the Legal Profession, p 137 et seq; Wiegand, ZBJV 1988, p 229 et seq.

<sup>1485</sup> Kramer, p 256.

<sup>1486</sup> Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 895.

<sup>1487</sup> Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 895; cf Wojcik, IFRS als europäisches Recht, p 104 et seq.

specified date).<sup>1488</sup> A dynamic reference is based on the source's current version (*in der geltenden Fassung*).<sup>1489</sup> The legislature delegates legislative power with dynamic references.<sup>1490</sup> A change of source leads to an automatic change of the law.<sup>1491</sup>

427 Static references are allowed because the legislature can consider the effects of the reference in the creation of the norms.<sup>1492</sup> It can also react to changes in the source by adapting the reference. In principle, direct dynamic references are not allowed.<sup>1493</sup> The reason for this is the inclusion of changes in the future. The referred source could change and the authoritative norm will also change. The private standard setter will have a *carte blanche*, giving him the power to change the law at will.<sup>1494</sup> Although the legislature is not supposed to create direct dynamic references, it has used them a few times (cf para 426 et seq).

428 Frequently, the tribunals take inspiration from comparative law (cf para 183 et seq) to solve the problems in Swiss exegesis.<sup>1495</sup> For example, Art 7 para 1 Maritime Code (*Seeschiffahrtsgesetz*)<sup>1496</sup> provides a mandate to follow the laws of other seafaring states.<sup>1497</sup> If the judge cannot find a specific norm to regulate the case in question, he shall consider the generally accepted guidelines in maritime law (*allgemein anerkannten Grundsätzen des Seerechts*).<sup>1498</sup> The legislature created a direct reference to the generally

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<sup>1488</sup> Brunner, Technische Normen, p 91; Schreiber, International Standards, p 152; Uhlmann, LeGes 2013, p 93 et seq; Wojcik, IFRS als europäisches Recht, p 105.

<sup>1489</sup> BGE 136 I 316, Consideration 2.3; Uhlmann/Gili, ZfR Band 5, p 8; To the legal instruments cf the informations in the web issued by the Federal Department of Justice, available at: <https://www.bj.admin.ch/bj/de/home/staat/legistik/hauptinstrumente.html> (accessed on 16.10.2018); cf Brunner, Technische Normen, p 91; Schreiber, International Standards, p 152; Uhlmann, LeGes 2013, p 93 et seq.

<sup>1490</sup> Uhlmann, LeGes 2013, p 94.

<sup>1491</sup> BGE 136 I 316, Consideration 2.3; Uhlmann/Gili, ZfR Band 5, p 8.

<sup>1492</sup> Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 902; Brunner, Technische Normen, p 87 et seq; Schreiber, International Standards, p 153.

<sup>1493</sup> Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 902.

<sup>1494</sup> Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 902.

<sup>1495</sup> Kramer, p 265 et seq; cf Nösberger/Boemle, ST 2014, p 14.

<sup>1496</sup> Bundesgesetz über die Seeschiffahrt unter der Schweizer Flagge vom 23. September 1953 (Seeschiffahrtsgesetz; SR 747.30).

<sup>1497</sup> Kramer, p 268.

<sup>1498</sup> German wording of Art 7 para 1 Seeschiffahrtsgesetz: '*Kann der Bundesgesetzgebung, insbesondere diesem Gesetz und den als anwendbar erklärten Bestimmungen internationaler Übereinkommen keine Vorschrift entnommen werden, so entscheidet der Richter nach den allgemein anerkannten Grundsätzen des Seerechts und, wo solche fehlen, nach der Regel, die er als Gesetzgeber aufstellen würde, wobei er Gesetzgebung und Gewohnheit, Wissenschaft und Rechtsprechung der seefahrenden Staaten berücksichtigt*'; cf also Kunz, recht 2012, p 51.

accepted principles of international law. In such cases, the interpreter has to consider the original sources.<sup>1499</sup>

An example of this can be found in the requirements of pension schemes (*Vorsorgeeinrichtungen*) in financial reporting. These are obliged to report according to Swiss GAAP FER 26 (Art 47 para 2 BVV 2).<sup>1500</sup> Swiss law (BVV 2) refers here to a private standard (Swiss GAAP FER; cf para 209 et seq). The date of reference is fixed to 1<sup>st</sup> January 2014; thus, it is a static reference.

## 2. Recognising the Connection

Indirect references occur if one text shows similarities to another, without the legislature (or the norm-setting body) mentioning the norm's source (incorporations or general clauses). It is difficult to determine an indirect reference, especially with incorporations. First, the similarities between two texts must be found. This poses a problem because the legislature does not always disclose the sources used in setting a norm (even in the dispatch). Nonetheless, finding a connection between the two texts indicates that the legislature was inspired by the original text. In many cases, the domestic law is not homemade, but instead is an altered version of a standard issued by an international organisation.<sup>1501</sup> Some authors term this process 'legal transplants'.<sup>1502</sup>

In cases in which the wording matches that of another text, there is an inevitable connection between the two sources.<sup>1503</sup> The match can be arbitrary or intentional. With the world's current interconnectedness, an arbitrary match is nearly unthinkable.<sup>1504</sup> Whenever the connection is intentional, the legislature has emerged with dependence on the original text. If the legislature uses similar wording, it creates a planned connection between the original source and its own new norm. It relies on the law operator to recognise this procedure.

If the original text was copied word for word, it cannot be utilised without regarding the consequences. With the original source there is a doctrine: this literature concerning the original text cannot be applied without estimating the impact it will have on the interpretation of the similar norm. The literature must be examined carefully in terms of the influence it will have in its application in Swiss law.

<sup>1499</sup> Kunz, FS Bucher, p 460.

<sup>1500</sup> Erläuternder Bericht VASR, p 7 n 27; cf HWP 2014, p 5; Müller/Wyss, p 1.

<sup>1501</sup> Delbrück, FS Thürer, p 107.

<sup>1502</sup> Cf for further reference Kunz, recht 2012, p 39.

<sup>1503</sup> Cf the wording of Art 959 para 2 and compare it with IFRS 13.24.

<sup>1504</sup> Kunz, recht 2012, p 39.

433 Turkey can be used as an example. Under Mustafa Kemal Atatürk, the Swiss Civil Code (CC) was considered by the Turkish government in 1926.<sup>1505</sup> Although the Turkish CC shows similarities to the Swiss CC, they are not applied in the same way in their respective jurisdictions due to their own practices, doctrines, and case law. Law forms a society and its culture (and vice versa). The same can be observed in Turkey, the culture of which was shaped by the Koran and its traditions.<sup>1506</sup>

### 3. Acting on the Found Connection

434 As a follow-up question, can the original source be applied as an auxiliary means if both norms show similarities? The second question is, what is the impact of indirect references? If the connection is established, one can wonder about the possibility of using the original text to interpret the new text. This idea arises from the fact that the norm setter was inspired by the original text, so why should the norm user not also be inspired. This question can be answered in different ways. If the norm setter did not disclose the source, then he did not want the norm user to know where to look for more information. It should be noted that this argument cannot be utilised as a reason to forbid the use of the original text as an interpretation instrument.

435 Glanzmann<sup>1507</sup> goes further by stating that the existence of different standards regulating the same topic alone is sufficient to interpret one standard with the help of another, but in consideration of the different underlying concepts. Baltzer<sup>1508</sup> sees an informal norm as a non-exclusive offer of interpretation (*nicht exklusives Auslegungsangebot*; cf paras 242, 435). Depending on how the jurisdiction interprets the private rules, it experiences another presumption of conformity (*Vermutungswirkung*): If the judge treats the private rules as a minimum standard, the non-compliance will lead to the presumption of carelessness (*Unsorgfaltsvermutung*). However, in cases of best-practice standards, their fulfilment leads to the presumption of careful behaviour.<sup>1509</sup> Sester<sup>1510</sup> takes the most extreme approach, stating the following: he who is IFRS compliant is also compliant with domestic accounting rules.

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<sup>1505</sup> ZK-Egger, Allgemeine Einleitung Art 1-10 paras 136 et seq; Kunz, LeGes 2012, p 266 et seq; cf also Wiegand, recht 2008, p 41.

<sup>1506</sup> With further references ZK-Egger, Allgemeine Einleitung Art 1-10 para 145 et seq; cf Kunz, recht 2012, p 53.

<sup>1507</sup> Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 31.

<sup>1508</sup> Baltzer, Zertifizierte Managementsysteme, para 168 et seq.

<sup>1509</sup> With further references Baltzer, Zertifizierte Managementsysteme, para 168.

<sup>1510</sup> SGHB Finanzmarktrecht I-Sester, § 3 para 32.

The legislature can take over the whole standard, parts of it, or its summary 436 (cf para 351 et seq).<sup>1511</sup> In cases in which the legislature has applied the whole standard to its national law, the interpreter may also use the whole standard.<sup>1512</sup> If the legislature intentionally has taken only parts, then the interpreter can only consider the standard for those parts; for the remaining parts, the interpreter may only, with special consideration, demonstrate the differences between the two norms. Often, the legislature uses summaries of parts of standards in the form of definitions or classification regulations.

If the legislature has considered foreign norms in the standard-setting 437 process, the norm applier can do the same.<sup>1513</sup> Either way, the interpreter must test the compatibility (compatibility test) of the norm used to interpret the legal norm (cf para 507).<sup>1514</sup>

The original source can be either of authoritative legal status (cf para 439 et 438 seq) or a non-legal source (cf para 441 et seq). However, the referring norm can be a legal or non-legal source as well. Thus, different variations can be considered: legal to legal (reception;<sup>1515</sup> eg Swiss CC to Turkish CC; cf para 433), non-legal to legal (eg IFRS to the CO; cf para 137 et seq), legal to non-legal (eg BankV to FINMA-RS; cf para 291 et seq), or non-legal to non-legal (eg IFRS to Swiss GAAP FER; cf para 190 et seq).

#### *a) Legal Sources*

A norm, or the whole law, can show similarities with another (foreign) law (formal 439 norm).<sup>1516</sup> The foundation for this is in the obligation for the legislature to consider different options in the norm-setting process (cf para 183 et seq). The most prominent examples are the approximations of Swiss laws on EU law and directives.<sup>1517</sup> Recently, FINFRAG<sup>1518</sup> was introduced to Swiss law, and

<sup>1511</sup> Kunz, recht 2006, p 43 et seq.

<sup>1512</sup> One example is the English FRS issued by the Accounting Standards Board. FRS 12 issued in September 1998 corresponds with IAS 37.

<sup>1513</sup> For further reference Kunz, recht 2012, p 49.

<sup>1514</sup> BGE 136 II 88, Consideration 3.4; Glauser, Archives 74, p 529, 555 et seq; Gutsche, veb.ch Praxiskommentar, Art 959a para 25; Handschin, Rechnungslegung, para 31; Kunz, recht 2006, p 45 et seq; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 79; Müller/Thomann, Jusletter 21. October 2013, paras 19, 65; Riederer, ex ante 2016, p 14; Riederer, Rückstellungen, para 35.

<sup>1515</sup> Kunz, recht 2006, p 39 Kunz, recht 2012, p 38; cf also Wiegand, Jusletter 25<sup>th</sup> Februar 2002, para 9 et seq; Wiegand, Am J Comp Law 1991, p 229 et seq; Wiegand, Legal Culture and the Legal Profession, p 137 et seq; Wiegand, ZBJV 1988, p 229 et seq.

<sup>1516</sup> For the similarities in the CO-wording to the IFRS cf para 351 et seq

<sup>1517</sup> Cf Kunz, recht 2006, p 39 et seq.

<sup>1518</sup> Finanzinfrastrukturgesetz.

FIDLEG<sup>1519</sup> is in the works.<sup>1520</sup> They are the equivalents to MiFID II<sup>1521</sup> and MiFIR<sup>1522, 1523</sup>.

440 Through the instrument of comparative law, foreign law can be applied to interpret national law (cf para 183 et seq), especially if the norm refers to international standards or in the existence of a treaty.<sup>1524</sup>

*b) Informal Norms*

441 Apart from comparative law, the legislature draws inspiration from informal norms in the norm-setting process.<sup>1525</sup> The legislature frequently uses the terminology of other sciences. Kramer<sup>1526</sup> uses the term ‘competition’ in Art 1 UWG, borrowing the term from economics, as defined by economists. It is used in Swiss competition law (UWG). With it, the legislature refers to the entire economic discourse on the term ‘competition’.<sup>1527</sup> Thus, the law operator must orientate himself on the cognition of other disciplines. Chinkin<sup>1528</sup> states that one use of the informal norm is to provide guidance for the interpretation, elaboration, or application of formal law.

442 The question is, what tools can be used?<sup>1529</sup> The traditional view is that interpretation tools have a secondary position in comparison to interpretation methods.<sup>1530</sup> The newer doctrine relies more on the connections of the norms to other standards and not just abstract methods.<sup>1531</sup> Kunz, for example, states that, in cases in which the norm refers to international standards or in the existence of

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<sup>1519</sup> Finanzdienstleistungsgesetz.

<sup>1520</sup> Also in the pipeline is the FINIG (Finanzinstitutsgesetz).

<sup>1521</sup> Regulation (EU) 2016/1033 of the European Parliament and of the Council of 23 June 2016 amending Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) No 596/2014 on market abuse and regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories.

<sup>1522</sup> Regulation 2014/600/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.

<sup>1523</sup> Botschaft FIDLEG FINIG, p 8931 et seq; cf also the official statement <https://www.efd.admin.ch/efd/de/home/themen/wirtschaft-waehrung-finanplatz/finanzmarktpolitik/fidleg-finig/fb-fidleg-finig.html> (accessed on 01.09.2017); cf SGHB Finanzmarktrecht I-Brändli, § 2 para.

<sup>1524</sup> Cf Kunz, LeGes 2012, p 270 et seq.

<sup>1525</sup> Thürer, Grundidee Gerechtigkeit, Band 2, p 174.

<sup>1526</sup> Kramer, Methodenlehre, p 68.

<sup>1527</sup> Kramer, Methodenlehre, p 68.

<sup>1528</sup> Chinkin, Commitment and Compliance, p 30.

<sup>1529</sup> Cf for further reference Giger, Corporate Governance, p 74 et seq.

<sup>1530</sup> Giger, Corporate Governance, p 75.

