

LEGAL OPINION

prepared for

Board of Directors of SoftwareONE Holding Ltd.

on the question of

**Conflict of interest of the Board members proposed by the 29%
Shareholder Group in view of a potential public-to-private
transaction**

by

Prof. Dr. Christoph B. Bühler, LL.M.

Attorney-at-law, Titular Professor for Corporate, Capital Market and Financial Market Law
at the University of Zurich

on

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PROF. DR. CHRISTOPH B. BÜHLER, LL.M., ATTORNEY-AT-LAW
JAN BANGERT, ATTORNEY-AT-LAW
MARTIN BÖCKLI, LL.M., ATTORNEY-AT-LAW*
DR. DANIEL HÄRING, ATTORNEY-AT-LAW
ANNE-SOPHIE BURCKHARDT-BUCHS, LL.M., ATTORNEY-AT-LAW
MERET MÜLLER, ATTORNEY-AT-LAW
STEPHAN BUSER, ATTORNEY-AT-LAW

PROF. DR. DR. h.c. PETER BÖCKLI, ATTORNEY-AT-LAW

ST. JAKOBS-STRASSE 41
P.O. BOX 2348
CH-4002 BASEL

TEL. +41 (0)61 317 94 50
FAX +41 (0)61 317 94 60
WWW.BOECKLI-BUEHLER.CH

Members of the Basel and Swiss Bar Associations SAV and registered in
the Cantonal Attorney Register of Basel.

* also admitted in New York

EXECUTIVE SUMMARY

- 1 *SoftwareONE Holding Ltd.* (hereinafter “SoftwareONE”) is a company active in the field of software portfolio management and software licensing. The company advises customers on the management and organization of their software licenses. The company has been listed on the SIX Swiss Exchange since October 2019. *Daniel von Stockar, B. Curti Holding AG* and *René Gilli* (hereinafter together the “29% Shareholder Group”) hold a stake of 29 percent in SoftwareONE.
- 2 On 15 June and on 20 July 2023, the American investment company *Bain Capital* supported by the 29% Shareholder Group (hereinafter together the “Bidder Group”) made indicative, unsolicited and non-binding proposals of interest for the acquisition of 100% of the company SoftwareONE. Both offers were rejected by the Board of Directors following a review. After a thorough review and on the basis of its own fair value assessment and the support of experts, including an independent fairness opinion, the Board of Directors concluded that the non-binding indication did not reflect the fundamental value of SoftwareONE. Rather, the indicative value was significantly below the fairness opinion of the independent expert and other valuation considerations. Moreover, it was not plausible that Bain Capital was willing and prepared, also in terms of financing and internal approvals to move ahead, to actually submit an offer to the shareholders anytime soon and that any offer at the proposed price level would ultimately reach a minimum acceptance threshold of two-thirds of the shares outstanding in a public offer.
- 3 On February 5, 2024, the Board of Directors received a formal request from the 29% Shareholder Group to convene an Extraordinary General Meeting. Since then, *Daniel von Stockar*, who co-represents the proposal as a member of the 29% Shareholder Group, no longer participated in meetings of the Board of Directors of the company. The Board of Directors also decided that this was the best way to address the situation for reasons of conflicts of interest, equal treatment of potential competing bidders, confidentiality reasons, antitrust considerations and equal treatment of shareholders. Already a year ago, Daniel von Stockar had resigned as Chairman of the Board of Directors. Since then, however, he has remained an elected member of the SoftwareONE Board of Directors.
- 4 The 29% Shareholder Group is requesting the *complete replacement of the Board of Directors*, with the exception of Daniel von Stockar, *with the aim of pursuing the takeover of SoftwareONE* having been considered by the Bidder Group. To ensure an appropriate corporate governance review, the Nomination and Compensation Committee has invited the new candidates proposed by the 29% Shareholder Group to interviews. Based on this, the Board of Directors has planned to submit its own recommendation to SoftwareONE shareholders for voting at the Annual

General Meeting. However, the new candidates refused to attend such an interview. Instead, one of the proposed candidates wrote a letter to SoftwareONE on behalf of all the new candidates that they did not find a meeting with the Nomination and Compensation Committee meaningful because the 29% Shareholder Group requested their replacement and that they would therefore refrain from the interview process.

- 5 Against this backdrop, the Board of Directors of SoftwareONE is faced with the following questions, which are to be answered in the context of this Legal Opinion:

Are members of the Board of Directors proposed by the 29% Shareholder Group subject to conflicts of interest within the meaning of corporation law or takeover law
(a) with regard to a possible takeover bid and
(b) with regard to other actions of the Board of Directors,
due to their position as "co-bidders" (Daniel von Stockar and René Gilli) or due to their nomination by the "co-bidders" or due to the announced purpose of their nomination by the "co-bidders" in favor of a "going private"?

