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Corporate Governance

Liechtenstein
Marxer & Partner Attorneys at Law

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Law and Practice

Contributed by Marxer & Partner Attorneys at Law

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Marxer & Partner Attorneys at Law was founded in 1925; today it has 13 partners, a permanent consultant, 12 legal staff, four of counsel and approximately 50 other professionals. For many years Marxer & Partner has focused its activities in the fields of corporate law, M&A, trust and estate planning, capital markets and tax. The firm provides in-depth knowledge and advice in these fields to its international client base. Marxer & Partner's experienced corporate litigation team has successfully represented clients in litigation, and international arbitration proceedings complete the scope of services provided to clients. Many of the firm's lawyers regularly contribute to international handbooks and other publications and speak at conferences. The firm exclusively represents Liechtenstein at Lex Mundi, the worldwide association of independent law firms.

Authors

Stefan Wenaweser studied law at the University of Innsbruck, the University of Paris Val-de-Marne (Erasmus) and the University of Edinburgh. He received his LLM from King's College London and his Dr. iur. from the University of Innsbruck. Stefan has practised law since 2000, passed the Bar exam in 2003 and became a partner of Marxer & Partner in 2008. He specialised in the law of trusts and company law during his studies, and in his practice he regularly advises clients in foundation law, trust law and litigation. Stefan frequently speaks at conferences and regularly writes contributions to renowned publications on trust law, wealth and estate planning, litigation and white-collar crime. In addition, he functions as a member of the board of the Liechtenstein Institute of Professional Trustees and Fiduciaries.

Daniel Damjanovic has been a partner of the firm since 2015, and has been counselling banking industry clients for more than ten years. In 2015 he advised on an in-bound sale and merger transaction between the third- and fourth-largest Liechtenstein banks. In 2017, he was lead counsel of the seller on the Liechtenstein side in one of the largest Liechtenstein cross-border sale transactions between an Austrian bank and a Liechtenstein bank. Daniel has studied law at the University of Vienna, and received a full scholarship from the Austrian Ministry of Science and Education for his Master of Laws degree at the University of Virginia. Daniel is admitted to the Bar in Austria and Liechtenstein.

Christian Ritzberger joined Marxer & Partner Attorneys-at-Law in 2016, having previously worked for Ivoclar Vivadent AG in Schaan, as a law clerk at the Princely Court in Vaduz and as a legal associate with major Liechtenstein law firms. He focuses on foundation, trust and company law and regularly writes contributions to renowned publications on wealth and estate planning and litigation. Christian has studied law at the University of St Gallen (HSG) and the Private University of the Principality of Liechtenstein (UFL); in 2018, he earned a Certificate in National and International Tax Law from the University of Liechtenstein. Christian passed the Liechtenstein Bar examination in 2013.

Edgar Seipelt is a legal associate with Marxer & Partner, focusing on foundation, trust and company law. He studied law and finance at the University of Innsbruck, where he earned a Bachelor's degree in economics, a Master's Degree in Banking & Finance, a Diploma in Law and a Diploma in Business Law. Edgar is currently pursuing his Dr. iur. degree from the University of Innsbruck. He has served as a law clerk at several courts in Austria.

1. Introduction

1.1 Forms of Corporate/Business Organisations
The principal forms of corporate/business organisations in Liechtenstein are:

- the company limited by shares (*Aktiengesellschaft* or AG);
- the Establishment (*Anstalt*);
- the Business Trust (*Treuunternehmen*);
- the Foundation (*Stiftung*) with restrictions regarding its business operations; and
- the partnership.

Apart from these, there are several other organisational forms which are less common in legal practice, such as:

- the limited liability company (*Gesellschaft mit beschränkter Haftung* or GmbH);
- the limited partnership (*Kommanditgesellschaft*);
- the Societas Europaea.

1.2 Sources of Corporate Governance Requirements
There is no general Corporate Governance Code in Liechtenstein.

Nonetheless, the Liechtenstein Persons and Companies Act (*Liechtensteinisches Personen- und Gesellschaftsrecht* or PGR; Liechtenstein Law Gazette 1926/004) provides for regulations and rules concerning the governance of legal entities. Article 347 PGR, for instance, contains regulations concerning AGs establishing several types of committees on a voluntary or compulsory basis.

For companies which are controlled by the Principality of Liechtenstein there is a specific Public Code of Corporate Governance. However, this is not a law, but rather a recommendation.