<sup>1531</sup> SGHB Finanzmarktrecht I-Brändli, § 2 para 61; ZK-Dürr, Art 1 paras 224, 245; cf Giger, Corporate Governance, p 75.



a treaty, these norms shall be considered in the application of the domestic norm.<sup>1532</sup>

Private standards can also be utilised as an interpretation tool in the sense of Art 1 para 3 CC in cases in which the law does not refer to these standards.<sup>1533</sup> HWP:<sup>1534</sup>

*Wo allgemein anerkannte Grundsätze und detaillierte Einzelregelungen nicht zweifelsfrei bestehen, müssen solche Grundsätze aus dem Gesetz abgeleitet werden. Dabei kann auf die bestehenden Erkenntnisse der betriebswirtschaftlichen und juristischen Lehre, aber auch auf den Stand der Praxis abgestützt werden. Den formell erarbeiteten Empfehlungen und Standards kommt dabei, soweit das Gesetz einer Interpretation und Konkretisierung bedarf, grosses Gewicht zu. Entscheidend für deren Massgeblichkeit als Auslegungshilfe ist das Ausmass der allgemeinen Anerkennung und der Orientierung an den Zielsetzungen des Gesetzes.*

When neither recognised principles and detailed individual regulations are not established beyond a doubt, such principles and rules must be derived from the law. In this regard, the interpreter can rely on existing knowledge in economic and legal science, but also on the state of practice. Formally created standards and recommendations are of great importance where the law requires concretisation. The extent of the general recognition and orientation on the objectives of the law are significant for their application as interpretation tools.<sup>1535</sup>

#### 4. In Financial Reporting

Böckli<sup>1536</sup> divides financial reporting into two worlds, where the CO is separate from the recognised standards. Handschin,<sup>1537</sup> on the other hand, unifies these two separate parts into one legal system. Or, as Nobel and Waldburger put it, listing an entity means leaving the CO's formal norms.<sup>1538</sup> Meanwhile, Böckli<sup>1539</sup> recognises the possibility to take the recognised standards' terminology as a dynamic reference for the interpretation of the CO. In his view, however, approximations in the CO to the recognised standards do not

<sup>1532</sup> Kunz, LeGes 2012, p 270 et seq.

<sup>1533</sup> HWP 2014, p 5; Baltzer, Zertifizierte Managementsysteme, para 168 et seq; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 31; Flückiger, Informal International Lawmaking, p 421 et seq; Giger, Corporate Governance, p 80; Martens, RabelsZ 1992, p 219 et seq; Marti, ZBl 2000, p 566 et seq; ZK-Marti, Vorbem. Art 5 and 6 para 179 et seq and Art 5 para 215; Schreiber, International Standards, p 103 et seq; for German law cf Hohl, Private Standardsetzung, p 129 et seq.

<sup>1534</sup> HWP 2014, p 5.

<sup>1535</sup> Interpretation by the author.

<sup>1536</sup> Böckli, Rechnungslegung, para 40; cf also Botschaft 1983, p 772.

<sup>1537</sup> Handschin, Rechnungslegung, para 31.

<sup>1538</sup> Nobel/Waldburger, Festschrift für Peter Böckli, p 28.

<sup>1539</sup> Böckli, ST 2010, p 168; cf Kleibold, Ausschüttungsregulierung, p 51.

create a reference – they instead create independent Swiss law (also known as Helvetism, cf para 140).<sup>1540</sup>

445 The legislature can use different kinds of source for inspiration in the legislating process. Does the newly created norm unfold its own, independent meaning, or is it possible to use auxiliary means that do not relate to the norm directly (such as the doctrine or case law)? In other words, whether or not the law becomes a Helvetism<sup>1541</sup> is questionable. Böckli acknowledges<sup>1542</sup> the problem of the legislature having copied parts of IFRS, but at the same time opposes<sup>1543</sup> the idea of using IFRS as a tool for interpretation. Since the legislature does not explain how these verbal acquisitions should be treated,<sup>1544</sup> it is up to jurisprudence and the doctrine to do so.

446 IFRS can be applied directly or indirectly.<sup>1545</sup> In direct application, the legislature refers to the recognised standards directly through a dynamic or static reference. Jurisdiction can also implement IFRS through an endorsement process, in which IFRS are adapted and then incorporated into national law.<sup>1546</sup> Problems arise with this application due to the existence of the different versions of IFRS.

447 The revised Swiss CO shows many similarities to IFRS. Since the Swiss legislature considered IFRS partially in the standard-setting process,<sup>1547</sup> the law operator shall apply the same standards as auxiliary means.<sup>1548</sup> Even more striking is the resemblance between Swiss GAAP FER and IFRS (cf para 190 et seq) in terms of their structure and content.<sup>1549</sup> Definitions and classification regulations appear in Swiss GAAP FER that are almost identical to those found in IFRS.

## 5. Consequences

448 Because of the connection between the two norms, the source can be used as an interpretation tool for the other norm. If a state chooses to adopt a legal source (meaning foreign law) in its domestic legal order, then the interpreter can use

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<sup>1540</sup> Böckli, Rechnungslegung, para 40 et seq.

<sup>1541</sup> Cf Böckli, Aktienrecht, § 8 para 102.

<sup>1542</sup> Böckli, Rechnungslegung, paras 346 et seq, 1029.

<sup>1543</sup> Böckli, Rechnungslegung, para 40.

<sup>1544</sup> Böckli, Rechnungslegung, para 350.

<sup>1545</sup> Bergmann, Jahrbuch 2009, p 194 et seq.

<sup>1546</sup> Bergmann, Jahrbuch 2009, p 194 et seq.

<sup>1547</sup> Kleibold, Ausschüttungsregulierung, p 155.

<sup>1548</sup> Kleibold, Ausschüttungsregulierung, p 155 et seq.

<sup>1549</sup> Behr/Leibfried, Rechnungslegung, p 170; Böckli, Aktienrecht, § 8 para 37; Böckli, Rechnungslegung, paras 46, 50, 54; Gurtner, ST 2010, p 394; Kleibold, Ausschüttungsregulierung, p 54 et seq.

this standard as an auxiliary means through the tool of comparative law (cf para 183 et seq). Another possibility would be to create an analogy to an already existing norm in the same legal order. The analogy can be applied to the example mentioned above in which pension schemes must report according to Swiss GAAP FER (cf para 190 et seq). Furthermore can the addressees diverge from the referenced source if they provide evidence that their incompliance is better than their compliance with the standard.<sup>1550</sup>

## 6. Linguistic-Grammatical Interpretation of Art 960e para 2 CO

The question is, when does an entity have to report a provision and to what extent? The previous explanations can be applied to the Art 960e para 2 CO, regulating the duty to report a provision. Starting with the linguistic-grammatical method, we examine the wording of Art 960e para 2 CO, which reads as follows: ‘If past events lead to the expectation of a cash outflow in future financial years, the provisions probably required must be made and charged to the profit and loss account’.<sup>1551</sup> The wording is unclear in terms of how the degree of occurrence-probability (*Eintrittswahrscheinlichkeit*) affects the amount of the provision reported. Due to this lack of clarity, the doctrine developed its own method but cannot agree on a common denominator with regard to the legal consequences of valuating the occurrence-probability.<sup>1552</sup> Similarities can be found between the CO’s and recognised standards’<sup>1553</sup> wording (cf para 351 et seq).<sup>1554</sup> Since similar wording exists, IFRS can be utilised as an auxiliary means to interpret Art 960e para 2 CO (cf para 399 et seq).<sup>1555</sup> Therefore, if the risk has an occurrence-probability of more than 50 per cent, meaning that the risk is more likely to occur than not, the preparer shall report a provision to the full extent.<sup>1556</sup>

<sup>1550</sup> Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 902.

<sup>1551</sup> Authoritative German version: ‘Lassen vergangene Ereignisse einen Mittelabfluss in künftigen Geschäftsjahren erwarten, so müssen die voraussichtlich erforderlichen Rückstellungen zulasten der Erfolgsrechnung gebildet werden’.

<sup>1552</sup> For the different opinions cf Riederer, Rückstellungen, para 191 et seq.

<sup>1553</sup> IAS 37.IN 2; Swiss GAAP FER 23.1.

<sup>1554</sup> For the comparison of the oCO’s, CO’s and recognised standards’ wording cf Riederer, Rückstellungen, para 50 et seq.

<sup>1555</sup> Handschin, Rechnungslegung, para 775; Boemle/Lutz, Jahresabschluss, p 373 et seq; Rentsch/Zöbeli, Praktiker, p 11 et seq; Rentsch/Zöbeli, Umsetzung, p 181; Riederer, ex ante 2016, p 11 et seq; Riederer, Rückstellungen, para 197 et seq; dissenting Böckli, Rechnungslegung, para 1025 et seq.

<sup>1556</sup> For exceptions in cases of multiple risks cf Riederer, Rückstellungen, para 222 et seq.

## II. Teleological Interpretation (*Teleologische Auslegung*)

### 1. In General

450 The two following quotes demonstrate the heart of teleological interpretation: ‘*Scire leges non hoc est verba earum tenere, sed vim ac potestatem*: To know the law is not merely to understand the words, but also their force and effect’.<sup>1557</sup> Thus, the text’s meaning is of importance. The teleological interpretation<sup>1558</sup> is about finding the law’s objective.<sup>1559</sup> The word ‘teleological’ comes from the Greek word τέλος (telos), meaning ‘the end’ or ‘a purpose’.<sup>1560</sup> The teleological interpretation is results orientated.

451 The judicial evaluation of a case is always guided by the balance of interests.<sup>1561</sup> These interests can lead to the conclusion of interpreting the norm’s wording narrowly or broadly, depending on the best fulfilment of the law’s purpose. This is only possible by applying the teleological method.<sup>1562</sup>

### 2. In Financial Reporting

452 The teleological exegesis raises some difficulties. Since financial reporting follows different purposes, it is difficult to define which purpose a certain article supports.<sup>1563</sup> Depending on the standard, financial reporting can serve the tax authorities (*Fiskus*), creditors (*Gläubigerschutz*; cf Art 725 CO),<sup>1564</sup> capital (*Kapitalschutz*),<sup>1565</sup> and investor protection (*Anlegerschutz*).<sup>1566</sup> Thus,

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<sup>1557</sup> Justinian, Digest, Book 1, Title 3, 17, cf Celsus 26 dig, D 1.3.17; Translation: To understand the law does not mean to know the wording but rather to recognise the law’s purpose and meaning.

<sup>1558</sup> Egger calls it the critical method (*kritische Methode*) and in it he finds the teleological interpretation, ZK-Egger, Art 1 para 18.

<sup>1559</sup> BGE 141 III 155, Consideration 4.2; ZK-Dürr, Art 1 para 161; cf Häfelin, Haller, Keller and Thurnherr, Schweizerisches Bundesstaatsrecht, para 120; Kramer, p 152 et seq; Meier-Hayoz, Art 1 para 192 et seq; Traub, FS Richli, p 817 et seq; Wiegand, Jusletter 17<sup>th</sup> June 2002, para 21; Wojcik, IFRS als europäisches Recht, p 275.

<sup>1560</sup> Cf also ZK-Egger, Art 1 para 18; Wojcik, IFRS als europäisches Recht, p 275.

<sup>1561</sup> ZK-Dürr, Vorbem. Art 1 und 4 paras 156 et seq; ZK-Egger, Art 1 para 18.

<sup>1562</sup> ZK-Egger, Art 1 para 19.

<sup>1563</sup> Altorfer/Duss/Felber, veb.ch Praxiskommentar, Massgeblichkeit für die Steuerbilanz, para 6; BK-Käfer, Art 957 para 6.141; Druey/Druey Just/Glanzmann, § 25 paras 14, 29.

<sup>1564</sup> Cf Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 30; CHK-Lipp, Art 962 para 1; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 13 et seq; Spadin, FS Forstmoser, p 337.

<sup>1565</sup> Cf Böckli, Aktienrecht, § 8 para 8 et seq; Kleibold, Ausschüttungsregulierung, p 3 et seq.

<sup>1566</sup> Cf also Behr/Leibfried, Rechnungslegung, p 51 et seq; Handschin, Rechnungslegung, para 7 et seq.

commercial accounting rules protect shareholders<sup>1567</sup> and stakeholders.<sup>1568</sup> The financial report itself is also a management tool.<sup>1569</sup>

The Swiss commercial accounting rules have manifold purposes.<sup>1570</sup> They 453 serve all of the purposes listed above (cf para 58). Due to these different purposes, it is difficult to work with the teleological interpretation method to find the purpose of a norm.<sup>1571</sup> In the recognised standards, the protection of creditors is different, because recognised standards place more emphasis on the information character.<sup>1572</sup> Therefore, it is easier to apply the teleological interpretation when interpreting the recognised standards.

The different purposes – as mentioned above – are spread over the CO. One 454 norm can serve different and diverging purposes from another norm. For example, the premise of going concern reflects the management's view of the value of items for the entity (cf para 352).<sup>1573</sup> The same is said for impairment (cf para 402 et seq), where the management translates its view of the item's lifetime into the financial report. The prudence principle serves mainly the stakeholders (cf para 303 et seq). They use the prudent financial report to control if their stake in the entity is still protected. The management uses the prudence principle to save taxes (cf para 303 et seq) and to limit the amount paid to the shareholders.

### 3. Teleological Interpretation of Art 960e para 2 CO

Following up on reporting a provision, the question remains, when does an 455 entity have to report a provision and to what extent? Art 960e CO serves the purpose of reporting corrections that are necessary to disclose a correct image of the entity's financial situation considering the principle of prudence (cf

<sup>1567</sup> Behr/Leibfried, Rechnungslegung, p 55 et seq; Böckli, Rechnungslegung, para 6; CHK-Lipp, Art 959 para 5.

<sup>1568</sup> Altorfer/Duss/Felber, veb.ch Praxiskommentar, Massgeblichkeit für die Steuerbilanz, para 6.

<sup>1569</sup> Böckli, Aktienrecht, § 8 para 11; Böckli, Rechnungslegung, para 9; cf Simoniello's project description available at: <https://ifrs.ius.unibas.ch/en/23-2/financial-management-duties/> (accessed on 16.10.2018).

<sup>1570</sup> Altorfer/Duss/Felber, veb.ch Praxiskommentar, Massgeblichkeit für die Steuerbilanz, para 6; Behr/Leibfried, Rechnungslegung, p 51 et seq; Böckli, Aktienrecht, § 8 para 8 et seq; Böckli, Rechnungslegung, para 6 et seq; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 14, 29 et seq; BK-Käfer, Art 957 para 6.141; Kleibold, Ausschüttungsregulierung, p 3 et seq; CHK-Lipp, Art 959 para 5, Art 962 para 1; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 13 et seq.