- 6 Based on the legal analysis, the Undersigned has come the following conclusions:
- 7 According to prevailing doctrine and practice, a *conflict of interest* exists from the perspective of a member of the Board of Directors if a member of the Board of Directors has to make a decision in which the interests of the company conflict with his own interests or other interests assigned to him, so that acting impartially in the interests of the company is jeopardized or at least appears to be so. The conflict then consists of a member of the Board of Directors becoming the *"servant of two masters"* and having to decide which interests should be given greater weight. Essentially, the assumption of a legally relevant conflict presupposes a *clash of interests between the interests of the company and a special interest of a certain intensity*. In certain individual cases, a conflict of interest can only arise *situationally* or be of a *permanent* nature. According to Art. 717a para. 2 CO, the Board of Directors must take measures necessary to safeguard the interests of the company in order to deal with situational conflicts of interest, such as adopting two resolutions, walkout of the person concerned, ordering a fairness opinion, forming a committee or approval by the General Meeting. However, if there is a *permanent conflict of interest*, the aforementioned measures are fundamentally unsuitable for resolving the conflict. In this case, the member affected by the conflict of interest may ultimately not (or no longer) be a member of the Board of Directors.
- 8 If a potential *public takeover bid* is on the table, the previously largely aligned *interests of the company's stakeholders* may suddenly come into conflict with one another or become a legally

relevant conflict of interest as described above: In the present case, the success of a potential takeover bid and thus the answer to the question of whether the control over SoftwareONE as the target company should be transferred to other hands depends on the majority or often 2/3 decision of the *shareholders* who are the addressees of a takeover bid. As a rule, the bidder, here Bain Capital (or the Co-Bidders respectively), attempts to influence this decision through targeted strategies and measures in order to be able to acquire the shares at the lowest possible takeover price, without the individual shareholder under pressure to decide being able to protect himself against this behavior of the bidder. Part of this strategy was to lock the 29% Shareholder Group in by the co-bidder agreement, thereby making it less likely that third party investors would engage in the costs of preparing a competing bid. Due to the lack of information vis-à-vis the offeror, the shareholders run the risk of selling their shares too cheaply by accepting the offer. However, in contrast to the other public shareholders, the *29% Shareholder Group* have a different interest in this case, which largely coincides with that of the bidder, especially since they have agreed with the bidder as potential Co-Bidders in the present case: *they would have the right to remain invested and therefore benefit from a low offer value and future value creation, whereas the public shareholders would not benefit from these and other advantages should the company be taken private.*

- 9 Due to the motion of the 29% Shareholder Group to convene a General Meeting and to *replace the entire Board of Directors of SoftwareONE*, with the exception of *Daniel von Stockar*, a member of their own ranks, and their justification that the change is necessary *in order to implement the public-to-private transaction they are considering*, ***all members of the Board of Directors proposed for election by the 29% Shareholder Group are presumably in a conflict of interest under takeover law with regard to a potential takeover offer.*** This conflict is most obvious in the case of *Daniel von Stockar*, who not only belongs to the 29% Shareholder Group who had agreed with Bain Capital on the non-binding takeover offers, but who is also to be re-elected by the 29% Shareholder Group as the only existing member of the Board of Directors. From a takeover law perspective, a conflict of interest can also clearly be assumed in relation to *René Gilli*, as he is also a member of the 29% Shareholder Group. There is also a certain appearance of a conflict of interest with regard to *Dr. Till Spillmann*, as he and his law firm, where he was a partner, apparently had a business relationship with the bidder Bain Capital until recently. However, the other members of the Board of Directors proposed for election by the 29% Shareholder Group, *Dr. Annabella Bassler*, *Jörg Riboni* and *Andrea Sieber*, would also presumably be in a conflict of interest under takeover law – should they actually be elected – simply because they are *proposed for election* to the Board of Directors of the target company by the 29% Shareholder Group acting in concert with the Bidder (Art. 32 para. 2 lit. c Takeover Ordinance,

TOO) and, according to the 29% Shareholder Group's own official justification in their motion to the Board of Directors to convene an Extraordinary General Meeting on 4 February 2024, are apparently to take over this position with the "mission" of helping the planned public-to-private transaction to achieve a breakthrough:

«The Founding Shareholders fundamentally disagree with the Board of Director's conclusion of the strategic review and are of the opinion that the contemplated public-to-private transaction should have been pursued and presented to the shareholders. [...]»

*«The founding shareholders **therefore** request [...] the removal of the current Chair as well as all current members of the Board, with the exception of Daniel von Stockar, who did not participate in the Board discussions since the launch of the recent approach for a going-private transaction. [...] The Founding Shareholders believe that the right conditions for SoftwareONE's next phase of growth are best provided in a private context, and that a going-private transaction with the right partner is in the best interest of SoftwareONE and all stakeholders. [...]»*

- 10 The principles of takeover law also provide indications for the assessment ***under corporate law*** as to when a legally relevant conflict of interest exists in a planned transaction. In contrast to takeover law, however, corporate law does not provide a list of presumptions of typical conflicts of interest, but requires a *case-by-case assessment* of the qualification of a conflict of interest. It is required that the members of the Board of Directors are also pursuing a *special interest* in relation to the takeover in question that is *contrary* to the *long-term interests of the company*. With its motion to vote out the existing members of the Board of Directors (with the exception of *Daniel von Stockar* himself) and to elect the new members of the Board of Directors proposed by them, the 29% Shareholder Group is, according to its own statements, aiming to help the intended public-to-private transaction achieve a breakthrough. The proposed members of the Board of Directors are thus *implicitly and unequivocally instructed* to pursue the *special interests of the 29% Shareholder Group* on the Board of Directors. However, as members of the Board of Directors, they are also obliged to safeguard the interests of the Company and all stakeholders in the medium and long-term growth of business and earnings of SoftwareONE in good faith. The members of the Board of Directors proposed by the 29% Shareholder Group are therefore "*servants of two masters*": Due to their dual role as "representatives" of the opposing special interest of the 29% Shareholder Group and as members of the Board of Directors of SoftwareONE committed to the interests of the company, which includes the interests of all stakeholders (including those of the other public shareholders), ***the members proposed by the 29% Shareholder Group for election to the Board of Directors are also in a legally relevant conflict of***

interest from a corporate law perspective with regard to the assessment and decisions of a public-to-private transaction.