1.3 Corporate Governance Requirements for Publicly Traded Companies
Liechtenstein has no stock exchange on which shares of companies may be publicly listed. However, Article 1096a PGR stipulates certain requirements for companies which are publicly traded elsewhere within the EEA. This provision foresees that such companies shall prepare a corporate governance report.

2. Corporate Governance Framework

2.1 Key Rules and Requirements
As stated in **1.2 Sources of Corporate Governance Requirement**, above, there is no general law or act determining corporate governance that is applicable to all legal forms in Liechtenstein.

However, in the course of the Foundation Law Reform of 2009, special 'Foundation Governance' rules have been introduced.

2.2 Current Issues and Developments
For many years now, a more or less intensive debate revolving around the question of whether or not a general Code of Corporate Governance for privately held companies should be established or not has been ongoing in Liechtenstein. Currently, it seems somewhat unlikely that further steps beyond a mere public discussion will be taken in this endeavour.

For publicly held companies, however, a specific recommended Public Code of Corporate Governance has already been established.

3. Management of the Company

3.1 Bodies or Functions Involved in Governance and Management
Article 106 et seq PGR stipulate the general rules which are applicable to all Liechtenstein legal entities. Every Liechtenstein legal entity has a supreme body with certain indispensable competencies. Further bodies may, and for some company forms must, be foreseen. The legally required main bodies and their rank within the organisational hierarchy generally depend on the legal form.

For a company limited by shares, the required principal bodies are the board of directors, a statutory auditor and the general assembly of shareholders as the supreme body. Article 347 PGR contains regulations for a company limited by shares to establish several types of committees on a voluntary or compulsory basis, which may subsequently be engaged in the corporate governance process.

3.2 Types of Decisions Made by Governing Bodies
The competencies of the general assembly of shareholders (as the supreme body of a company limited by shares) include, most importantly, the distribution of profit, the approval of the annual financial statements, discharge of the members of the management and the auditors, the amendment of the articles of association and the appointment of the board of directors.

The board of directors usually runs day-to-day operations and represents the company limited by shares in all external matters. For some actions, however, assertive consent of the general assembly of shareholders is required (eg Article 287 PGR). The articles of association of the respective corporation may foresee additional approval requirements but may also delegate some (non-crucial) tasks and responsibilities.

3.3 Decision-making Processes
Specific requirements have to be met in order for the general assembly of shareholders to be convened and to ensure the orderly conduct of voting. However, if all members of the supreme body are present and no-one objects to proper resolutions being adopted, then such resolutions would be valid even if the formal requirements for convening the general assembly have not been observed. Moreover, minority shareholder rights have to be considered for several issues.

In general, a resolution is passed by the simple majority of votes. There are other cases, however, where a qualified majority (most often two thirds) or a unanimous decision is required. Apart from these decision quora, specific attendance rates have to be met in order to effectively reach a binding resolution.

For the most part there is the possibility of circular resolution, which can prove very advantageous in situations where time is a crucial factor.

4. Directors and Officers

4.1 Board Structure
The provisions in Article 344 et seq PGR determine the structure of the board of directors of a company limited by shares. A board of directors of a company limited by shares must have at least one member, which can be an individual or a legal entity. For companies limited by shares with a share capital of at least CHF1 million, the board of directors must consist of at least three members (either individuals and/or legal entities).

If considered necessary or required by the articles of association or company regulations, a board president has to be elected by the members of the board of directors.

The articles of association or company regulations may also alter the organisational/structural requirements of the board of directors to some degree.

In particular Article 347 PGR contains regulations which enable the board of directors to establish special committees on a voluntary or compulsory basis which may subsequently be responsible for several corporate governance issues.

For companies which are not required to hold a specific licence to conduct a certain business, at least one member of the board of directors must be an EEA citizen (or equivalent based on a bilateral agreement) and be licensed as a trustee according to the Liechtenstein Trustee Act (TrHG, Liechtenstein Law Gazette 2013/421) (Article 180a PGR). This 'Article 180a-man' may also be a legal person, as is often the case in practice.

4.2 Roles of Board Members
Article 349 PGR in general entrusts the board of directors with the day-to-day business operations and the external representation of the company. Apart from the aforementioned possibilities in Article 347 PGR to create specialised additional corporate bodies, the assignment of different tasks to single members of the board of directors depends on the individual case and circumstances of the respective company limited by shares.

A delegation of the duties of the board of directors to third parties is, in general, possible (Article 348 PGR).

Special legal provisions may apply in some areas of business (eg, a firewall between the compliance and the risk management department for some financial intermediaries).