<sup>1571</sup> Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 29.

<sup>1572</sup> Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958 para 13.

<sup>1573</sup> Zemp/Haas, EF 2015, p 869 et seq.

para 303 et seq).<sup>1574</sup> Like other norms, Art 960e para 2 CO shows no specific interest. The general interests are used to interpret this article. The existing stakeholders are keen on a prudent report, because this way they are informed early in case of financial difficulties of the entity they invested in. For future stakeholders and shareholders, it is important that they can evaluate their plan to invest in the entity based on a financial report that shows the entity's risks. Already existing shareholders have an interest in steadily earning a dividend and in an increase in their investment. The state also has an interest in a consistent tax base.

456 The first part of the question is, at what point in time must the entity report a risk? As soon as the management recognises a risk, it must be evaluated.<sup>1575</sup> Thus, the risk of occurrence must be measured. In the next step, the consequences are assigned. Depending on the method used, the results can vary (cf para 422).<sup>1576</sup> The recognised standards<sup>1577</sup> use an all-or-nothing method. If it is more likely than not that the risk will occur, a provision should be reported fully. Another option is to report a provision proportionally for a risk that has less than a 50 per cent probability of occurrence; for a risk greater than 50 per cent, the provision should be reported fully.<sup>1578</sup> However, it is not prudent to report a risk provisionally if it has a probability of occurrence greater than 50 per cent.<sup>1579</sup>

### III. Systematic Interpretation (*Systematische Interpretation*)

#### 1. In General

457 A law builds a single unit. This unit serves to interpret the single norm in its context. This method is called systematic interpretation.<sup>1580</sup> The systematic interpretation can be divided into external and internal systematic interpretations.<sup>1581</sup> The external systematic interpretation describes the formal placement in the

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<sup>1574</sup> Verdict from the BGer from 3<sup>rd</sup> April 2012, 6B\_778/2011, Consideration 5.4.2; 4C.192/2004 vom 11<sup>th</sup> August 2004, Consideration 2.4; cf Riederer, Rückstellungen, para 130 et seq.

<sup>1575</sup> IAS 37.14 et seq.

<sup>1576</sup> For the different methods cf Riederer, Rückstellungen, para 191 et seq.

<sup>1577</sup> IAS 37.23; Swiss GAAP FER 23.5.

<sup>1578</sup> Handschin, Rechnungslegung, para 774c; cf Riederer, Rückstellungen, para 191 et seq.

<sup>1579</sup> Riederer, Rückstellungen, para 216.

<sup>1580</sup> Kantonsgericht Zug, decision of 27<sup>th</sup> October 2016, A3 2015 27, Consideration 4.5; cf ZK-Dürr, Art 1 para 151 et seq; ZK-Egger, Art 1 para 12; Häfelin/Haller/Keller/Thurnherr, Schweizerisches Bundesstaatsrecht, para 97; Kramer, p 88 et seq; Meier-Hayoz, Art 1 para 188 et seq; cf Wiegand, Jusletter 17<sup>th</sup> June 2002, para 20; Wojcik, IFRS als europäisches Recht, p 274.

<sup>1581</sup> Forstmoser, Meier-Hayoz/Noblel, § 7 para 48; BK-Emmenegger/Tschentscher, Art 1 para 250.

regulation.<sup>1582</sup> The internal systematic interpretation is the functional interaction of a certain norm according to the intention of the legislature.<sup>1583</sup>

## 2. In Financial Reporting

### a) Switzerland

In financial reporting, this means that the interpreter must consider the context 458 of the whole law system when interpreting a single commercial accounting norm. Swiss commercial accounting norms are set in the form of a pyramid. At the top is Art 958 Para 1 CO, which states that the financial report should present a basis for a reliable assessment of the entity's economic situation. This is the main purpose of Swiss financial reporting. The reliable assessment should not be mistaken for the principle of the true and fair view (cf para 303 et seq) provided by the recognised standards. At the second level of the pyramid are the 'recognized financial reporting principles' (*Grundsätze ordnungsmässiger Rechnungslegung*; Art 958c Para 1 CO).<sup>1584</sup> The legislature introduced this inexact legal notion (*unbestimmter Rechtsbegriff*)<sup>1585</sup> to find solutions if no specific norm can be found or if the existing norm needs interpretation.<sup>1586</sup> The inexact legal notion ensures a dynamic development of accounting norms (cf para 500). The two previous stages are followed by the third (and final) stage: the specific commercial accounting rules, such as Art 960e Para 2 CO, regulating the duty to report a provision (cf para 399 et seq).<sup>1587</sup>

The question now is how one interprets the specific commercial accounting 459 rule. The principle known as *lex specialis derogat legi generali* is a way of prioritising a norm when it stands in conflict with another.<sup>1588</sup> This principle gives us an order, particularly one in which commercial accounting rules are more specific than the recognised financial reporting principles and are more concrete than the goal for a reliable assessment. In the case of a contradiction, the more specific norm always has the advantage. Hence, if the legislature diverged deliberately from the main purpose of the law in the creation of a specific norm, the specific norm supersedes the law's purpose. In this case, the preparer will disclose this fact in the notes.

<sup>1582</sup> BK-Emmenegger/Tschentscher, Art 1 para 250.

<sup>1583</sup> BK-Emmenegger/Tschentscher, Art 1 para 255; cf Kantonsgericht Zug, decision of 27<sup>th</sup> October 2016, A3 2015 27, Consideration 4.5 et seq.

<sup>1584</sup> Cf HWP 2014, p 5.

<sup>1585</sup> Von Bhicknapahari, veb.ch Praxiskommentar, Art 957a para 2.

<sup>1586</sup> With further references von Bhicknapahari, veb.ch Praxiskommentar, Art 957a para 3; cf HWP 2014, p 5.

<sup>1587</sup> Cf also the scheme of Nösberger/Boemle, ST 2014, p 12.

<sup>1588</sup> Cf BK-Käfer, Art 957 para 6.143; Kramer, Methodenlehe, p 111 et seq.

- 460 However, it can be argued that the goal for a reliable assessment sets the target and the recognised financial reporting principles as the interim goal for the interpretation of specific commercial accounting rules. Then, the pyramid should not be only seen as a cascade of more and more specific norms but also as points of orientation in the interpretation process.
- 461 The pyramid combines thoughts from the systematic interpretation with others of the teleological interpretation because it deals with the purpose(s) of the norm. The pyramid should be considered in the systematic interpretation due to fact that it is the result of the legislature's structure of commercial accounting law (Art 957 et seq CO): at the beginning of the regulation of financial reporting, we find the law's purpose in Art 958 para 1 CO (reliable view), which is followed by Art 958c CO (recognised principles of financial reporting), and the specific norms.
- 462 Divergences are tied to certain conditions:<sup>1589</sup> the preparer must provide a reliable view with the divergence.<sup>1590</sup> Only in rare cases are divergences acceptable in the event of relevant reasons.<sup>1591</sup> The divergence and its effects on the financial report must be disclosed in the notes.<sup>1592</sup> The preparer will report the divergence in the financial report and the legally required version in an attachment.
- 463 Difficulties occur if strict compliance with a recognised financial reporting principle, such as the principle of prudence, does not necessarily achieve the law's purpose of giving a reliable view (cf para 303 et seq). In this case, a reliable view can be accomplished in reporting carefully, but still disclosing the reliable view in the notes.

#### *b) IFRS*

- 464 IFRS have a similar pyramid. Here, the underlying concept of fair presentation is so important that cases can be reported against IFRS ('*contra legem*') in instances where compliant reporting will lead to distortions of the fair presentation.<sup>1593</sup> The conceptual framework does not have the same rank (cf paras 96 et seq, 99 et seq) as the recognised financial reporting principles under Swiss law (cf para 353 et seq). However, the ability to report against the norms found in IFRS is not only possible under the systematic interpretation, but is always applicable.

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<sup>1589</sup> Böckli, Aktienrecht, § 8 para 188 et seq.

<sup>1590</sup> Botschaft 2007, p 1701; Swiss GAAP FER, Conceptual Framework, 32; Böckli, Aktienrecht, § 8 para 189.

<sup>1591</sup> Swiss GAAP FER, Conceptual Framework, 20; Böckli, Aktienrecht, § 8 para 189.

<sup>1592</sup> Böckli, Aktienrecht, § 8 para 190.

<sup>1593</sup> IAS 8.14 (b).



### 3. Systematic Interpretation of Art 960e para 2 CO

The question is when an entity has the obligation report a provision and to what extent. We start with Art 960e para 2 CO. This is a specific norm and must be interpreted with the help of the recognised principles of financial reporting and still consider a reliable view. Thus, it is important to report a provision prudently while still ensuring a reliable view. The concept of prudence is upheld by fully reporting a provision that has a risk with a probability of occurrence greater than 50 per cent. This method also creates a reliable view because the risk is reported transparently. However, if the risk will not occur until the period after the next, the periodic presentation must be considered. In this case, the periodic presentation demands the risk to be reported or *pro rata*. This means the provision is distributed over the concerned periods in equal parts. A risk of having to pay CHF 500 soon after the fifth year can be distribute over these five periods. In year one, a provision of CHF 100 is reported; in year two, an additional CHF 100, resulting in provisions valuing CHF 200 and so on.

The reliable view is only achieved if the preparer discloses the necessary information in the notes for the report user to understand the risk and its valuation. In this sense, the fact must be disclosed that the risk did not occur but that the provision was still kept in the report, which is possible under the CO (Art 960e para 4 CO<sup>1594</sup>).<sup>1595</sup>

## IV. Historic Interpretation (*Historische Auslegung*)

### 1. In General

The historic interpretation gives deference to the thoughts of the legislature while drafting the law.<sup>1596</sup> For this reason, all circumstances that led to the law are examined.<sup>1597</sup> Thus, dispatches (*Botschaft*), predrafts (*Vorentwürfe*), drafts (*Entwürfe*), and the protocol of Parliament and the commissions (*Parlaments-*

<sup>1594</sup> English wording: 'Provisions that are no longer required need not be cancelled'; authoritative German version: '*Nicht mehr begründete Rückstellungen müssen nicht aufgelöst werden*'.

<sup>1595</sup> Cf Handschin, Rechnungslegung, paras 384, 768, 786; Riederer, Rückstellungen, para 142.

<sup>1596</sup> Kantonsgericht Zug, decision of 27<sup>th</sup> October 2016, A3 2015 27, Consideration 4.6; ZK-Dürr, Art 1 para 155 et seq; ZK-Egger, Art 1 para 15; Evans/Baskerville/Nara, Language, p 11; Häfelin/Haller/Keller/Thurnherr, Schweizerisches Bundesstaatsrecht, para 101; Immenhauser, FS Bucher, p 316; Wiegand, Jusletter 17<sup>th</sup> June 2002, para 22; Wojcik, IFRS als europäisches Recht, p 271.

<sup>1597</sup> Kantonsgericht Zug, decision of 27<sup>th</sup> October 2016, A3 2015 27, Consideration 4.6; cf Kramer, Methodenlehre, p 121 et seq; Meier-Hayoz, Art 1 para 214 et seq.

*und Kommissionsprotokolle*) are of relevance in this type of interpretation.<sup>1598</sup> However, these cannot contradict the cogent law (*zwingendes Recht*).<sup>1599</sup>

468 This method is restricted by the notion that the law will develop its own independent character as soon as it is issued.<sup>1600</sup> As a result, the newly created norm disconnects from its source of inspiration and starts to develop itself independently from the original. Böckli<sup>1601</sup> supports this view by stating that the Swiss commercial accounting rules become a Helvetism at their creation and must be interpreted independently from other standards (cf para 445).

469 The historic interpretation can be divided into the subjective-historic interpretation and the objective-historic interpretation.<sup>1602</sup> The subjective-historic interpretation calls for the legislature's and other participants' intentions when drafting the norm. The objective-historic interpretation relies on the purpose of the norm at the time of its creation in the context of its surroundings (political, social, economic, and ideological).<sup>1603</sup> In the subjective-historic interpretation, the interpreter derives the legislature's intentions by using all of the available materials documenting the legislation process.<sup>1604</sup> This search can unveil a connection between a formal law and an informal norm. The connection can be explicit or implicit (for further explanation cf para 152 et seq).

## 2. In Financial Reporting

470 The historic interpretation has little weight in areas of expertise that are subjected to rapid changes in order to keep pace with modern life. One of these areas is financial reporting.<sup>1605</sup> Therefore, it is up to the doctrine and the praxis to further develop and adapt the law to this ever-changing environment.<sup>1606</sup> Self-regulation<sup>1607</sup> has become a vital part of financial reporting in dynamic areas where regulation must adapt to changes quickly.<sup>1608</sup>

<sup>1598</sup> BGE 141 III 155, Consideration 4.2; BK-Käfer, Art 957 para 6.153 et seq; ZK-Egger, Art 1 para 16; BSK ZGB-Honsell, Art 1 para 9.

<sup>1599</sup> With further references BK-Käfer, Art 957 para 6.187.

<sup>1600</sup> BGE 134 V 170 Consideration 4.1; BSK ZGB-Honsell, Art 1 para 9.

<sup>1601</sup> Böckli, Aktienrecht, § 8 para 102; Böckli, Rechnungslegung, para 40.

<sup>1602</sup> Kramer, p 123 et seq.

<sup>1603</sup> BK-Emmenegger/Tschentscher, Art 1 para 295; Kantonsgericht Zug, decision of 27<sup>th</sup> October 2016, A3 2015 27, Consideration 4.6.

<sup>1604</sup> ZK-Dürr, Art 1 para 155 et seq; ZK-Egger, Art 1 para 15; Evans/Baskerville/Nara, Language, p 11; Häfelin/Haller/Keller/Thurnherr, Schweizerisches Bundesstaatsrecht, para 101.

<sup>1605</sup> Cf Handschin, Rechnungslegung, para 27; HWP 2014, p 5.

<sup>1606</sup> Kleibold, Ausschüttungsregulierung, p 56.

<sup>1607</sup> Such as IFRS; Swiss GAAP FER.

<sup>1608</sup> Bundesamt für Justiz, Gesetzgebungsleitfaden 2007, para 898; Kleibold, Ausschüttungsregulierung, p 56.