- 11 Finally, the members proposed by the 29% Shareholder Group for election to the Board of Directors – if elected – would probably also find themselves ***in a permanent or structural conflict of interest***, due to the *pressure* generated by the 29% Shareholder Group and the *associated latent de facto obligation to pursue the going private-strategy of the 29% Shareholder Group, also with regard to almost all other conceivable strategic decisions in the core competence area of the Board of Directors that are directly or indirectly related to this "mission"*. They would practically have to constantly disclose their conflict, and the conventional measures for conflict management would not be effective in this constellation. Since in this situation *all* members of the Board of Directors would *permanently* find themselves in a legally relevant conflict of interest *in practically all decisions*, the company would basically no longer be able to make decisions or function at all. According to the relevant Federal Supreme Court rulings and prevailing doctrine, this situation could even result in a ***organizational deficiency*** within the meaning of Art. 731b CO, which could then only be resolved by the court appointment of a *custodian* at the request of a shareholder.

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PART 1: BASIS OF THE OPINION

I. The Mandate

- 12 On 15 February 2024, Dr. *Dieter Gericke*, Partner of Homburger AG, has contacted the Undersigned and informed him that there would be a request to elaborate a Legal Opinion on behalf of SoftwareOne Holding Ltd. (hereinafter “*SoftwareONE*”) in connection with the motion of the shareholders *Daniel von Stockar*, *B. Curti Holding AG* and *René Gilli* (hereinafter the “29% Shareholder Group”) for the election of new members of the Board of Directors proposed by them at an extraordinary general meeting of shareholders. The Undersigned has proposed the terms of the engagement in an engagement letter on 25 February 2024, and the engagement has been approved on 29 February 2024. The Legal Opinion was delivered as agreed on 18 March 2024.
- 13 The legal questions to be answered are as follows:

Are members of the Board of Directors proposed by the 29% Shareholder Group subject to conflicts of interest within the meaning of corporation law or takeover law
(a) with regard to a possible takeover bid and
(b) with regard to other actions of the Board of Directors,
due to their position as "co-bidders" (Daniel von Stockar and René Gilli) or due to their nomination by the "co-bidders" or due to the announced purpose of their nomination by the "co-bidders" in favor of a "going private"?

II. Background Facts

- 14 SoftwareONE is a company active in the field of software portfolio management and software licensing. The company advises customers on the management and organization of their software licenses. The company has been listed on the SIX Swiss Exchange since October 2019.
- 15 On 15 June and on 20 July 2023, the American investment company *Bain Capital* supported by the 29% Shareholder Group (hereinafter together the “Bidder Group”) made indicative, unsolicited and non-binding proposals for the acquisition of 100% of the company SoftwareONE. Both proposals were rejected by the Board of Directors following a review. After a thorough review and on the basis of its own fair value assessment and the support of experts, including an independent fairness opinion, the Board of Directors concluded that the non-binding indication did not reflect the fundamental value of SoftwareONE. Rather, the indicative value was significantly below the fairness opinion of the independent expert and the Board of Directors' own valu-

ations. Moreover, it was not plausible that any offer at the proposed price level would ultimately reach a minimum acceptance threshold of two-thirds of the shares issued in a public offer.

- 16 On February 5, 2024, the Board of Directors received a formal request from the 29% Shareholder Group, who together currently hold around 29% of the company's share capital, to convene an Extraordinary General Meeting. Since then, *Daniel von Stockar*, who co-represents the proposal as a member of the 29% Shareholder Group, has stepped down from the Board of Directors in accordance with his own decision and no longer participated in meetings of the Board of Directors of the company also in all other matters. Already a year ago, *Daniel von Stockar* had resigned as Chairman of the Board of Directors and stepped down. Since then, however, he has remained an elected member of the SoftwareONE Board of Directors.
- 17 Possibly already as Chairman and certainly later as member of the Board, Daniel von Stockar started to prepare and discuss with a number of parties his plans to take the company private but did not disclose this and related conflicts of interest to the Board. When asked by the Board he confirmed that there are no plans for a change of the shareholder base. The new Chairman, the new CEO and a new board member were installed with the knowledge and support of Daniel von Stockar, but without him disclosing to them that shortly thereafter a letter would be sent to the Board, announcing Bain's and the Group's takeover plans.
- 18 The Group is now requesting the *complete replacement of the Board of Directors*, with the exception of Daniel von Stockar, *with the aim of pursuing the takeover of SoftwareONE* being considered by the Bidder Group consisting of Daniel von Stockar and the other member of the 29% Shareholder Group as well as Bain Capital. To ensure an appropriate corporate governance review, the Nomination Committee has invited the new candidates proposed by the shareholder group to interviews. Based on this, the Board of Directors will submit its own recommendation to SoftwareONE shareholders for voting at the Annual General Meeting. However, none of the new candidates agreed to attend such an interview. Instead, one of the proposed candidates wrote a letter to SoftwareONE on behalf of all the new candidates that they were not interested and saw no merit in a meeting with the Nomination Committee because the 29% Shareholder Group had requested to replace them all.
- 19 In detail, the request of the 29% Shareholder Group is as follows:

SoftwareOne Holding Ltd.
Chairman of the Board
Riedenmatt 4
6370 Stans
Switzerland

Zurich, 4 February 2024

To the Board of Directors of SoftwareOne Holding Ltd.