4.3 Board Composition Requirements/ Recommendations
See **4.1 Board Structure** and **4.2 Roles of Board Members**, above.

4.4 Appointment and Removal of Directors/ Officers
According to Article 338 paragraph 2 sub-paragraph 1 PGR, the general assembly of shareholders has the right to appoint and remove the board of directors as a whole, or single members of it. The provisions of Article 344 et seq PGR (see **4.1 Board Structure** and **4.2 Roles of Board Members**, above) must also be considered in this context. Hence a delegation of the duties of the board of directors to third parties is, in general, possible (Article 348 PGR).

It is possible to appoint directors for a limited time (the default timeframe is three years) and to re-elect them several times (Article 180 paragragh 1). Special reasons for dismissal exist (eg, conflict of interest).

4.5 Independence of Directors and Conflicts of Interest
Article 182 paragraph 2 PGR provides for a 'safe harbour' for directors when acting on behalf of the legal entity ('business judgement rule'). This principle requires directors to act on the basis of appropriate information and in the best interest of the company, and to ensure that they are not misled by irrelevant issues.

Article 183 PGR encompasses several non-competition provisions. Apart from special rules in the articles of association or company regulations, directors must not act in their own interest in the same area of business as the company limited by shares. This includes taking on similar job positions in competing enterprises. The general assembly of shareholders can, however, give their approval in individual matters or reach a contractual solution with the director concerned or with all directors pre-emptively.

4.6 Legal Duties of Directors/Officers

For the general principle of the 'business judgement rule' please refer to **4.5 Independence of Directors and Conflicts of Interest**, above.

Article 349 PGR compiles several duties of the board of directors. The directors have to run the day-to-day operations, give appropriate instructions, establish necessary rules and parameters accordingly and keep themselves reasonably informed.

It is also their responsibility to ensure that the financial statements and records comply with the respective accounting standards.

Moreover, the (president of the) board of directors usually chairs the general assembly of shareholders whenever an ordinary or extraordinary meeting is conducted.

Apart from these principal legal duties, several additional duties may arise due to special provisions relevant to the particular area of business of the company.

4.7 Responsibility/Accountability of Directors

The directors owe their principal duties to the legal entity. Provided they have fulfilled their duties, all members of the board of directors are entitled to be discharged by the general assembly of shareholders (Article 225 PGR).

In some cases the directors may also be held accountable for their actions towards third parties, provided such third parties act in good faith.

For the general principle of the 'business judgement rule' please refer to **4.5 Independence of Directors and Conflicts of Interest**, above.

According to Article 220 paragraph 6 PGR, directors may refuse to follow an order given by a superior corporate body if by doing so they would breach their respective duties. In this case they cannot be held liable for this action.

4.8 Breach of Directors' Duties

Article 218 et seq PGR contain several provisions revolving around the liability of directors for their actions.

The law differentiates between liabilities to the corporation, to individual members of the corporation and to third parties. In general, directors are only liable for wilful misconduct or negligence. Nonetheless, the different types of liabilities described often require/allow different levels of negligence on the part of the director in question.

Generally speaking, directors are liable for the damage caused when they do not live up to their responsibilities as outlined under **4.6 Legal Duties of Directors/Officers** and **4.7 Responsibility/Accountability of Directors**, above (Article 220 paragraph 1 PGR).

Primarily, the corporation as such is entitled to the claim for damage against the director. If the corporation has no such claim, its members may directly enforce their respective claim for damages (Article 222 PGR).

Apart from wilful misconduct, the general assembly of shareholders may also forfeit their claim for damages by resolution.

4.9 Other Bases for Claims/Enforcement Against Directors/Officers

See **4.8 Breach of Directors' Duties**, above.

4.10 Approvals and Restrictions Concerning Payments to Directors/Officers

According to Article 180 paragraph 1 PGR, directors may be paid for their services, although this is not a requirement. The general assembly of shareholders decides upon the extent of the remuneration of directors and related benefits.

4.11 Disclosure of Payments to Directors/Officers

Apart from the general provisions which require the publication of corporate financial statements (Article 1122 et seq PGR), additional information regarding the remuneration of directors and officers does not have to be disclosed. Special provisions exist for certain areas of business.

Liechtenstein has no stock exchange on which shares of companies may be publicly listed. Hence, no special regulations regarding the publication of such additional data for publicly listed companies exist under Liechtenstein law.

Nonetheless, it is possible for Liechtenstein companies to list their shares on foreign exchanges, in which case they would be subject to the requirements of the respective jurisdiction.