Glanzmann states that, even though theories can appear unreasonable in a new light, they should be applied if used in practice.<sup>1609</sup> In the process of regulating fast-changing topics, the legislature designed them using inexact legal notions (cf para 458). This gives the interpreter the ability to adapt the interpretation to new insights. Hence, these topics can experience change without the legislature changing the law.

The legal regulations in financial reporting and accounting are limited to an outer frame, and the details are left to the practice.<sup>1610</sup> When an accounting standard shows lacunae (which is inevitable), it can be filled by applying another accounting norm. The underlying principles of both standards must be examined first.<sup>1611</sup> From the historical perspective, it is important to know what the legislature meant by the phrase ‘generally accepted commercial principles’ (*allgemein anerkannte kaufmännische Grundsätze*; cf para 152 et seq).<sup>1612</sup>

### 3. Historic Interpretation of Art 960e para 2 CO

In the application of the subjective-historic interpretation, it can be observed that the legislature does not explain when to report a provision concerning the probability of occurrence.<sup>1613</sup> However, the context (objective-historic interpretation) shows the influence of the recognised standards on the CO’s revision (cf paras 247 et seq, 351 et seq).<sup>1614</sup> Thus, it is justifiable to apply the recognised standards as an auxiliary means.

## V. Concluding Remarks Concerning the Interpretation of Art 960e para 2 CO

The following conclusion can be drawn from the explanations concerning the interpretation of Art 960e para 2 CO: no method wins over the other. On its own, each method proves to have equal weight (cf para 422). However, the different methods must be weighed against each other. On a formal level, the grammatical, teleological and systematic methods prove to be valuable. This leads to the following result. In my view, the CO permits the application of the method the recognised standards use. If the risk has a probability of occurrence greater than 50 per cent, the CO, in my view, does not permit the use of the proportional method. In this case, it would not be prudent to report a provision proportionally.

<sup>1609</sup> Druey/Druey Just/Glanzmann, *Gesellschafts- und Handelsrecht*, § 25 para 28.

<sup>1610</sup> Druey/Druey Just/Glanzmann, *Gesellschafts- und Handelsrecht*, § 25 para 24.

<sup>1611</sup> Druey/Druey Just/Glanzmann, *Gesellschafts- und Handelsrecht*, § 25 para 31.

<sup>1612</sup> For further reference BK-Käfer, Art 957 para 6.154.

<sup>1613</sup> Cf Botschaft 2007, p 1713 et seq.

<sup>1614</sup> Riederer, *Rückstellungen*, para 53 et seq.

## B. Differences between Legal and Economic Perspective

- 475 In commercial law, the Swiss Federal Tribunal not only uses the common interpretation methods but also searches for a practicable form of interpretation.<sup>1615</sup> In certain cases the Swiss Federal Tribunal also applies an economic view.<sup>1616</sup> This concept is also referred to as ‘substance over form’.<sup>1617</sup> It is a deliberate deviation from the law.
- 476 The view of substance over form is not only important for capitalisation but also in reporting liabilities. Liabilities can be distinguished between legally enforceable obligations and constructive obligations.<sup>1618</sup> Constructive obligations are mentioned numerous times in the recognised standards.<sup>1619</sup> ‘A constructive obligation is an obligation that derives from an entity’s actions where: by an established pattern of past practice, published policies or a sufficiently specific current statement, the entity has indicated to other parties that it will accept certain responsibilities; and as a result, the entity has created a valid expectation on the part of those other parties that it will discharge those responsibilities.’<sup>1620</sup> Constructive obligations arise from goodwill (*Kulanz*).<sup>1621</sup> In other words, an obligation does not exist based on a legal relationship; however, the entity is compelled to fulfil the obligation. The capitalisation of leased items is another example of substance over form,<sup>1622</sup> because a legal perspective would allow only the owner to capitalise the asset and not the lessee (cf para 395).
- 477 The internal report serves as an instrument for the board of directors and top management to guide the entity.<sup>1623</sup> The measurement shall occur objectively, meaning free from hidden reserves; ie, the limits of valuation

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<sup>1615</sup> BGE 96 I 605, Consideration 4, 136 II 119, Consideration 3.3.4; cf Kunz, AJP 2015, p 414.

<sup>1616</sup> BGE 126 III 466, Consideration 3.b.; Kunz, AJP 2015, p 414.

<sup>1617</sup> Behr/Leibfried, Rechnungslegung, pp 168, 419; Böckli, Aktienrecht, § 8 para 172, § 10 para 57; Handschin, Rechnungslegung, para 349; Kleibold, Ausschüttungsregulierung, p 62; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 72 et seq.

<sup>1618</sup> Cf IAS 37.10.

<sup>1619</sup> IFRS 11.C4; IAS 10.9(d); multiple times in IAS 19; 28.39; 32.AG12; multiple times in IAS 37; IFRIC 21.7(d); 21.9; Swiss GAAP FER 2.14, 21.30, 23.2, 23.5, 23.14 et seq.

<sup>1620</sup> IAS 37.10; cf Swiss GAAP FER 23.14.

<sup>1621</sup> The word goodwill is not used here as a technical term, cf Kleibold, Ausschüttungsregulierung, p 62, cf also p 91.

<sup>1622</sup> Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 73.

<sup>1623</sup> Bühlmann, Stille Reserven, p 24 et seq; Simoniello’s project description available at: <https://ifrs.ius.unibas.ch/en/23-2/financial-management-duties/> (accessed on 16.10.2018).

(*Höchstbewertungsgrenze*) and the nominal concept (*Nominalwertkonzept*) do not have to be applied in the internal report (cf para 306 et seq).

The law provides discretionary powers (*Ermessensspielräume*). These are 478 used in accordance with the perspective of the person using said powers, creating conflicts between the preparers and the users of a financial report.<sup>1624</sup> The preparers will use the discretionary powers of the law to create an advantage for the entity.<sup>1625</sup> This process is referred to as accounting policy (*Bilanzpolitik*) or earnings management.<sup>1626</sup> Hidden reserves are used to reach the intended financial development.<sup>1627</sup> The instruments are mainly provisions. Different strategies are applied; for example, the ‘cookie jar reserve’ and the ‘big bath’. In the former strategy, an entity will report provisions in good periods and resolve them in bad ones.<sup>1628</sup> The big bath (or ‘one-time charge’) is used when the board of directors tries to pack as many negative elements as possible into one bad period in order to disburden the following periods.<sup>1629</sup> Earnings management is therefore used to gloss over poor operational performance.<sup>1630</sup> Studies<sup>1631</sup> have shown that earnings management also happens in application of IFRS.<sup>1632</sup>

Management generally makes decisions based on the internal report, 479 whereby it sets the goal and follows through with the statutory report. The management considers the effects on taxation and checks the possibility of hiding the negative effects also under the recognised standards.<sup>1633</sup>

In different cases, the state neglects the legal perspective and relies on an 480 economic view. Examples can be found in different legal fields: the state pierces the corporate veil (*Durchgriff*) if the entity has chosen the form of an entity only to avoid taxes (tax law),<sup>1634</sup> in cases in which the delinquent individual created a corporate structure to hurt others without being liable (liability law);<sup>1635</sup> or, in the requirements to consolidate a group, the legislature

<sup>1624</sup> Bühlmann, Stille Reserven, p 24 et seq.

<sup>1625</sup> Cf Behr/Leibfried, Rechnungslegung, p 123; Bühlmann, Stille Reserven, p 24 et seq.

<sup>1626</sup> Cf Bühlmann, Stille Reserven, p 77 et seq; Meyer, Festschrift Behr, p 217.

<sup>1627</sup> Bühlmann, Stille Reserven, p 24 et seq.

<sup>1628</sup> Link: <http://financial-dictionary.thefreedictionary.com/Cookie+jar+reserves> (accessed on 16.10.18); Riederer, Rückstellungen, para 134.

<sup>1629</sup> Berman/Knight, Financial Intelligence, pp 4, 72; Riederer, Rückstellungen, para 135.

<sup>1630</sup> Meyer, Festschrift Behr, p 217.

<sup>1631</sup> OECD, Lessons from the Financial Crisis.

<sup>1632</sup> For further reference Meyer, Festschrift Behr, p 222.

<sup>1633</sup> Cf Simoniello’s project description available at: <https://ifrs.ius.unibas.ch/en/23-2/financial-management-duties/> (accessed on 16.10.2018).

<sup>1634</sup> Behr, Festschrift Druey 2002, p 31 et seq.

<sup>1635</sup> Behr, Festschrift Druey 2002, p 31 et seq.

applies an economic view of the group by stating that every subsidiary must be consolidated by the group controls (commercial accounting law; cf para 411).<sup>1636</sup>

- 481 The economic perspective is an important tool in the interpretation process. This perspective is applied in the interpretation step of verifying the result. After the strict application of the law did not lead to a reasonable result, the substance is preferred over the form. The result is an application of the law, which follows the purpose of the law.

### C. Interpretation of International Norms

- 482 The methods explained above are recognised when interpreting national formal law. The question here is how to interpret international norms. The general problem is that unity in international law is only upheld if the norms and their interpretation are uniform. Only a harmonised interpretation of an international norm fulfils the purpose of the international norm itself, which is harmonisation.<sup>1637</sup> One argument is that international law is derived from sources of international law, ‘and not alone from the arbitrary view of the applier’.<sup>1638</sup> Furthermore, to ensure uniform interpretation, organisations such as the IASB created IFRIC with the purpose of interpreting IFRS authoritatively. IFRIC’s interpretations are also part of IFRS as a whole.<sup>1639</sup>

- 483 Informal norms are a vital part of the evolution of international law. Over time, informal norms can develop into customary international law and later become international formal law themselves.<sup>1640</sup> This process can happen rapidly. ‘The mere existence of norms in international relations – whether binding or not – allow the world players to refer immediately to these norms, thus avoiding some of the lengthy discussions necessitated by every law-making process.’<sup>1641</sup>

### D. Cultural Influence on the Interpretation of IFRS

- 484 Influences associated with IFRS are a two-way stream. IFRS can have an influence on national accounting standards (for the effects on Swiss law cf

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<sup>1636</sup> Behr, *Festschrift Druey* 2002, p 31 et seq; cf Vischer, *Recht im Wandel*, p 437.

<sup>1637</sup> Cf Häfelin/Haller/Keller/Thurnherr, *Schweizerisches Bundesstaatsrecht*, para 163; Thürer, *Grundidee Gerechtigkeit*, Band 2, p 211.

<sup>1638</sup> Goldmann, *Sources of Law*, p 5.

<sup>1639</sup> IAS 1.16; cf Schreiber, *International Standards*, p 24.

<sup>1640</sup> Thürer, *Grundidee Gerechtigkeit*, Band 2, p 174.

<sup>1641</sup> Thürer, *Grundidee Gerechtigkeit*, Band 2, p 175.

para 351 et seq), and the national accounting standards can also have an influence on the application of IFRS. This is due to the cultural influences of the report preparer, user, and auditor (for cultural influences cf para 44 et seq).

IFRS are also interpreted from a domestic point of view.<sup>1642</sup> The result is a reverse influence; eg, Swiss law foresees multiple norms regulating the entity's equity.<sup>1643</sup>

## I. In General

The cultural influence on standards is explained above (cf para 44 et seq). This section discusses the cultural influence on the interpretation of IFRS. The fact that different DASs exist in different states raises the subject of the influence of culture on national accounting.<sup>1644</sup> The evidence goes further and suggests that, even though parties are using the same language and the same standard, differences still occur (cf para 59 et seq).<sup>1645</sup> Numerous empirical studies<sup>1646</sup> show the non-uniform interpretation of IFRS. There are various factors influencing the interpreter in a certain direction, such as cultural background,<sup>1647</sup> used language,<sup>1648</sup> gender,<sup>1649</sup> and enforcement.<sup>1650</sup> Evidence suggests<sup>1651</sup> that a preparer from a prudent country reports more prudently than his peers in non-prudent countries. In other words, influences on the preparer's understanding of the national proper financial reporting methods are constantly at play when he is applying IFRS.

<sup>1642</sup> Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 79 n 180.

<sup>1643</sup> Art 659a et seq, 670–674, 959a para 3 fig 3 CO.

<sup>1644</sup> Cf Evans/Baskerville/Nara, Language, p 4; Semba Hu/Yao, p 4; Wehrfritz/Haller, National Influence, p 197; cf also Haller/Wehrfritz, Impact, p 40; Zeff, British Accounting Review 2007, p 290 et seq.

<sup>1645</sup> Evans/Baskerville/Nara, Language, p 4 et seq.

<sup>1646</sup> To the specific studies cf below.

<sup>1647</sup> Doupnik/Richter, Accounting, Organizations and Society 28 (2003), p 15 et seq; Feleaga/ Dragomir/Feleaga, p 1 et seq; Gray, p 1 et seq; Hellmann/Perera/Patel, p 108 et seq; Waterstraat, *passim*; Wehrfritz/Haller, p 196 et seq.

<sup>1648</sup> Davidson/Chrisman, Journal of International Accounting Auditing and Taxation (1994) 3 (2), p 187 et seq; Nobes, Accounting and Business Research 43 (2013), Issue 2, p 83 et seq.

<sup>1649</sup> Bonner, Accounting Horizons, December 1999, p 394; Han/Hellmann/Lu, Asian Review of Accounting (2016), Vol. 24 Iss 2, p 185 et seq.

<sup>1650</sup> Zeff, British Accounting Review 2007, p 290 et seq.

<sup>1651</sup> Doupnik/Richter, Accounting, Organizations and Society 28 (2003), p 15 et seq; Feleaga/ Dragomir/Feleaga, p 1 et seq; Gray, p 1 et seq; Hellmann/Perera/Patel, p 108 et seq; Waterstraat, *passim*; Wehrfritz/Haller, p 196 et seq.