Request to convene an extraordinary shareholders' meeting

Dear Adam

According to Article 8 para 3 of the Articles of Incorporation of SoftwareOne Holding Ltd. we, SoftwareOne's founding shareholders Daniel von Stockar, B. Curti Holding AG and René Gilli (the "Founding Shareholders"), representing 29% (as entered in the share register and known to the company) of the share capital and the voting rights of the company, herewith request the Board of Directors of Software One Holding Ltd. to convene, at the earliest possible date, and in no event later than within 30 days of the date hereof, an **extraordinary shareholders' meeting** and to put the following items on the agenda:

1. Removal of the following members of the Board of Directors:

Proposal:

- 1.1 Removal of José Alberto Duarte
- 1.2 Removal of Jim Freeman
- 1.3 Removal of Timo Ihamuotila
- 1.4 Removal of Marie-Pierre Rogers
- 1.5 Removal of Isabelle Romy
- 1.6 Removal of Elizabeth Theophille
- 1.7 Removal of Adam Warby

Explanation:

The Founding Shareholders fundamentally disagree with the Board of Directors' conclusion of the strategic review and are of the opinion that the contemplated public-to-private transaction should have been pursued and presented to the shareholders. The Founding Shareholders have lost confidence in the current members of the Board of Directors.

The term of office of the members of the Board of Directors would end at the Annual General Meeting 2024. As the matter is important and requires immediate action the Founding Shareholders wish to remove the said members of the Board of Directors at the earliest possible date.

2. Election of Members of the Board of Directors

Proposal: The Founding Shareholders propose the election of the following new members of the Board of Directors for a term of office until completion of the next Annual General Meeting.

Explanation: With a renewed competent, objective, business-oriented Board of Directors, the Founding Shareholders intend to establish an open-minded governing body to evaluate a public-to-private transaction, taking into account the market environment, SoftwareOne's positioning, the company's existing growth and value creation potential as well as the interests of all stakeholders.

2.1 Election of Annabella Bassler

Dr. Annabella Bassler brings significant expertise in finance, controlling, as well as senior leadership from her role as the CFO of Ringier AG.

She has been the CFO of Ringier AG since 2012. She joined Ringier in 2007 and was the Head of Corporate Finance/Treasury from 2008 to 2012. In addition, Annabella Bassler restructured Ringier's operations in Romania into a profitable and modern media company from mid-2014 until 2021.

Additionally, to her current role as CFO, she is Chairman of the Board of Directors at Ringier Axel Springer Polska sp. z o.o., and a member of the Board of Directors at Ringier Digital Ventures AG, Ringier Axel Springer Schweiz AG, Ticketcorner AG, and Hallenstadion AG where she focuses on strategy, M&A activities and financial management.

In November 2019, she initiated the EqualVoice initiative, underscoring her commitment to gender equality in media. The core of the initiative is an algorithm making gender equality in media measurable.

Before joining Ringier, she worked at the finance department of Hamburg Süd, the shipping company of the Oetker Group from 2004 to 2007..

Annabella Bassler studied Economics at the European Business School in Oestrich-Winkel, Buenos Aires and Los Angeles, where she also received her doctorate. She was born in 1977 and is a Swiss and German citizen.

In case of her election to the Board of Directors, Annabella Bassler will also be proposed for election to the Nomination and Compensation Committee (separate individual election in agenda item 4.1.).

2.2 Election of René Gilli

René Gilli's broad experience in the industry as well as his contribution to the company as a Founding Shareholder of SoftwareOne Holding AG make him a valuable addition to the Board of Directors.

René Gilli has a long track record at the company having co-founded the firm by merging his company, MicroWare (founded 1992), with Softwarepipeline in 2005 and thus paving the way for a successful founding of SoftwareOne in 2006. Additionally, he was a member of the Board of Directors 1992 to 2005 at MicroWare, 2005 to 2006 at Softwarepipeline and 2013 to 2022 at SoftwareOne.

He currently serves as Chair of the Board of Directors at Alivant AG.

René Gilli holds a degree in Economics and Information Technology of the Business IT School/ School of Economics and Business Administration of Lucerne (today Lucerne University of Applied Sciences and Arts). He was born in 1958 and is a Swiss citizen.

In case of his election to the Board of Directors, René Gilli will also be proposed for election to the Nomination and Compensation Committee (separate individual election in agenda item 4.2.).

2.3 Election of Jörg Riboni

Jörg Riboni is a renowned finance and audit expert with international experience.

He has an extensive track record as CFO and has served on the Board Directors of several companies. Jörg Riboni was the CFO of Emmi AG from 2013 to 2019, the CFO of Forbo Holding AG from 2005 to 2012, the CFO of Sarna Group from 1997 to 2005 and CFO of Jelmoli AG from 1995 to 1997. Before that, he was Chief Financial and Administrative Officer at Lacoray Group (Cosa Liebermann) from 1991 to 1995.

He served on the expert commission of the Swiss stock exchange SIX from 1999 to 2010 and was a member of the Swiss GAAP FER Commission from 1999 to 2006.