5. Shareholders

5.1 Relationship Between Companies and Shareholders

The general meeting of shareholders is the supreme authority of companies limited by shares. Its powers include in particular:

- the appointment of the board of directors and the auditor;
- the approval of the business report (*Geschäftsbericht*);
- the determination of the dividends;
- the discharge (*Entlastung*) of the board of directors from their responsibility for the previous business year;
- the adoption and amendment of the articles and the formation of branches; and

- the passing of resolutions concerning all matters that are reserved to the general meeting by law (for example, dissolution or conversion of the company) or by the articles or are submitted to it by other bodies.

The articles may provide for the assignment, in whole or in part, of tasks imposed on the general meeting by law or by the articles to another body (Article 338 PGR).

Only the company's assets are available to pay the company's debts. Shareholders' liability for the company's indebtedness does not exist. The individual shareholder is thus not required to contribute more than the amount determined by the company upon subscription of his/her share to fulfil the company's objects and pay its debts (obligation to pay up). The rights of a shareholder include:

- membership;
- the right to vote;
- the right of avoidance of a resolution;
- to dividends;
- to a share in the liquidation surplus;
- if the articles do not limit or exclude such specific rights within the scope of the law.

The duty of equal treatment requires the board of directors to treat shareholders under the same circumstances equally (Article 292 PGR).

5.2 Role of Shareholders in Company Management

The operation and management of a company limited by shares is, by statutory law, carried out by the management body (board of directors and the management consisting of delegates of the board of directors or third-party individuals, as the case may be), and such power may not be withdrawn by way of a shareholders' resolution. Hence, under Liechtenstein law, shareholders have no direct rights or powers in the operation and management of the company. However, shareholders may vote on the appointment and the removal of the members of the board of directors whenever a shareholders' meeting is held and its agenda provides for the appointment or removal of members of the board of directors. In addition, there are a number of corporate actions which may have an impact on the operation of a company and for which the shareholders' approval is required, eg, adoption and amendment of the articles, approval of mergers, determination of dividends, increase or decrease in the company's share capital, and transfer of domicile (see **5.1 Relationship Between Companies and Shareholders**, above).

5.3 Shareholder Meetings

Companies limited by shares must hold an ordinary general meeting every year within six months of the close of the business year (Article 339 PGR). Other (extraordinary) general meetings may be convened as required. Shareholders who together hold 10% of the countable votes may request the calling of such a meeting (Article 168 PGR). Shareholders representing at least 5% of the countable votes may demand that specific subjects be placed on the agenda for discussion and the passing of resolutions (Article 339d PGR). The method of calling the meeting is determined first and foremost by the articles and otherwise by law. The notification of the meeting must include the agenda of the meeting, clearly and fully indicating the matters to be dealt with (Article 339b PGR). Shareholders may attend the general meeting in person. Except where otherwise provided for in the articles, shareholders may be represented by other shareholders or third parties, which requires a power of attorney (Article 332 PGR). Unless otherwise provided for by the articles or by law, the general meeting passes all resolutions by a simple majority, provided that one tenth of all votes are present or represented. The articles may stipulate that certain matters require a higher majority and/or quorum. The general meeting need not necessarily take place in Liechtenstein and may be held at any other place. A violation of the requirements regarding the calling of meetings renders the resolutions passed by the general meeting contestable, unless all shareholders or proxies are present (so-called universal meeting, Article 167 PGR) and no person entitled to object does so. General meetings of companies limited by shares whose shares are admitted for trading on a regular market in an EEA member state are governed by special rules.

5.4 Shareholder Claims

Liechtenstein law provides for a catalogue of specific rights of shareholders to take legal action in the event of an infringement of the law or the articles by the general meeting of shareholders, the board of directors, the management or the auditors. For example, the representatives of at least 5% of all votes, as long as this amounts to but at least three votes (and, where there are less than ten votes in total, each vote or member) may, by virtue of the law, cause any resolution of the general meeting that they have not approved to be contested and annulled. In the same way, individual shareholders entitled to vote may do so in cases where, contrary to law or the articles, they have not been summoned to meet or their participation in the general meeting or the voting has been made impossible in another way or rendered difficult in an inequitable manner and, as a result, they have not participated in the meeting or the voting. Where unauthorised persons have been involved in the passing of a resolution, shareholders entitled to vote may also cause a resolution to be contested and annulled if they are able to substantiate by prima facie evidence that this defect had an influence on the resolution passed (Article 178 PGR).