- 487 This leaves us with a situation in which the same items are reported differently, depending on the preparer. The dispatch also states that the rules in Art 958 et seq CO shall be applied *mutatis mutandis* on the consolidated statements and on the reports according to the recognised standards.<sup>1652</sup> Here, we observe a reverse influence. The CO is not only being influenced by IFRS; the perception of the domestic accounting system also influences the application of IFRS. The cultural background of the user of IFRS influences how IFRS are interpreted. In addition to the cultural background, other factors also lead to a reverse influence. References, in a broader sense, that are found in national laws may also have an influence on the setter of the referred-to standards.<sup>1653</sup> An example is the endorsement of IFRS by the EU, which leads to factual power of the EU over IFRS (cf para 121 et seq).
- 488 The HWP mentions occasional incompatibilities between the CO and the recognised standards.<sup>1654</sup> These incompatibilities can be avoided. One can imagine two overlapping circles, one incorporating all of the CO requirements and the other all of the IFRS requirements. Both have discretionary powers (*Ermessensspielräume*). These can be used in such a way that a financial report follows IFRS and the CO, in the interconnection between the two overlapping circles. To achieve this, the CO must be interpreted more in the sense of the true and fair view, and IFRS must be interpreted prudently wherever possible.<sup>1655</sup>
- 489 It is possible to interpret a standard in different ways. This leads me to the following model. A norm can always be interpreted in various ways. The options of interpretation can all be found within a circle. The question concerning multiple norms is where they overlap each other. This creates an intersection.
- 490 It is up to the interpreter to find options to interpret both norms in such a way that leads to compatibility. This abstract formulation can be applied for the CO and IFRS. The latter must be interpreted prudently, while the former shall be interpreted extensively. Müller<sup>1656</sup> tried to find a single common denominator between the financial report according to the CO and the report according to IFRS. In my view, the key is to interpret IFRS in a prudent manner and the CO in a transparent direction.

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<sup>1652</sup> Botschaft 2007, p 1699; CHK-Lipp, Art 958 para 18.

<sup>1653</sup> Hettich, Kooperative Risikoversorge, para 512 et seq.

<sup>1654</sup> HWP 2014, pp 166, 209, 272, 316 et seq.

<sup>1655</sup> In depth Schmid, his project description available at: <https://ifrs.ius.unibas.ch/en/23-2/dual-standard-accounting/> (accessed on 16.10.2018).

<sup>1656</sup> Müller, Risk-Sharing, p 4.



The same can be applied to the relationship between the CO and Swiss GAAP FER. According to some voices in the doctrine,<sup>1657</sup> it could be possible to create a statutory report that is compatible with Swiss GAAP FER.

## II. Example

The differences can be shown in the comparison of Germany and the UK. German accounting professionals show more uncertainty avoidance than their peers in the UK, because the principle of prudence (cf para 303 et seq) has a more dominant role in Germany. The UK relies on the true and fair view (cf para 303 et seq).<sup>1658</sup> They each also deal with uncertainty differently. In Germany, conservatism and secrecy are important, whereas the UK is characterised by optimism and transparency; hence, they are opposites.<sup>1659</sup> These different principles are prominent in the minds of accountants even if the same standard (IFRS) is applied. As a result, German accountants are more prudent than their English counterparts.<sup>1660</sup> This can be shown in the example of provisions. While UK GAAP FRS 12 is almost identical to IAS 37, the German law is more prudent in reporting provisions by relying on a lower probability.<sup>1661</sup> In addition, Germans value provisions higher.<sup>1662</sup> Sociocultural studies have shown that how one handles risk depends one's culture.<sup>1663</sup>

The interpreter cannot apply a norm objectively.<sup>1664</sup> Differences can occur when applying the same standard even in the same jurisdiction.<sup>1665</sup> A study by Haller and Wehrfritz shows that, even though entities adopted IFRS, they continued with their own accounting policies that they created using DAS.<sup>1666</sup> Although two entities may use the same standard, they are influenced by their culture in such a way that leads them to different results.

We must acknowledge that accounting and finance 'are as much art as they are science'.<sup>1667</sup> Like art, accounting and finance practitioners are influenced by other artists (other accountants, in our case).

<sup>1657</sup> Annen/Teitler-Feinberg, ST 2014, p 311 et seq; Jutzi, Unternehmenspublizität, para 469.

<sup>1658</sup> Wehrfritz/Haller, National Influence, p 199.

<sup>1659</sup> Wehrfritz/Haller, National Influence, p 199.

<sup>1660</sup> Wehrfritz/Haller, National Influence, p 199.

<sup>1661</sup> Wehrfritz/Haller, National Influence, p 199.

<sup>1662</sup> Wehrfritz/Haller, National Influence, p 199.

<sup>1663</sup> Hofstede and his work cf <http://geerthofstede.com/hofstede-books/> and <http://scholarworks.gvsu.edu/orpc/contents.html> (accessed on 15.08.17).

<sup>1664</sup> Immenhauser, FS Bucher, p 308.

<sup>1665</sup> Wehrfritz/Haller, National Influence, p 206.

<sup>1666</sup> Haller/Wehrfritz, Impact, p 55.

<sup>1667</sup> Berman/Knight, Financial Intelligence, p 4.

## E. Interpretation in Accordance with International Norms

495 Each standard defines its own approach to interpretation. However, a few general remarks can be made nevertheless. As soon as an international treaty or standard is involved, it cannot be interpreted for one state only. Instead, it must be in conformity with the guidelines set by the issuing body.<sup>1668</sup> Some standard-issuing boards solve this problem by defining who has the legitimacy to interpret. This committee can set authoritative rules for the interpretation of the standard. For example, IFRS are interpreted authoritatively by IFRIC (cf para 99 et seq).

496 The goal of international standards is to make regulated topics uniform. This uniformity is endangered the more divergences exist in the regulated topic in the form of different rules or different interpretations of the same norm. To avoid divergences between domestic and international norms, the former shall be interpreted in accordance with international norms.<sup>1669</sup> The Fed SFT<sup>1670</sup> even states that European law will be used to interpret domestic law. In such cases, auxiliary means are thus interpreting guidelines in the standard, authoritative interpretations, and databases. With the IOSCO (International Organization of Securities Commissions), the IASB began to create a platform for pooling important decisions of states concerning the interpretation of IFRS.<sup>1671</sup> Here, judges and regulators are encouraged to share their verdicts with their peers in other jurisdictions.<sup>1672</sup> In this way, the IASB tries to enforce (cf para 79 et seq) IFRS on a global level.<sup>1673</sup>

497 On the European level, the EuGH demands that domestic judges prefer these methods of interpretation, which best correspond with European community law.<sup>1674</sup> In the EU, EU-IFRS must be interpreted as part of European community law. The interpretation of European community law orientates itself at the principles of the concerned national laws, but it must consider the specific nature of the community law.<sup>1675</sup> This is similar to Switzerland's situation. Swiss law can only maintain conformity with European law if it not only aligns its

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<sup>1668</sup> BSK ZGB-Honsell, Art 1 para 19.

<sup>1669</sup> Leu/Teitler-Feinberg, ST 81 (2007), p 547; for further reference Thürer, Grundidee Gerechtigkeit, Band 1, p 79 et seq mainly p 83; cf for the global level IOSCO, link: <http://www.iosco.org/> (accessed on 16.10.18); cf for Europe ESMA (European Securities and Markets Authority) Link: <https://www.esma.europa.eu/convergence/ifrs-supervisory-convergence> (accessed on 16.10.18); cf also Kunz, recht 2012, p 50 for the conformity with European law especially for the interpretation of regulation in financial investments.

<sup>1670</sup> BGE 129 III 335, Consideration 6; Kunz, recht 2012, p 50.

<sup>1671</sup> Leu/Teitler-Feinberg, ST 81 (2007), p 546 et seq.

<sup>1672</sup> Leu/Teitler-Feinberg, ST 81 (2007), p 548 et seq.

<sup>1673</sup> Leu/Teitler-Feinberg, ST 81 (2007), p 550.

<sup>1674</sup> Wiegand, Jusletter 17<sup>th</sup> June 2002, para 26.

<sup>1675</sup> Wojcik, IFRS als europäisches Recht, p 268.

laws to European law but also its interpretations (for the autonomous alignment of para 230).<sup>1676</sup>

The Swiss constitution states that the confederation and the cantons shall respect international law (Art 5 para 4 BV). Thus, interpretation of domestic law shall be in conformity with international law.<sup>1677</sup> In a narrower sense, only that part of international law that Switzerland has ratified is meant.<sup>1678</sup> However, norms can only be considered if the legislature did not diverge from them intentionally.<sup>1679</sup> IFRS can only be utilised as an auxiliary means if the legislature did not deliberately stray from IFRS. Hence, the will of the legislature is not surpassed by interpretation.<sup>1680</sup> As a result, the interpreter must make sure to fulfil the principles of the CO whenever he considers IFRS as an interpretation tool.<sup>1681</sup>

## F. Fill in the Gaps

After discussing how a norm, when there is one, should be interpreted, the question is how the interpreter must proceed when a certain case is not regulated (= lacuna; cf para 42 et seq). Swiss law gives the court a guideline on how to proceed in the case of a lacuna with Art 1 para 2 et seq CC: ‘In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislature. In doing so, the court shall follow established doctrine and case law’.<sup>1682</sup>

<sup>1676</sup> Wiegand, Jusletter 17<sup>th</sup> June 2002, para 27 et seq; cf Kunz, FS Bucher, p 464 et seq.

<sup>1677</sup> Häfelin/Haller/Keller/Thurnherr, Schweizerisches Bundesstaatsrecht, para 162.

<sup>1678</sup> Art 184 para 1 BV, cf Art 6 Vienna Convention on the Law of Treaties.

<sup>1679</sup> Cf “Schubert-Praxis”, cf BGE 99 Ib 39, limited by ‘PKK-Entscheid’ BGE 125 II 417; in more recent time proper norm conflicts are decided on behalf of international law cf 138 II 524.

<sup>1680</sup> Thürer, Grundidee Gerechtigkeit, Band 2, p 216.

<sup>1681</sup> BGE 136 II 88 et seq; BGE 136 II 88, E 3.4; Glauser, Archives 74, p 529, 555 et seq; Gutsche, veb.ch Praxiskommentar, Art 959a para 25; Handschin, Rechnungslegung, para 31; Müller/Henry/Barmettler, veb.ch Praxiskommentar, Art 958c para 79; Müller/Thomann, Jusletter 21. October 2013, paras 19, 65; Riederer, ex ante 2016, p 14; Riederer, Rückstellungen, para 35; cf also HWP 2014, p 5; Buchmann/Dolente, ST 2012, p 890 et seq; von der Crone, Aktienrecht, § 7 para 25; Druey/Druey Just/Glanzmann, Gesellschafts- und Handelsrecht, § 25 para 31; Duss/Duss, p 408 et seq; cf Glauser/Beusch, SJZ 106/2010, p 269; Glanz/Pfaff, veb.ch Praxiskommentar, Art 958d para 25 et seq; BankG Komm-Handschin, Art 6 para 37 et seq; Kleibold, Ausschüttungsregulierung, p 163; CHK-Lipp, Art 959 para 13; Matteotti/Felber, p 753 et seq; Müller, SZW 2008, p 400 et seq; Müller/Thomann, Jusletter 21. October 2013, paras 19, 65; Nösberger/Boemle, ST 2014, p 14; Stoffel, Grundriss des Aktienrechts, para 1029.

<sup>1682</sup> Cf also HWP 2014, p 5; Häfelin/Haller/Keller/Thurnherr, Schweizerisches Bundesstaatsrecht, para 147.

- 500 The SFT defines customary law (*Gewohnheitsrecht*) as a practice established over a long period of time and a basis on the common conviction of law (*Rechtsüberzeugung*).<sup>1683</sup> This shows that an informal norm can be hardened over time.<sup>1684</sup> Problems arise in the fast-changing sectors such as commercial law. These sectors are characterised through functionality, institutionalism, interdiscipline, internationality, and flexibility.<sup>1685</sup> Flexibility leads to fast changes, which makes the hardening process difficult to almost impossible. For financial reporting, customary law plays no role because this sector experiences rapid changes in which no established practice survives a long period.<sup>1686</sup> Formal law is not as flexible as informal norms; thus, the latter is used in most cases concerning technical matters such as financial market regulation.<sup>1687</sup>
- 501 The question remains concerning which auxiliary means<sup>1688</sup> a judge can use to administer justice. Foreign laws can be considered in filling the lacunae (comparative approach; cf para 183 et seq).<sup>1689</sup> The doctrine is split on the question of whether judges can use or at least consider private standards.<sup>1690</sup> Kunz's<sup>1691</sup> promoted differentiation between uses for interpretation or filling lacunae is, in my view, unfounded. Regardless of how the interpreter uses private norms, they lack democratic legitimacy (cf para 264 et seq). He narrows the applicability of the comparative approach (cf para 183 et seq) and states that only in cases in which the norm refers to an international standard or in cases of an existing treaty can foreign norms be considered. Kunz, in general, is against the consideration of foreign norms in the interpretation process, except for cases in which the Swiss norm shows a connection to an international standard or in the existence of a treaty.

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<sup>1683</sup> BGE 119 IA 59 et seq; cf also BGE 94 I 305 et seq; Häfelin/Haller/Keller/Thurnherr, *Schweizerisches Bundesstaatsrecht*, para 12; BSK ZGB-Honsell, Art 1 para 20.

<sup>1684</sup> Cf Chinkin, *Commitment and Compliance*, p 31 et seq, but an informal norm targeted at privates cannot become customary international law over time because it has no intended influence on the behaviour of states, Chinkin, *Commitment and Compliance*, p 36.

<sup>1685</sup> Schluep, SZW (Sonderheft) 1997, p 10; cf also SGHB *Finanzmarktrecht I-Brändli*, § 2 para 27; Kunz, *recht* 2012, p 37 et seq.

<sup>1686</sup> Botschaft 2007, p. 1701 et seq; cf HWP 2014, p 36; HWP 2009, Band 1, p 57; CHK-Lipp, Art 958c para 5; Müller/Henry/Barnettler, *veb.ch Praxiskommentar*, Art 958c para 23; Handschin, *Rechnungslegung*, para 302; Schreiber, *International Standards*, p 80.

<sup>1687</sup> Brunner, *Technische Normen*, p 93; Troxler, *Jusletter* 16. November 2015, para 9.

<sup>1688</sup> Cf Traub, FS Richli, p 831 et seq.

<sup>1689</sup> Kunz, FS Bucher, p 461; Kunz, *recht* 2012, p 49; cf Kunz, *LeGes* 2012, p 270 et seq.

<sup>1690</sup> Pro: Giger, *Corporate Governance*, p 74 et seq, 81 et seq; Marti, ZBl 2000, p 566 et seq; ZK-Marti, *Vorbem. Art 5 and 6 para 179 et seq and Art 5 para 215*; con: Böckli, *Rechnungslegung*, 350.