Jörg Riboni started his career as an auditor at Peat, Marwick, Mitchell & Co from 1985 to 1988, subsequently served at Deloitte & Touche from 1988 to 1991.

He has prior experience with enterprise software services through his time on the Board of ERNI AG, a Swiss software engineering company. Additionally, he has served on the Special Expert Committee of Sika AG and was Board member and Chair of the Audit Committee at Hochdorf Holding AG and ARYZTA AG.

He is currently the Chairman of the Board of Directors at Rothorn Group AG, a Board member and Chair of the Audit Committee at HERITAGE B B.V. and serves on the Board of Glas Troesch AG.

Jörg Riboni holds a degree in Economics from the University of St. Gallen and received his CPA in 1990. He was born in 1957 and is a Swiss citizen.

2.4 Election of Andrea Sieber

Andrea Sieber is a renowned legal, mergers and acquisitions, as well as corporate governance expert.

She is a partner at the Swiss law firm MLL Legal AG, where she started her career in 2003 and specializes since twenty years on national and cross-border M&A, private equity and capital market transactions and advises clients on corporate governance topics and general corporate and commercial laws. She co-leads the firm's M&A Practice Group since 2015 and served as CFO in the firm's management board from 2021 to 2023.

Since 2016 until today she serves as Vice Chairwoman of the Board of Directors of Allreal Holding AG, a publicly listed real estate company in Switzerland, and heads Allreal's Nomination and Compensation committee. From 2011 to 2017 she served as Chairwoman of the Supervisory Board of Roth & Rau AG (today: Meyer Burger Germany GmbH), a formerly publicly listed German company. In addition, she serves as member of the Board of Directors of four other private Swiss companies.

Andrea Sieber holds law degrees from the University of St. Gallen law school (lic. iur. HSG) and the University of California, Davis, school of law (LL.M.) and is admitted to the Swiss bar since 2003. She was born in 1976 and is a Swiss citizen.

In case of her election to the Board of Directors, Andrea Sieber will also be proposed for election to the Nomination and Compensation Committee (separate individual election in agenda item 4.3.).

2.5 Election of Till Spillmann

Dr. Till Spillmann is a renowned legal, capital markets, mergers and acquisitions, as well as investment expert.

He currently acts as co-founder and partner at Argon Management AG, a private investment firm, which he co-founded in January 2024. In 2014, he also co-founded Actium AG, an independent owner-led Swiss investment company investing in real estate, private equity and private debt and offering related structuring solutions. Actium not only holds a Swiss real estate portfolio comprising of over 900 apartments, commercial properties and serviced apartments but also holds, amongst other investment, stakes in Vision Group AG as well as Hair and Skin Medical AG. In addition to his engagement as an independent investor, Till Spillmann had been partner at Niederer Kraft Frey AG between 2018-2022 as well as managing partner at Baer & Karrer AG between 2014-2017 where he started his legal career in 2004. He specialized in private and public M&A, capital markets and financing transactions, as well as corporate governance. He started his career at McKinsey and Company.

Till Spillmann currently serves, among others, as Chairman of the Board of Directors at Chronext Group Ltd and Actium Ltd as well as a member of the Board of Directors at Argon Management AG. In addition, he also serves as Chairman of the Board of Directors at ImmoMentum AG, the real estate investment vehicle at Actium AG.

Till Spillmann received a doctor title in law from the University of Zurich in 2004 and was admitted to the bar in Switzerland in 2006. He was born in 1977 and is a Swiss citizen.

3. Election of the Chairperson of the Board of Directors

Proposal: The Founding Shareholders propose that Daniel von Stockar be elected as Chairman of the Board of Directors for a term of office until completion of the next Annual General Meeting.

Explanation: After holding the office of Chairman for ten years until AGM 2023, he is prepared to take over the Chairmanship again with the support of the other Founding Shareholders.

4. Election of the Members of the Nomination and Compensation Committee

Proposal: The Founding Shareholders propose the election of the following members of the Board of Directors as members of the Nomination and Compensation Committee for a term of office until completion of the next Annual General Meeting.

4.1 Election of Annabella Bassler

4.2 Election of René Gilli

4.3 Election of Andrea Sieber

In case of her election, it is intended that Andrea Sieber will assume the role as Chair of the Nomination and Compensation Committee.

If the Board of Directors of SoftwareOne Holding Ltd. considers it as required, the founding shareholders are prepared to submit securities account statements showing their share positions. However, the undersigned herewith confirm their respective shareholdings as entered in the company's share register.

Yours sincerely,



Daniel von Stockar



Regula Curti
B. Curti Holding AG



René Gilli

- 20 The media release published by the applicant 29% Shareholder Group via its communications consultancy Lemongrass Communications AG on 5 February 2024 reads as follows:

Media release from Daniel von Stockar, B. Curti Holding AG, René Gilli

SoftwareOne Founding Shareholders request the convening of an EGM

Zurich, 5 February 2024 – Daniel von Stockar, B. Curti Holding AG and René Gilli – together forming the Founding Shareholders group holding approx. 29% of SoftwareOne Holding AG (SIX: SWON) – have requested the company's Board of Directors to convene an Extraordinary General Meeting to elect a new Board with no delay.

SoftwareOne's founding shareholders fundamentally disagree with the Board of Directors' conclusion of the strategic review and are of the opinion that the recent non-binding offer for a going-private transaction should have been presented to shareholders.