Shareholders have no right to challenge resolutions by the board of directors. However, any resolution passed by the board of directors violating fundamental rules of company law is void. Such a resolution may be declared void by the court following a petition of a shareholder. Furthermore, all persons entrusted with the administration and the auditing

of a company (board of directors, the management, auditors, etc) are liable for the damage caused by any intentional or negligent violation of their duties (Article 220 PGR). Primarily, the company that has suffered damage shall be entitled to claim compensation. Where the company does not have a claim, as well as in the case of malicious injury, each shareholder may demand that they be compensated directly for the damage inflicted upon them. If the company renounces the filing of a claim or fails to assert a claim within three months after a shareholder's request to do so, each shareholder may institute an action in favour of the company for compensation for the damage intentionally inflicted upon the company, subject to a binding resolution of release (Article 222 PGR). Moreover, the court may, upon application by shareholders and against the provision of security for possible loss, temporarily withdraw the functions of management and representation from the board of directors by appointing a legal adviser, provided it can be substantiated by prima facie evidence that the board of directors endangers the interests of the legal entity and danger is imminent (Article 191 PGR).

5.5 Disclosure by Shareholders in Publicly Traded Companies

Whoever, directly or indirectly or acting in concert with others, acquires or sells shares in a Liechtenstein company limited by shares whose shares are admitted for trading on a regulated market in an EEA member state and thereby reaches, exceeds or falls below the threshold percentage of 5, 10, 15, 20, 25, 33, 50 or 66% of the voting rights must notify the company as well as the Liechtenstein Financial Market Surveillance Authority (FMA) within four trading days (Article 25 et seq Liechtenstein Disclosure Act; *Offenlegungsgesetz*). The disclosure requirements are also triggered by put or call options and conversion rights. Special rules apply to banks and insurance companies as well as for investment companies.

6. Corporate Reporting and Other Disclosures

6.1 Financial Reporting

Companies limited by shares are always required to observe proper accounting procedures even if they do not conduct any commercial business. The accounting rules are fully compliant with the relevant directives of the European Community. Banks and finance companies as well as insurance companies are governed by special rules. The larger the company limited by shares, the more severe are the regulations concerning the breakdown and scope of data which have to be drawn up and possibly be made available. Article 1064 PGR distinguishes between small, medium-sized and large companies, using the balance sheet total, the net turnover and the number of employees as classification criteria.

Large companies must, within 15 months of their balance sheet date, submit the approved annual accounts, the auditor's report and the shareholders' resolution regarding the use of profits to the Commercial Register Division at the Department of Justice. The smallest companies (ie, companies which fulfil at least two of the following three criteria: a balance sheet sum below CHF450,000; a turnover below CHF900,000; and/or less than 10 employees) and small companies limited by shares (ie, companies which fulfil at least two of the following three criteria: a balance sheet sum below CHF7.4 million; a turnover below CHF14.8 million; and/or less than 50 employees) benefit from certain exemptions. Such companies only have to file a considerably shortened balance sheet with the Commercial Register Division at the Department of Justice. They are not required to file an annual report. In addition, the smallest companies are not obliged to file an annex to the balance sheet. Medium-sized companies (ie, companies which fulfil at least two of the following three criteria: balance sheet sum between CHF7.4 million and CHF25.9 million; turnover between CHF14.9 million and CHF51.8 million; and between 50 and 250 employees) only have to file a shortened annual account (consisting of balance sheet, profit and loss statement and annex) and the auditor's report with Commercial Register Division at the Department of Justice.

A parent company having its registered office in Liechtenstein is required to draw up a consolidated business report (annual accounts and annual report) if the majority of voting rights in a subsidiary is vested in the parent company or if the latter is in a position to control that subsidiary. However, if specific ratios are not exceeded (balance sheet sum, turnover, employees) parent companies are released from such requirement. Furthermore, holding companies may be exempted from the requirement to draw up consolidated business reports if they do not interfere with the administration of their subsidiaries, do not exercise their voting rights in the election of their subsidiaries' bodies and if they grant loans only to subsidiaries.

The annual accounts (consisting of balance sheet, profit and loss statement and annex) must comply with the principle of fair presentation. Instead of the accounting rules according to the Persons and Companies Act, the international accounting standards of the International Accounting Standards Board (International Accounting Standards (IAS), and International Financial Reporting Standards (IFRS) as well as related provisions) may be applied when drawing up the annual accounts and the consolidated annual accounts (Article 1139 PGR). Special rules apply to banks and insurance companies as well as for investment companies.