<sup>1691</sup> Kunz, FS Böckli, p 487; cf Kunz, *LeGes* 2012, p 270 et seq.

In commercial accounting, the CO gives little advice on how to report individual positions in the financial report. Thus, the practice relies on other standards. If the preparer cannot find an answer in the CO, he turns to the doctrine,<sup>1692</sup> Swiss GAAP FER, IFRS, and US GAAP. After applying the standard, he shall ask whether the result is in accordance with the CO (cf para 507).<sup>1693</sup>

For example, nuclear power plants must report provisions for decommissioning and disposal costs (*Stilllegungs- und Entsorgungskosten*). The CO only states that a provision must be recognised if it is likely that, due to past events, cash will outflow in the future (Art 960e Para 2 CO). In general, a provision must be reported fully.<sup>1694</sup> If certain conditions<sup>1695</sup> are met, a provision may also be reported gradually.<sup>1696</sup> The conditions are:<sup>1697</sup> fixed time for the materialisation of the risk, periodic causal link (*periodenmässiger Kausalzusammenhang*), and the disclosure<sup>1698</sup> of the necessary information. A strict application of the CO's wording would mean a full report of the provision without the capitalisation of the decommissioning and disposal costs. Disposal costs occur in the future. Meanwhile, the definition in the CO relies on past events. Without the capitalisation of the disposal and decommissioning costs, a nuclear power plant will be overindebted on day one of its existence.<sup>1699</sup>

The recognised standards foresee a solution for this special case. They allow nuclear power plants to capitalise the costs for decommissioning and disposal.<sup>1700</sup> In this way, the provision is reported to the full extent. Meanwhile, the costs are capitalised to the same amount of the provision followed by depreciation. Here, the answer to the question of how the provision for

<sup>1692</sup> Mainly HWP; Böckli, Rechnungslegung; BSK; Druey/Druey Just/Glanzmann; Forstmoser/Meier-Hayoz/Nobel; Handschin, Rechnungslegung; CHK-Lipp; veb.ch Praxiskommentar.

<sup>1693</sup> For the novelties of the CO's revision cf Glanz/Pfaff/Stenz, veb.ch Praxiskommentar, Anwendersicht, para 4 et seq.

<sup>1694</sup> HWP 2014, p 216.

<sup>1695</sup> Cf Riederer, Rückstellungen, para 279 et seq.

<sup>1696</sup> HWP 2014, p 190; Handschin, Rechnungslegung para 781 et seq; Riederer, Rückstellungen, para 279 et seq; and also the cantonal taxation-praxis, cf Altorfer/Duss/Felber, ASA 83, p 540; for German law: MüKomm-Morck, § 253 para 4 and § 249 para 5; Forster/Adler, Teilband 1, § 253 HGB para 211.

<sup>1697</sup> Riederer, Rückstellungen, para 279 et seq; Riederer, ex ante 2016, p 12.

<sup>1698</sup> Disclosure of the estimated total amount; reason for the gradual reporting of the provision, cf Riederer, Rückstellungen, para 295.

<sup>1699</sup> Riederer, ex ante 2016, p 13; for the capitalisation cf Hüttche/Teitler-Feinberg, EF 2016, p 730.

<sup>1700</sup> IAS 16.16c; IFRIC 1.1, 21, 6.9; Swiss GAAP FER 23. Example 1; Kleibold, Ausschüttungsregulierung, p 125.

decommissioning and disposal costs should be reported can be found in IFRS. Although the CO's definition of an asset is strained by capitalising these costs, it should be allowed because they only occur in the future as the entity makes profits in the present.<sup>1701</sup>

505 Development costs occur in an entity regarding profits in the future. Therefore, they can be capitalised if certain conditions are met (cf para 394).<sup>1702</sup> Decommissioning and disposal costs arise in the future for profits gained in the present. Thus, development costs function in the opposite way to decommissioning and disposal costs, but both can be capitalised.<sup>1703</sup>

506 Here, we see the possibility of applying foreign norms in the interpretation of Swiss law. Thus, the comparative method enriches the set of tools the interpreter can apply when filling in the gaps in the law.<sup>1704</sup> This method is especially valuable in laws where the legislature also considered foreign norms (cf para 351 et seq).

## G. Verification of the Result

507 Once a suitable norm is found and interpreted, verification of the result follows. This process is especially necessary if the wording permits only a solution that is incompliant with the underlying concept or purpose of the applicable law (formal or informal).<sup>1705</sup> In this case, we talk about an improper lacuna (*unechte Lücke*;<sup>1706</sup> *offene Gesetzeslücke*;<sup>1707</sup> *teleologische Lücke*;<sup>1708</sup> cf paras 42 et seq, 420, 423). If the literal interpretation leads to an improper result, the interpreter shall find a proper result by applying the systematic (cf para 457 et seq) and teleological interpretation (cf para 450 et seq).<sup>1709</sup>

508 This step is important. It ensures an adequate result that fulfils the underlying principles of the interpreted set of norms. The verification of the result also enables the interpreter to check whether the interpretation is too one-

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<sup>1701</sup> Riederer, ex ante 2016, p 14 et seq.

<sup>1702</sup> BGer 4A\_91/2011, E. 3.5; Swiss GAAP FER 2.12; HWP 2014, p 200; Gutsche, veb.ch Praxiskommentar, Art 959a para 91–93; Handschin, Rechnungslegung, paras 643, 646, 683; CHK-Lipp, Art 959a para 20; dissenting Bockli, Aktienrecht, § 8 para 758; Bockli, Rechnungslegung, para 944 et seq.

<sup>1703</sup> Riederer, recht 2017, p 41.

<sup>1704</sup> Cf Kunz, LeGes 2012, p 270 et seq.

<sup>1705</sup> Cf Kramer, Methodenlehre, p 197 et seq.

<sup>1706</sup> Instead of many just BGer 1C\_102/2016 from 20.12.2016, Consideration 2.3.

<sup>1707</sup> Kramer, Methodenlehre, p 197.

<sup>1708</sup> For further reference Kramer, Methodenlehre, p 199.

<sup>1709</sup> Kantonsgericht Zug, decision of 27<sup>th</sup> October 2016, A3 2015 27, Consideration 4.4.1; Kramer, Methodenlehre, p 199.

sided. Not having this controlling mechanism could lead to the interpretation of recognised standards losing the true and fair view.<sup>1710</sup>

## H. Duty to Consider Foreign Norms

The norm setter considers foreign norms in creating his own set of norms (cf para 183 et seq). The Swiss legislature used recognised standards as a guideline for the CO's revision, as discussed above (cf para 247 et seq). One unanswered question remains, and that is whether the norm setter's consideration of recognised standards leads to the duty of the interpreter also to consider them in the application of the CO. According to Kunz,<sup>1711</sup> the sole consideration of foreign norms should not lead automatically to a duty for the interpreter to use the same source for his interpretation. In my view, the proper way to apply a norm is to apply it within its norm system. Therefore, the hierarchy must be considered (cf para 458). The interpreter must go from the specific norms to the more abstract (cf para 458). This will lead him to the recognised financial reporting principles, which (as we have seen in cf para 152 et seq) incorporate the recognised standards. However, this does not necessarily mean that they must be applied. Recognised standards can only be of use if they are in line with the CO. Hence, the recognised standards *shall* be considered, but *should* only be applied if they are in line with the underlying principles of the CO. The result is the following cascade: first, the preparer must search in the CO, then in the recognised standards; he shall verify the results afterwards according to the underlying principles of the CO.

## I. Interim Conclusion

The previous chapters led towards this chapter for a particular reason. It comprised the climax of this thesis. Obstacles such as democratic legitimacy and the prudence principle had to be discussed first before the application of IFRS as an interpretation tool for Swiss commercial accounting rules could be explained. In this sense, the final chapter implemented the previous chapters.

This chapter has demonstrated how the interpreter should interact with the CO and its connections to IFRS. The method of pluralism is applicable in the interpretation of the CO. Regarding the systematic method, the following cascade is promoted here: when interpreting a specific commercial accounting norm (third stage), the recognised financial reporting principles (second stage)

<sup>1710</sup> Leibfried/Mitterlechner, rechnungswesen & controlling 2017, p 12.

<sup>1711</sup> Kunz, FS Bucher, p 459; Kunz, recht 2006, p 46.

must be considered. At the same time, the reliable view must still be perused (first stage; cf para 303 et seq). This cascade outlines the process of interpretation. First, a norm must be found, which is followed by the interpretation. In the next critical step, the result of this interpretation must be verified. In other words, the interpreter must check whether his result is in line with the recognised financial reporting principles and the reliable view.

512 In the linguistic-grammatical method, the norm's wording is the starting point for the interpretation. Similarities in the wording of norms lead to the conclusion of a connection between these norms. As a result, the older norm can be used as an auxiliary means to interpret the newer norm (cf para 426 et seq). The idea is that, if the legislature considered a norm, then the interpreter can also use it. In this process, the norm's underlying principles must be retained (cf para 507).

513 The teleological interpretation method is difficult to apply because the commercial accounting rules serve different purposes (cf para 452 et seq). The historic interpretation shows similar issues. It has little weight in fast-changing fields, which is exactly what financial reporting is (cf para 470 et seq).

514 An inconsiderate interpretation is not enough. Cultural influences must be considered in the interpretation of a norm. The result of the application of a certain norm depends heavily on the applicant. His cultural background influences his application of the norm. An English accountant will interpret IFRS differently to his German peer. Thus, the application of the same standard can lead to different results. The same goes for the interpretation of the CO. Different views also influence the interpretation of Swiss commercial accounting rules.



## Conclusion

Foreign norms have always had an impact on Swiss financial reporting regulation (cf para 13 et seq). However, the sources have changed. Not until the 21<sup>st</sup> century were informal norms considered in the creation or the interpretation of formal norms. Until then, the point of orientation was the laws of neighbouring states and trading partners (cf para 18 et seq). Early in the 21<sup>st</sup> century, the IASB created IFRS, the impact of which on worldwide financial reporting grew rapidly. Thus, Swiss financial reporting regulation has always experienced foreign influences (cf para 18 et seq). The response to globalisation was and still is harmonisation (cf para 23 et seq). The IFRS soon became generally accepted and jurisdictions began to adopt them in various ways (cf para 112 et seq). 515

Of particular interest is the growing influence of IFRS on Swiss commercial accounting rules. This influence occurred not only directly but also indirectly. The direct influence appears in the form of references in a narrower sense (cf para 160 et seq). In my view, their use changes the legal nature of the referred-to norm, which adapts the form of the referring norm. When a formal norm refers to an informal norm, the latter adopts the nature of the former. If the Swiss commercial accounting rules refer to IFRS, they become a part of the Swiss legal system (cf para 141 et seq). The Swiss authorities also chose to consider IFRS. The Federal Council qualified IFRS as recognised standards (cf para 141 et seq). In addition, the Swiss legislature incorporated parts of IFRS into the commercial accounting rules (cf para 351 et seq). 516

The influence is not limited to references in a narrower sense. IFRS also have an impact on Swiss commercial accounting rules through incorporations (cf para 157 et seq) and general clauses (cf para 165 et seq). Additional indirect influence appears through analogies (cf para 178 et seq) and comparative law (cf para 183 et seq). In these cases, the legal nature of IFRS does not change and remains an informal norm. Nonetheless, it has an impact on Swiss law. 517

However, IFRS' impact on Swiss law goes even further in an indirect way. This means IFRS are the basis of another set of informal norms, which themselves have an impact on financial reporting in Switzerland. Therefore, IFRS were a source of inspiration for Swiss GAAP FER. They influence Swiss law in many ways, as in their use as an incorporation of the recognised financial reporting standards (cf para 190 et seq). In addition, IFRS were the basis for IPSAS, on which HRM2 is also based. The latter are of particular significance 518

in public financial reporting (cf para 213 et seq). This influence of IFRS through another standard can be of use in interpreting commercial accounting rules with the argument of analogy (cf para 178 et seq). In addition, European law is also effected. The endorsement of IFRS in the EU allows the Swiss legislators or interpreters to consider EU-IFRS as foreign law in the comparative approach (cf para 226).

519 IFRS' impact on Swiss law is the subject of debate in the doctrine (cf para 243). On an abstract level, many authors are against the use of IFRS as an interpretation tool for the CO. In their treatments of commercial accounting law, they occasionally use Swiss GAAP FER. Both mentioned standards lack democratic legitimacy (cf para 264 et seq). In addition, Swiss GAAP FER follows the true and fair view, much like IFRS (cf para 303 et seq). If one argues that IFRS cannot be used because they are informal norms and follow the true and fair view, then Swiss GAAP FER cannot be applied as an interpretation tool for the CO either.

520 This thesis has tried to solve both problems. With the help of the legitimacy chain, the control over IFRS influence was traced back to the people. Therefore, IFRS' impact is democratically legitimised. The second problem is the conflict of the prudence concept with fair presentation. This problem exists only at first sight. On closer inspection, IFRS are often as prudent as the CO and sometimes even more so (for example, in group valuation or in reporting a risk with a probability of occurrence greater than 50 per cent; cf paras 315, 399 et seq). Therefore, both concepts can be aligned by interpreting IFRS prudently and the CO transparently.

521 Following the abstract notions of IFRS' influence, § 10 showed the manifestations of their impact on Swiss commercial accounting rules. Here, the different actors who used IFRS to create or interpret Swiss law were analysed. These actors are the legislature, jurisdiction, and the doctrine. It can be seen that the revision of Swiss commercial accounting rules led to an approximation to the recognised standards. The legislature accomplished this approximation by considering recognised standards in the norm-setting process. Jurisdiction and the doctrine use IFRS in the application of Swiss law. In other words, when the law does not answer a question, the doctrine consults the recognised standards, but not without verifying whether the result is in line with Swiss financial reporting principles.

522 The relationship between domestic law and IFRS is not a one-way stream flowing from IFRS towards domestic law. Cultural influences in the interpretation of IFRS are also noticeable. The consequences are different results in the application of the same standard. Thus, national perceptions also have an impact on IFRS, meaning that a reverse influence occurs (cf para 484 et seq).