The founding shareholders therefore request the convening of an EGM, proposing the removal of the current Chair as well as all current members of the Board, with the exception of Daniel von Stockar, who did not participate in the Board discussions since the launch of the recent approach for a going-private transaction. Annabella Bassler, Jörg Riboni, Andrea Sieber and Till Spillmann are proposed as new independent Board members, whereby Andrea Sieber will be Vice Chair and act as Lead Independent Director. Daniel von Stockar and René Gilli will stand for election as Chair and as an additional Board member, respectively.

The founding shareholders believe that the right conditions for SoftwareOne's next phase of growth are best provided in a private context, and that a going-private transaction with the right partner is in the best interest of SoftwareOne and all stakeholders. On 15 January 2024, the current Board rejected a going-private transaction based on a value indication of CHF 18.80 per share, which the founding shareholders believe would be supported by other major investors, too. The founding shareholders now feel they need to take action out of responsibility for the business, shareholders, employees and other stakeholders.

- 21 For reasons of efficiency, the Board of Directors has decided to combine the two meetings and convene them on 18 April 2024 (the Annual General Meeting was originally scheduled for 2 May 2024). The invitation to the Extraordinary General Meeting, including the request of the 29% Shareholder Group, has been published on 6 March 2024.
- 22 On 4 March 2024, the 29% Shareholder Group released a statement and announced that it decided to dissolve the group acting in concert between them and Bain Capital and terminate their underlying agreement.
- 23 The media release published by the applicant 29% Shareholder Group via its communications consultancy Lemongrass Communications AG on 4 March 2024 reads as follows:

Media release from Daniel von Stockar, B. Curti Holding AG, René Gilli

SoftwareOne Founding Shareholders provide update on group acting in concert with Bain Capital

Zurich, 4 March 2024 – Daniel von Stockar, B. Curti Holding AG and René Gilli – together forming the founding shareholders group holding 29% of SoftwareOne Holding AG (SIX: SWON) – today announced that they have decided to dissolve the group acting in concert between them and Bain Capital and terminate their underlying agreement. The group (which is separate from the founding shareholders group) was made public, and notified to SIX Swiss Exchange, in June 2023 to make transparent to the capital market that Bain Capital and the founding shareholders were jointly pursuing an offer for SoftwareOne.

Since the current Board of Directors of SoftwareOne rejected Bain Capital's latest offer in January 2024, it has been clear that there is no scope for a going-private transaction under the current circumstances. In addition, soon after receipt of the founding shareholders' request to convene an extraordinary general meeting to replace the Board of Directors, the current Board started to assert flimsy, unfounded legal arguments to question the constitution of the group (announced more than eight months ago) and the founding shareholders' ownership in their shares. Indeed, in its attempt to prevent a proper and fair conduct of the upcoming EGM, the current Board has not shied away from the baseless threat of suspending the voting rights of the founding shareholders. This left the founding shareholders with no choice but to dissolve the group.

While the founding shareholders and their legal advisors are fully convinced of their legal position, they wish to avoid the company being embroiled in protracted, grueling, and expensive litigation. With today's announcement of the dissolution of the group, the path toward a smooth EGM that adequately reflects shareholder intentions and brings about the urgent change in the Board is made. The founding shareholders expressly reserve the right to take legal action against the current Board and individual members.

The founding shareholders reiterate that SoftwareOne needs new leadership at Board level. Throughout the lengthy strategic review process in 2023, the current Board has stalled and impeded progress whilst the business has deteriorated, and shareholder value has been destroyed. The unsubstantiated legal threats that have now been made ahead of the EGM highlight once again that the current Board is no longer tenable, and those responsible must be voted out of office.

The founding shareholders continue to be convinced that the right conditions for SoftwareOne's next phase of growth are best provided in a private context. The competent and experienced individuals proposed by the founding shareholders as independent members of the Board of Directors will examine the matter of a potential going-private transaction impartially upon their election at the upcoming EGM.

III. Underlying Documents

- 24 The following company documents were considered relevant for the legal issue at hand:
- Articles of Association of SoftwareONE;
 - Organizational Regulations of SoftwareONE;
 - Nomination and Compensation Committee Charter of SoftwareONE;
 - List of significant shareholders of SoftwareONE;
 - Request to convene an extraordinary shareholders' meeting from the 29% Shareholder Group dated 4 February 2024;
 - Media release from Daniel von Stockar, B. Curti Holding AG, René Gilli regarding "SoftwareONE Founding Shareholders request the convening of an EGM" of 5 February 2024
 - Media release from Daniel von Stockar, B. Curti Holding AG, René Gilli regarding "SoftwareONE Founding Shareholders provide update on group acting in concert with Bain Capital of 4 March 2024
 - Press releases of SoftwareONE regarding the potential takeover of 15 June 2023, 20 July 2023, 24 July 2023, 8 January 2024, 15 January 2024, 5 February 2024, 12 February 2024, 15 February 2024, 5 March 2024 and 6 March 2024
 - Article in the NZZ of February 16, 2024 on "SoftwareONE has become too sluggish for the founders", page 25.