6.2 Disclosure of Corporate Governance Arrangements

In general, Liechtenstein law does not require companies to disclose their corporate governance arrangements. How-

ever, Liechtenstein companies whose shares are admitted for trading on a regulated market in an EEA member state are required to include a corporate governance report in their annual reports. This report shall form a separate section in the annual report and contain at least information as required by Article 1096a PGR. Special rules apply to banks and insurance companies as well as for investment companies.

6.3 Companies Registry Filings

A company limited by shares acquires legal personality only upon its entry in the Commercial Register. For this purpose, the members of the board of directors with signing authority must file an application for the registration of the company limited by shares with the Commercial Register Division at the Department of Justice. The application for registration must include the following documents (detailed information can be found in the Commercial Register Ordinance):

- complete formation deed (*Errichtungsakt*);
- an original or certified copy of the articles as well as of the declaration of formation or minutes of the constituent general meeting, if not already contained in the mentioned documents;
- proof that the entire share capital has been subscribed to and that at least 25% (or more, if applicable) has been paid up;
- proof that the board of directors and the auditor have been appointed; and
- specimen signature statements and acceptances of mandate from the officers (Article 290 PGR).

Inter alia, the following facts are entered in the Commercial Register and published as an extract in the official gazettes:

- the date of adoption of the articles;
- the name, legal form and domicile of the company;
- the objects and, if appropriate, the duration of the company;
- the amount of the share capital and the amount of the contributions made on it;
- the number, nominal value/quota and type of shares;
- provisions relating to the restriction on transferability, and preferential rights and conversion rights of individual classes;
- the members of the board of directors, of the supervisory board (if appointed) and their representatives, including first and last names, residence/domestic business address and citizenship and/or name and domicile of the company;
- the manner in which representation is implemented; and
- data concerning the auditor and form of notices of the company (Article 291 PGR).

Changes to the registered facts must be registered and entered in the same way as the new entry.

Every interested person may inspect the file which the Commercial Register (Commercial Register Division at the Department of Justice) keeps for a company limited by shares. Prima facie evidence of a justified interest is not required. Moreover, certified copies of specific documents in the registry file may be requested by every interested person (Article 953 PGR). Accordingly, anyone may inspect the deed of formation and identify the (fiduciary) initial shareholders. However, other details such as the names of the economic founders or shareholders are not recorded in the Commercial Register itself.

7. Audit, Risk and Internal Controls

7.1 External Auditors

The appointment of an auditor (*Revisionsstelle*) is mandatory for companies limited by shares, irrespective of the company's objects and even if the company limited by shares does not engage in commercial activities (Article 350 PGR). The auditor is appointed by the general meeting of the shareholders. It must be independent of the company audited. The auditor examines the annual accounts of the company limited by shares as to their compliance with law and the articles (Article 195 PGR). The results of the audit are reported in writing to the general meeting. In the audit report, the auditor must indicate, inter alia, whether it advises that the general meeting approve the annual accounts with or without any qualification or refer them back to the board of directors. If the company limited by shares is required to draw up an annual report, this report must also be examined by the auditor. If, in the course of its examination, the auditor establishes that there are violations of the law or the articles, it notifies the board of directors in writing and possibly the supreme authority (ie, the general assembly of the shareholders) as well (Article 196 PGR).

7.2 Management Risk and Internal Controls

Liechtenstein companies limited by shares whose shares are admitted for trading on a regulated market in an EEA member state are required to appoint an audit committee (Article 347 PGR). At least one member of the audit committee must be independent and have expertise in the field of accounting or auditing. In addition to members of the board of directors, persons appointed by a majority decision of the general meeting may also be members of the audit committee. The duties of an audit committee include, in particular, the monitoring of the accounting process, the effectiveness of the internal control system, risk management and internal auditing as well as the audit of the financial statements, whereby the independence of the auditor and any additional services provided by the auditor shall also be taken into account. Special rules apply to banks and insurance companies as well as investment companies.

Apart from the above, there is no general duty to establish internal control systems. In fulfilling its responsibilities, the members of the board of directors must comply with the duties of care and safeguard the company's interests. Depending on the individual circumstances of the company, internal guidelines on risk management and internal control may be required.

Marxer & Partner Attorneys at Law

Heiligkreuz 6
PO Box 484
LI-9490 Vaduz

MARXER & PARTNER
RECHTSANWÄLTE

Tel: +423 235 81 81
Fax: +423 235 82 82
Email: info@marxerpartner.com
Web: www.marxerpartner.com