The following conclusion can be made: the interpreter is allowed to use IFRS as an interpretation tool for the CO. However, the interpreter must be aware of fulfilling the CO's underlying principles. This can be ensured by dividing the process of interpretation into two steps: first the interpreter shall search for a suitable norm and interpret it with the help of IFRS; second, he shall verify the result in terms of compatibility with the CO's underlying principles. 523

The following two rules are key. First, if IFRS are as prudent or even more prudent than the CO, they can be relied on as an interpretation tool. Second, there is a rule for better alignment of IFRS and the CO: IFRS and the CO can be aligned by interpreting IFRS prudently and the CO transparently. 524



# Synopsis

What follows is a summary of the discussed issues, which will be presented in the same order as discussed above. This allows for a brief overview of the thesis and will guide the reader to the relevant chapters. 525

## § 1 Financial Reporting

The first chapter explains financial reporting and its standardisation. Financial reporting standards try to unify the ways in which entities report their numbers. These standards developed over time. However, they did not evolve independently. In particular, Swiss legislature often considered foreign law in the legislation process. Before Switzerland was founded as a federal state in 1848, the cantons had the authority to regulate financial reporting. They used mainly the laws of their trading partners as a source of inspiration. Depending on the trading partners, the financial reporting laws showed similarities to their French, German, Italian, or Prussian counterparts. Then, in 1864, Munzinger created the first draft of a federal accounting law, which considered Prussian AHGB. Hence, Swiss financial reporting always experienced foreign influences. 526

## § 2 International Accounting Harmonisation and Differences

The second chapter places financial reporting standards in the international context and shows the effect of globalisation on financial reporting. Globalisation influences financial reporting regulations and leads to harmonised standards. This tendency leads to issues because commercial accounting law should reflect the society in which it is applied. Different factors influence the development of financial reporting standards. Such differences are manifold. Most of the differences date back to the style of setting rules and, in the end, civil or common law. 527

Commercial accounting rules, like the law in general, are the result of compromises in the past; therefore, they are the sum of different influences. However, with globalisation comes unification. The unification of these standards leaves room in the application of the standards only to adapt them to local circumstances. This gives the application of the harmonised rules a local colouring, which will also be encoded in another chapter (cf para 484 et seq). 528

- 529 This development can also be observed regarding IFRS. Before IFRS were created, the use of foreign wording or systems caused differences, meaning that, although a country adopted the true and fair view, the applicants did not fully understand this foreign system, which generated differences on an international level in accounting practice. In other words, the same concept was applied differently (cf also para 484 et seq). It is likely that these will continue even under IFRS. To improve the comparability, national standard setters should improve their norms so that reports by different entities from different jurisdictions using the same standard become more comparable. The improvement should also originate in IFRS themselves, in a reduction of the options the standard applier can use.
- 530 Globalisation has benefits and drawbacks. The benefits are harmonised norms. However, in the process of globalisation, states are losing their freedom to regulate independently. This is because, on an international level, supranational or private organisations take over regulation. There are tools available to reap the benefits but limit the downside. One solution could be to harmonise standards at a minimum level to keep the advantages of competition (ensuring quality) and minimise the drawbacks (race to the bottom), yet still ensure some form of freedom for a state. Sovereignty is sometimes misused to create locational advantages, but it is also utilised as an opportunity to improve the norm. In Switzerland, the latter process is sometimes referred to as ‘Swiss finish’.

### § 3 IFRS Basics

- 531 In this thesis, IFRS plays an important role. Thus, Chapter Three explains IFRS and their issuing body, which is the IASB. The IASB is a private organisation (cf para 79 et seq). From the IASB’s point of view, IFRS are a set of informal, in other words, private norms (cf para 79 et seq). The IASB fulfils the UNO criteria for an acceptable NGO, meaning that the IASB supports the UN’s work, has a transparent body, which is responsible to a democratic policy-making conference, and is not a profit-making body (cf para 85 et seq).
- 532 At the core of this chapter, lies the interpretation of IFRS (cf para 99 et seq). They promote their own method of interpretation, which consists of the following cascade. The first place to look for the answer is in the standards themselves. In step two, the SIC or IFRIC Interpretations must be considered. Third, an analogy can be made to a similar standard. Only in the fourth step can the framework be of use. Fifth, standards such as IFRS are permitted as an interpretation tool or the doctrine’s explanations regarding the use of IFRS. In the final step, the result must be verified for compatibility with the underlying principles of IFRS.

Despite this cascade, differences in interpretation still occur, which are the result of cultural differences (cf 484 et seq). The same case will be reported differently depending on the preparer of the report, especially regarding risk avoidance. Differences are also an important factor in the relationship between IFRS and US GAAP. The FASB and the IASB are in the process of harmonising US GAAP and IFRS, which could have a small impact on the distribution of the used standards in Switzerland (cf para 105 et seq). 533

In addition, this chapter assesses the point of view the IASB takes on IFRS. It regards IFRS as private norms. Things begin to change when states draw inspiration from them or even reference them in their laws. It is important to consider these two points of view. Depending on the point one takes, the norms change their character. The next chapter deals with this second view. 534

## § 4 IFRS Adoption

§ 4 deals with the question of how states adopt IFRS on a formal level; in other words, how states officially deal with these standards. However, on another more informal level, IFRS influence formal law as well. This is the topic of the next two chapters. 535

IFRS' global influence on financial reporting is undisputed. Jurisdictions have found different ways of interacting with IFRS. While some jurisdictions such as the EU adopted IFRS as their standards for consolidated statements (cf para 121 et seq), others have made them the basis for the statutory report. For the implementation of IFRS there are different possibilities: incorporation, meaning recepted norms (cf para 157 et seq), references, meaning links to other norms (cf para 160 et seq), or general clauses, meaning broad terms (cf para 165 et seq). However, it is not the case that IFRS only impact domestic accounting standards; states also have an influence on the IASB. Maintaining this influence is also an incentive for choosing a certain way of adopting IFRS. To ensure influence on the standard-setting process of the IASB, many jurisdictions opted to endorse each IFRS novelty rather than setting a dynamic reference (cf para 160 et seq). The EU took the same path. The EU is involved from the early stages of the standard-setting process until the standards are enacted in the IASB, making it unlikely that the EU will not endorse a change proposed by the IASB. 536

Switzerland, as we will see later (cf para 137 et seq), chose a different path to the EU. The EU operate with an endorsement process, which enables the EU to control every change the IASB makes and then adopt it or not. Thus, the EU decides what becomes EU law and what does not. Each change to EU law remains in the hands of the EU. This mechanism gives the EU power over the 537

IASB. The IASB is keen to consult the EU before making an amendment. If the European legislature is not happy with the change, it will simply not adopt it, creating different variants of IFRS. However, this way the strength of uniformity would be lost. Due to the chosen method, Switzerland does not have this kind of influence over the IASB. With the dynamic reference of recognised standards in the CO, the IASB can change Swiss law by changing IFRS; this is explained further in the next chapter (cf para 137 et seq).

## § 5 IFRS' Legal Nature and their Forms of Influence

538 This chapter deals with two issues: how IFRS influence Swiss law and what this means with regard to IFRS' legal nature. IFRS influence Swiss law in different ways: through references in a broader sense (cf para 152), analogy (cf para 178 et seq), and comparative law (cf para 183 et seq). These influences affect the legal nature of IFRS. As soon as the legislature refers to informal norms, their legal nature changes (cf para 141 et seq). In this way, the incorporated parts become formal law. References in a narrower sense also lead to the same change, whereby referred-to parts of the informal norm change their legal character. However, the use of general clauses is different. General clauses are often used to refer to the latest state of the art in a certain field. Here, the state of the art does not become formal law itself, but rather gives a reference point for the interpretation of a formal norm.

539 The different IFRS influences show the impact of these standards. Even supporters of a conservative view (cf para 243 et seq) must admit that Swiss commercial accounting rules are influenced by foreign private standards. In addition to the influences already mentioned, IFRS have an impact on Swiss financial reporting through other standards. A separate chapter will explain these influences (cf para 189 et seq).

## § 6 IFRS' Influences on Other Standards

540 This chapter presented the impact of IFRS on other standards, which themselves have an influence on Swiss law. The result is an indirect impact of IFRS on Swiss law. Standards such as Swiss GAAP FER consult IFRS in their standard-setting process. Thus, they show similarities to IFRS with regard to structure, content, and underlying principles. Swiss GAAP FER are particularly interesting for the influence of private standards on Swiss commercial accounting rules. They are regarded as a part of Swiss recognised financial reporting principles. As a result, IFRS influence Swiss GAAP FER, which



have an impact on Swiss law. Thus, an indirect IFRS influence on the CO can be observed through Swiss GAAP FER (cf para 190 et seq):

IFRS – Swiss GAAP FER – Swiss Law

IFRS' impact is even observable in the public sector. IPSAS, and with them HRM2, are of importance for financial reporting in the public sector. IFRS are the point of orientation for IPSAS, which were considered for the creation of HRM2. The Conference of Finance Directors (*Finanzdirektorenkonferenz*) promotes their use in the communes, cantons, and federation. This creates a chain of influence from IFRS to IPSAS, to HRM2, to financial reporting of authorities (cf para 213 et seq). HRM2 and Swiss GAAP FER are both recognised financial reporting principles. However, they both lack the legal basis in Swiss law, but have a significant influence on Swiss financial reporting. HRM2 can develop itself to become the pendant to Swiss GAAP FER. IFRS influence Swiss Law in the following way:

IFRS – IPSAS – HRM2/NRM/IPSAS – Swiss Law

Certain peculiarities can be mentioned concerning financial reporting in the public sector. It is possible to be compliant in one financial report with HRM2 and IPSAS due to their broad scope. It is still unclear whether the same is possible for one report fulfilling both IFRS and the CO.

IFRS also have an impact on European law. The influence of IFRS on EU-IFRS is already a part of the term. The two differ only slightly from each other. The EU's incorporation of IFRS makes EU-IFRS foreign law, which enables the interpreter to consider EU-IFRS in the comparative law approach (cf para 228 et seq).

This chapter is the last in which IFRS' influence is analysed. It follows the previous two chapters, each of which explains a certain aspect of IFRS' influence on Swiss law. § 4 explained the adoption of IFRS on a formal level. This chapter is followed by § 5 concerning the different ways IFRS influences Swiss law and how this impact changes the legal nature of IFRS as private standards. As we have seen, IFRS also have an indirect influence on Swiss law through other private standards, which themselves influence Swiss law. In conclusion, IFRS have an impact on Swiss commercial accounting rules and exercise this impact in various ways.

## § 7 Previous Research and the Revision of the CO

This chapter analyses the different opinions regarding IFRS' influence on Swiss commercial accounting rules. The doctrine can be divided into two camps: conservatives and progressives. Although IFRS influenced the legislation (cf paras 239 et seq, 351 et seq), a part of the doctrine thinks the influence stops

here (cf para 243 et seq). The SFT used IFRS as an interpretation tool (cf para 241 et seq). Common ground can be found in the acknowledgement of different authors that the new CO has similarities to IFRS. Opponents raise two concerns: IFRS lack democratic legitimacy and have a completely different purpose with the true and fair view than the CO with the prudence principle. These concerns, however, not only exist regarding IFRS but also appear in the analysis of Swiss GAAP FER (cf paras 245, 190 et seq).

546 Concerns relating to IFRS being used as an interpretation tool can be summarised as follows (for further reference, cf para 243 et seq). (1) IFRS have other addressees and a different goal to that of the CO. § 9 responds to the conflict of the prudence concept with the fair presentation (cf para 303 et seq). (2) In particular, IFRS cannot be seen as a basis of assessment for profit taxes because the IASB does not consider the effects of the rules on taxation. The application of IFRS for the tax report is also critical from a constitutional viewpoint. In addition, the draft committed to tax neutrality. (3) IFRS itself forbids the application of a single standard without applying the rest. IAS 1.16 simply states that an entity can only claim to report according to IFRS if it applies every IAS, every IFRS, every IFRIC Interpretation, and every SIC Interpretation. In other words, cherry picking is not permitted. Taking IFRS as an instrument in the preparation of the statutory report is a different matter. (4) The legislature dismissed the possibility of reporting only according to IFRS.

547 All of the arguments discussed are also viable against the use of Swiss GAAP FER as an interpretation tool. (1) They also follow the true and fair view (cf paras 190 et seq, 303 et seq). (2) Swiss GAAP FER are tax neutral. (3) They should to be applied in their predetermined way. (4) The subjective-historic interpretation does not necessarily lead to this conclusion (cf para 467 et seq). Since IFRS were not mentioned expressly, but as the recognised standard, the turnaround would have been not only from IFRS but also from Swiss GAAP FER and US GAAP, which are all recognised standards in the sense of Swiss commercial accounting rules. It would only have been a complete turnaround if the legislature had eliminated all of the novelties, which led to more similarities to IFRS. Thus, these arguments can only be raised if they are also applied to Swiss GAAP FER.

548 The following conditions can be extracted that IFRS must fulfil in order to serve as auxiliary means: IFRS must not contradict the CO, nor Swiss tax law, and they shall have a tax-neutral effect. To meet this condition, all of the norms in the revised CO showing similarities to IFRS must be interpreted with the CO's underlying principles (namely, with the prudence principle). Although the wording of the CO and IFRS might be similar, differences in their interpretations may occur.

## § 8 Informal Norms

Chapters 8 and 9 are concerned with the two main issues associated with the 549 impact of IFRS on Swiss commercial accounting rules. The first problem is the fact that IFRS are a set of informal norms. The second problem is the conflict of the prudence principle with fair presentation. This is the topic of the next chapter. The problem with informal norms is not only observable in financial reporting but also in many other sectors with private norms influencing formal law. Thus, the explanations provided in this chapter are also applicable in other areas of the law.

What are informal norms? Only authorities with legislative power to issue 550 formal norms. Informal norms are norms set by non-state actors. Informal norms are used to harmonise rules on an international level (cf para 30 et seq). This is achieved by the creation of a set of norms, which the states can introduce into their domestic legal systems. However, this process is not always carried out voluntarily. This process allows states to adopt norms into their domestic legal systems and adapt them to their circumstances. States sometimes go further than the private standard setter wished or demanded. In these cases, the term ‘Swiss finish’ is used in Switzerland.

Informal norms are a source of inspiration for legislation and interpretation. 551 Problems arise when they encounter formal law, either through a reference in a broader sense (cf para 152 et seq) or as an interpretation tool (cf para 417 et seq). The main question is the permissibility of informal norms’ use (cf para 277 et seq). The same holds up for IFRS in terms of their influence on the CO. Dynamic references are only allowed if they are norms of technical quality and could have been the object of an enforcement ordinance (*Vollziehungsverordnung*). In the other cases, dynamic references are permitted if they have a constitutional basis and are not important (cf para 278 et seq).