IV. About the Undersigned

- 25 *Christoph B. Bühler* is a senior partner at böckli bühler partners. He has extensive experience in counselling corporations on corporate law and corporate governance matters, capital markets and issues of regulation and compliance. He has been rendering various expert legal opinions and publishing on corporate governance and capital market-related matters, including a leading commentary on the legal provisions of the Board of Directors in Switzerland ("Zürcher Kommentar" on Articles 707 et seq. Code of Obligations) as well as a thesis in the LL.M. postgraduate program on international business law of the European Institute of the University of Zurich on the topic "The neutrality obligation of the board of directors of the target company in public takeover bids".
- 26 Since 2000, he is admitted to the Basle and Swiss Bars, and since 2002, holds a further degree in the postgraduate work-study LL.M.-program in international business law. From 2002 to 2003, he was employed as a visiting associate with the American law firm Sullivan & Cromwell LLP in New York.

- 27 He is an authorized representative and member of the appeals board of the Swiss Exchange as well as founding member of swissVR, an association for the promotion of the professionalization of board activities in Switzerland. Furthermore, he is chairman, vice chairman or board member of various major Swiss companies such as a bank listed on the SIX (Valiant) and an internationally established pharmaceutical group (Geistlich). He has also been lecturing at the University of Zurich as a titular professor in the areas of corporate, capital market and financial market law.

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VI. Qualifications

- 28 The comments in this legal opinion are subject to the following qualifications:
- The Undersigned and the lawyers of *böckli bühler partners* admitted to the Basel and Swiss Bars and does not hold themselves out to be experts in any laws other than the laws of Switzerland. Accordingly, the comments are confined to Swiss law.
 - The Undersigned has been retained as legal expert for providing comments on the questions and issues addressed in this legal opinion.
 - All considerations in this legal opinion are referring to the specific Documents and Statement of Facts as determined in the above Chapters II. and III. The legal considerations contained in this opinion and the conclusions derived therefrom may not be transferred to other cases nor used as a basis for decisions on the background of facts not submitted to the Undersigned.
 - This review and comments relate to the laws of Switzerland as in force and effect on the date hereof. Such law and regulations are subject to change. English translations provided are not official versions of the law but the product of the authors' best efforts to render the German original in English.
- 29 The present legal opinion concentrates on the questions set forth above. The mandate of the Undersigned consists primarily in the presentation of his personal legal understanding of the relevant presumptions, allegations or facts.

VII. Copyright

- 30 The copyright to this text remains with the Undersigned. This applies in particular to the right to recognition of authorship pursuant to Art. 9 CopA, the right to be named as the author of the legal expert opinion, the right to first publication of the legal findings detached from the specific case in the context of a scientific article or paper and the right to protection of the integrity of the work pursuant to Art. 11 CopA. The present text is destined for the Board of Directors of SoftwareONE. It shall not, in the whole text or in parts, without the previous written consent of the Undersigned, be copied.

VIII. Confidentiality

- 31 This legal expert opinion was prepared on behalf of SoftwareONE for the attention of the Board of Directors of SoftwareONE. It is up to the Board of Directors to decide to whom it wishes to make this legal expert opinion available.

PART 2: LEGAL CONSIDERATIONS

I. Preliminary remarks

- 32 Before addressing the actual expert question of whether the board members proposed by the 29% Shareholder Group would be in a conflict of interest with regard to a possible takeover bid and also with regard to their other actions as board members, it must be clarified when, according to prevailing doctrine and practice, a conflict of interest exists at all. The term conflict of interest has therefore first to be clarified below.
- 33 The next step is then to examine whether the proposed board members would have a conflict of interest under takeover and company law in the specific constellation at hand *in relation to a possible takeover bid*, and finally whether such a conflict would also exist *in relation to their other actions as board members*.

II. Concept of conflict of interest

A. Definition of conflict of interest

- 34 The term "conflict of interest" is used in Art. 717a of the Swiss Code of Obligations (CO), but is not defined. It is an *undefined legal term* that is specified by the relevant doctrine and case law.¹
- 35 The legal system initially assumes that every participant in legal transactions looks after his own interests. However, this is different in legal relationships in which someone entrusts the protection of his interests to another person. In this case, there is a risk that this person will neglect his duty to protect interests of the other party and give priority to his own interests or the interests of another person. This constellation constitutes a conflict of interest.² *A conflict of interest therefore exists in principle if the party acting in a legal transaction is obliged to protect the interests of another party and at the same time has conflicting interests of his own.*³
- 36 The typical case is that of "*self-contracting*", in which the same person acts as a representative of one party and at the same time as its counterparty in legal transactions. If, on the other hand,

¹ DAMIAN FISCHER (2019) 11; ROLF WATTER (2022) 251; FACINCANI/SUTTER (2023) 88.

² ROLF SETHE (2018) 376.

³ ZK OR-BÜHLER (2018) Art. 717 N. 127; GERICKE/BÖTTCHER (2021) 341.

one person represents the interests of several persons (dual representation), these conflicting third-party interests constitute the conflict of interest.⁴