If the norm is important, dynamic references are allowed (falling under 552 Art 164 BV). The following criteria lead to the assumption of an important norm: (1) degree of interference with fundamental rights, dimension of the scope of addressees and regulated content, relevance of the norm for the political system, financial consequences, and degree of acceptance of the targeted group; (2) for less important norms, the constitution must allow the involvement of privates and name the law that refers to informal norms; (3) dynamic references are permitted if norms of technical quality could have been the object of an enforcement ordinance (*Vollziehungsverordnung*).

## § 9 Prudence in Conflict with Fair Presentation

553 This chapter deals with the supposedly contradictory underlying principle of IFRS and the CO. The contradiction only holds on first sight. The prudence principle is not necessarily incompatible with the regulations in the recognised standards. These standards demand a prudent approach themselves. Swiss law does not have an issue with the concept of the true and fair view. The problems lie in the possibilities to build arbitrary hidden reserves, which are not permitted in a fair presentation. The key difference between the prudence principle in the CO and in the recognised standards is that the CO allows bias. The question of how prudent a financial report should be is a question about how to manage risk. The problem here is ‘that there are no generally accepted risk management accounting principles’.

554 The CO is not sincere. On the one hand, it permits arbitrary hidden reserves; on the other hand, it demands a financial report that provides a reliable view of the entity’s financial situation. This is the biggest contradiction in this chapter, and not the contradiction between the CO’s prudence principle and IFRS’ true and fair view. It could be shown that the prudence principle can be regarded as a part of the fair presentation. Thus, the CO is not necessarily more prudent than IFRS. In some cases, the opposite is true. This thesis provides some examples of this aspect (for example, in group valuation or in reporting a risk with a probability of occurrence greater than 50 per cent; cf paras 315, 399 et seq). The CO is not only imprudent in some cases, but also leaves room for arbitrary reserves. One example is Art 960e para 4 CO, in which the entity can choose to dissolve provisions after the risk has not occurred.

555 Reporting prudently leads unavoidably to hidden reserves. They occur in the CO, HRM2, Swiss GAAP FER, and IFRS. However, the degree of hidden reserves created always depends on the interpreter of the standard. Comparing IFRS and the CO leads to the following rule: if IFRS are as prudent or even more prudent than the CO, they can be relied on as an interpretation tool.

## § 10 Manifestations of IFRS’ Impact on the CO

556 The influence of the recognised standards manifests itself in various ways. However, the content of this chapter is limited to the results from the recognised standards only. In addition, this chapter analyses the different actors using recognised standards in the application of Swiss commercial accounting law. This group of actors consists of the legislature, judges, and the doctrine. The Swiss legislature consulted IFRS in the revision of the CO. The doctrine and the Swiss Federal Tribunal considered recognised standards in the

application of Swiss commercial accounting rules. Numerous examples show how the recognised standards are used to create and apply the norms in the CO. Whenever IFRS demand the separate report of an item, the same should be allowed under the CO because this process leads to more information in the financial report. However, the application of IFRS must be compatible with the CO's requirements.

The applier of the CO profits from other sources, either as the standard setter 557 or its interpreter. This is of especially high value because the Swiss commercial accounting rules are limited to around 20 pages, leaving many questions unanswered. The consideration of foreign norms also provides the possibility of overthinking the reporting of certain items. The report of own shares is a perfect example of this benefit. Before the revision, it was possible for the entity to capitalise own shares. Now, own shares must be reported as a negative item in the financial report, as is found in the recognised standards (cf para 404 et seq).

In other cases, the legislature considered the definition of certain items, such 558 as the definition of assets (cf para 373 et seq) or provisions (cf para 399 et seq). The following question arises: if the legislature used recognised standards, is it possible for the interpreter to use them also? This question is answered in the final chapter (cf para 417 et seq).

The result of the recognised standards' influence is an alignment of 559 international informal with national formal norms. There are problems associated with this effect. Only the national legislature is sovereign to set enforceable norms. The people and, with their power, the national legislators are democratically legitimised to set the legal order, not privates. However, through the use of private standards in the national norm-setting process or the interpretation of formal norms with the help of informal norms, private standard setters gain indirect influence on domestic legal orders. The danger, here, is that the people's will is bypassed and democracy is undermined. Instead of the people, experts now set the law. § 8 provides solutions to this issue (cf para 264 et seq).

Another problem is the potential conflict between the different principles 560 used in the CO compared to the recognised standards. Most problematic is the prudence principle in relation to the true and fair view. If the conflict holds up, the recognised standards can only be used very carefully as an interpretation tool. Introducing foreign objects into another legal system can lead to a systemic break. Therefore, the introduction of foreign objects must be handled with care. However, this problem only exists if the two systems are altogether different, which is the question addressed in § 9 (cf para 303 et seq).

## § 11 Interpretation of Domestic Accounting Rules

561 The previous chapters led towards this chapter for a particular reason. This chapter comprises the climax of the thesis. Obstacles such as democratic legitimacy and the prudence principle had to be discussed first before the application of IFRS as an interpretation tool for Swiss commercial accounting rules could be explained. In this sense, the final chapter implements the previous chapters.

562 This chapter demonstrates how the interpreter should interact with the CO and its connections to IFRS. In the interpretation of Swiss law methods, pluralism is applied, meaning that multiple methods enjoy equal value. It is up to the interpreter to find the right method. Regarding the systematic method, the following cascade is promoted: when interpreting a specific commercial accounting norm (third stage), the recognised financial reporting principles (second stage) must be considered; at the same time, the reliable view must still be perused (first stage; cf para 303 et seq). This cascade outlines the process of interpretation. First, a norm must be found, then interpreted. In the next critical step, the result of this interpretation must be verified. In other words, the interpreter must check whether his result is in line with the recognised financial reporting principles and the reliable view.

563 In the linguistic-grammatical method, the norm's wording is the starting point for the interpretation. Similarities in the wording of norms lead to the conclusion of a connection between these norms. As a result, the older norm can be used as an auxiliary means to interpret the newer norm (cf para 426 et seq). The idea is that, if the legislature considered a norm, the interpreter can also use it. In this process, the norm's underlying principles must be retained (cf para 507).

564 The teleological interpretation method is difficult to apply because commercial accounting rules serve different purposes (cf para 452 et seq). The historic interpretation shows similar issues. It has little weight in fast-changing fields, which is exactly what financial reporting is (cf para 470 et seq).

565 A diligent interpretation is not enough. Cultural influences must be considered in the interpretation of a norm, meaning that the result of applying a certain norm depends heavily on the applicant. His cultural background influences his application of the norm. A UK accountant will interpret IFRS differently to his German peer. Thus, the application of the same standard can lead to different results. The same goes for the interpretation of the CO. Different views influence the interpretation of Swiss commercial accounting rules also. In summary, it is important to be aware that different methods can lead to different results. In addition, cultural influences affect the application of a norm. These factors thus allow for a large margin of interpretation.

## **Note 1: References in Swiss Law to Recognised Standards**

Regarding financial reporting:

Art 961 para 1, 962 et seq, 963 para 3, 963b CO; Art 2 para 3 GeBüV (SR 221.431);

Art 7 para 1, 17 para 1, 30 para 1, 85 para 1, 89 para 2, 91 para 2, 109 para 2 KKV-FINMA (SR 951.312);

VASR (SR 221.432);

Art 30<sup>o</sup><sup>quater</sup> para 4 EnV (SR 730.01);

Art 12 para 3 lit c, 16 para 2 lit b, 16a RAG (SR 221.302);

Art 6b para 4, 9 para 1, 52 BankG (SR 952.0);

Art 40 para 3, 48, 49 para 4 FHG (SR 611.0);

Art 65 para 2 UVG (SR 832.20);

Art 36 para 1 RTVG (SR 784.40);

Art 18 para 2 SAFIG (SR 420.2);

Art 42 para 2 KFG (SR 442.1);

Art 17 (2) Rahmenabkommen zwischen dem Bundesrat der Schweizerischen Eidgenossenschaft und der Regierung der Republik Südafrika über Entwicklungszusammenarbeit (SR 0.974.211.8);

Art 32 NBV (SR 951.131);

Art 21 para 2, 23 para 2, 29 para 3, 35 para 2, 46 para 2 et seq, 77 para 2, 78 para 2, 82, 94 para 2 and 4 FinfraG (SR 958.1);

Art 14a para 2 VStV (SR 642.211);

Art 26 para 5 VAG (SR 961.01);

Art 29 para 3 SERVG (SR 946.10);

Art 3 para 2 lit c fig 2 et seq, Art 18 para 2, Art 20 para 2, 83 para 3, 108 para 2, 124 para 2 KAG (SR 951.31);

Art 63 para 1 RTVV (SR 784.401);

Art 19 para 2 EIMG (SR 941.27);

Art 19 para 2 MSG (SR 432.30);

Art 15 para 2 ENSIG (SR 732.2);

Art 5 para 1 Verordnung des ETH-Rates über das Interne Audit des ETH-Bereichs (SR 414.121);

Art 35a para 2 ETH-Gesetz (SR 414.110);

Art 52 para 1 VPG (SR 783.01);

Art 15a para 1 lit d et seq, 15a para 2 lit a, 15b para 2 lit a, 17a para 5 LiqV (SR 952.06);

Art 4 lit f, 4 lith, 21 para 1 lit e, 31 para 3, 32 lit e, 32 lit g, 35 para 1, 46 para 1, 47, 55 para 2, 56 para 1 lit a, 57, 59 para 1, 66 para 3<sup>bis</sup>, 69 para 4, 70 para 1, 72 para 5, 77 para 2, 82 para 1 lit b, 88 para 2, 90 para 1 lit b, 91 para 1 and 4, 93, 107 para 2, 125 para 3<sup>ter</sup>, 125a, 126a para 1 lit d, 127a para 3, 132 para 5, 133 para 3 lit a, 137 para 1, 139, 148g para 3 ERV (SR 952.03);

Art 41 para 3 ASV (SR 831.403.2);

ASV-RAB (SR 221.302.33) references in most of the articles to auditing standards;

Art 16 para 1, 29d para 1, 34a para 2, 37 para 2 lit a, 80 para 4 KKV (SR 951.311);

Art 7 para 1 FinfraV-FINMA (SR 958.111);

Art 45 para 1 BEHV (SR 954.11).



## **Note 2: CO's wording**

### **Art 958c CO English:**

#### III. Recognised financial reporting principles

<sup>1</sup> The following principles in particular apply to financial reports:

1. they must be clear and understandable.
2. they must be complete.
3. they must be reliable.
4. they must include the essential information.
5. they must be prudent.
6. the same rules must be applied in presentation and valuation.
7. assets and liabilities and income and expenditure may not be offset against each other.

<sup>2</sup> The sum entered for the individual items on the balance sheet and in the notes to the account must be proven by an inventory or by some other method.

<sup>3</sup> Financial reports must be adapted to the special features of the undertaking and the sector while retaining the statutory minimum content.

### **Art 958c CO German:**

#### III. Grundsätze ordnungsmässiger Rechnungslegung

<sup>1</sup> Für die Rechnungslegung sind insbesondere die folgenden Grundsätze massgebend:

1. Sie muss klar und verständlich sein.
2. Sie muss vollständig sein.
3. Sie muss verlässlich sein.
4. Sie muss das Wesentliche enthalten.
5. Sie muss vorsichtig sein.
6. Es sind bei der Darstellung und der Bewertung stets die gleichen Massstäbe zu verwenden.
7. Aktiven und Passiven sowie Aufwand und Ertrag dürfen nicht miteinander verrechnet werden.

<sup>2</sup> Der Bestand der einzelnen Positionen in der Bilanz und im Anhang ist durch ein Inventar oder auf andere Art nachzuweisen.

<sup>3</sup> Die Rechnungslegung ist unter Wahrung des gesetzlichen Mindestinhalts den Besonderheiten des Unternehmens und der Branche anzupassen.

## **Art 962 CO English:**

### **A. General**

<sup>1</sup> In addition to annual accounts under this Title, the following must prepare financial statements in accordance with a recognised financial reporting standard:

1. companies whose equity securities are listed on a stock market, if the stock market so requires;
2. cooperatives with a minimum of 2000 members;
3. foundations that are required by law to have an ordinary audit.

<sup>2</sup> The following may also request financial statements in accordance with a recognised standard:

1. company members who represent at least 20 per cent of the basic capital;
2. 10 per cent of cooperative members or 20 per cent of the members of an association;
3. any company member or any member subject to personal liability or a duty to pay in further capital.

<sup>3</sup> The duty to prepare financial statements in accordance with a recognised standard ceases to apply if consolidated accounts are prepared in accordance with a recognised standard.

<sup>4</sup> The supreme management or administrative body is responsible for choosing the recognised standard, unless the Articles of Association, the by-laws or the foundation deed provide otherwise or the supreme management body fails to specify the recognised standard.

## **Art 962 CO German:**

### **A. Im Allgemeinen**

<sup>1</sup> Es müssen zusätzlich zur Jahresrechnung nach diesem Titel einen Abschluss nach einem anerkannten Standard zur Rechnungslegung erstellen:

1. Gesellschaften, deren Beteiligungspapiere an einer Börse kotiert sind, wenn die Börse dies verlangt;
2. Genossenschaften mit mindestens 2000 Genossenschaftern;
3. Stiftungen, die von Gesetzes wegen zu einer ordentlichen Revision verpflichtet sind.

<sup>2</sup> Es können zudem einen Abschluss nach einem anerkannten Standard verlangen:

1. Gesellschafter, die mindestens 20 Prozent des Grundkapitals vertreten;
2. 10 Prozent der Genossenschafter oder 20 Prozent der Vereinsmitglieder;
3. Gesellschafter oder Mitglieder, die einer persönlichen Haftung oder einer Nachschusspflicht unterliegen.

<sup>3</sup> Die Pflicht zur Erstellung eines Abschlusses nach einem anerkannten Standard entfällt, wenn eine Konzernrechnung nach einem anerkannten Standard erstellt wird.

<sup>4</sup> Das oberste Leitungs- oder Verwaltungsorgan ist für die Wahl des anerkannten Standards zuständig, sofern die Statuten, der Gesellschaftsvertrag oder die Stiftungsurkunde keine anderslautenden Vorgaben enthalten oder das oberste Organ den anerkannten Standard nicht festlegt.