B. Conflict of interest with relevance for the Board of Directors

- 37 In their function, the members of the Board of Directors must protect the interests of third parties, namely those of the *company*. Based on this, a conflict of interest exists if a member of the Board of Directors has to make a decision in which the *interests of the company* conflict with his own interests or other interests assigned to him, so that acting impartially in the interests of the company is jeopardized or at least appears to be so. The conflict then consists of a member of the Board of Directors becoming the "*servant of two masters*" and having to decide which interests he should give greater weight to.⁵
- 38 Essentially, the assumption of a legally relevant conflict presupposes a *clash of interests* between the company's interests and a special interest of a certain *intensity*.⁶ In a case relating to dual representation, the Federal Supreme Court held that a conflict of interest arises if a person is involved in a legal transaction who, by virtue of his or her position, has to safeguard the interests of both parties to the contract, whereby this constellation already exists with the election to the Board of Directors.⁷
- 39 The prevailing doctrine⁸ and practice⁹ require the existence of opposing interests in such a way that the interests of the company and the special interests of the member of the Board of Directors, whether personal or on behalf of third parties, conflict with each other. An intensive "disabling conflict" only exists in the case of such opposing interests.¹⁰
- 40 The question then arises as to what the *relevant interests of the company* are that may give rise to a conflict of interest. This is certainly likely to be the case if the interests represented by the member of the Board of Directors in question directly collide with the *direct economic interests of the company*, for example if the board member affected by the conflict represents the interests of the market opponent in a transaction who wishes to purchase a part of the company.¹¹ However, the interests of the company, which the members of the Board of Directors must safeguard in good faith, go beyond this short-term economic interest and, in addition to the

⁴ ZK OR-BÜHLER (2018) Art. 717 N. 132; TSCHÄNI/DIEM (2016) 75.

⁵ ROLF WATTER (2022) 251; DAMIAN FISCHER (2019) 37; ZK OR-BÜHLER (2018) Art. 717 N. 127.

⁶ See for the intensity requirement N. 41.

⁷ Federal Supreme Court 4A_360/2012 of 3 December 2012, E. 4.2.2.

⁸ TSCHÄNI/DIEM (2016) 75; PETER BÖCKLI (2012) 364; DANIEL DAENIKER (2005) 115 f.; WHERLOCK/VON DER CRONE (2015) 546.

⁹ Guideline no 19 para. 3 SCBP: "opposing interests".

¹⁰ TSCHÄNI/DIEM (2016) 76; DANIEL DAENIKER (2005) 116.

¹¹ TSCHÄNI/DIEM (2016) 76; PETER BÖCKLI (2012) 364.

interests of the shareholders or anchor shareholders, also include the interests of other stakeholders in *sustainable business and earnings growth*.¹² Two conclusions can be drawn from this:

- On the one hand, a conflict of interest may also exist if a board member represents or has to represent a special interest that conflicts with the *medium or long-term growth of the company's business and earnings*. Thus, if a member of the Board of Directors represents a third party who wishes to take the company off the market by means of a control transaction at the expense of minority shareholders, a "disabling conflict" may exist.¹³
- On the other hand, it must be concluded from the comprehensive duty to safeguard interests that a *collision with the interests of the company's shareholders* can also give rise to a conflict of interests, even if the company's assets themselves are not jeopardized by the transaction.¹⁴

C. Differentiation according to the intensity of conflicts of interest

- 41 Not every conflict of interest leads to a diametrical clash of interests, a situation in which the individual Board member harms the company with his vote or management action to the extent that it benefits his own interests or the third-party interests he represents. The member of the Board of Directors may also only be partially affected in his personal interests in that, on closer analysis, he has certain interests that are more or less contrary to the company, but by no means dominant. In this case, there is no actual contradiction between the interests; rather, they enter into a not very intense field of *tension* with each other. In such situations, the duty of the board member affected in this way to actually exercise the vote granted to him by law at the board meeting remains in principle in place.¹⁵
- 42 The situation is different if an *intense conflict of interest* arises, a constellation in which the interests pursued by the member of the Board of Directors in question are diametrically opposed and the member in question not only pursues these conflicting interests on the basis of personal incentives, but must also represent them in opposition due to legal obligations. The pursuit of personal or third-party interests has a reciprocal effect to the detriment of the company.¹⁶
- 43 The assumption of a legally relevant conflict of interest therefore presupposes that the conflict to which the body is exposed is of a *certain intensity*.¹⁷ It is required that the member of the board of directors is *under pressure* to give priority to the special interest over the interests of

¹² BSK OR-WATTER/ROTH PELLANDA (2024) Art. 717 N. 16; TSCHÄNI/DIEM (2016) 77.

¹³ TSCHÄNI/DIEM (2016) 77.

¹⁴ PETER BÖCKLI (2012) 364; TSCHÄNI/DIEM (2016) 77.

¹⁵ PETER BÖCKLI (2022) § 9 N. 796 f.; ZK OR-BÜHLER (2018) Art. 717 N. 138; ADRIANO MARGIOTTA (2005) 133; FORSTMOSER/MEIER-HAYOZ/NOBEL (1996) § 28 N. 32.

¹⁶ ZK OR-BÜHLER (2018) Art. 717 N. 139; WHERLOCK/VON DER CRONE (2015) 546.

¹⁷ BÜHLER/SPICHTIN (2015) 155; TSCHÄNI/DIEM (2016) 78.

the company. An intense conflict in this sense is likely to exist in any case if a member of the Board of Directors, as a representative of a legal entity or commercial company within the meaning of Art. 702 para. 3 CO, works towards ensuring that the legal entity represented by him benefits from a certain resolution at the expense of other shareholders.¹⁸ However, duties to safeguard interests may also arise for members of the Board of Directors who are designated as representatives of a shareholder group. In addition, other close relationships between the Board of Directors and a third party pursuing a special interest may give rise to conflicts of interest.¹⁹

D. Permanent and situational conflicts of interest

- 44 A distinction must then be made between conflicts of interest that arise situationally in individual, specific decisions to be made and those that are permanent in nature:²⁰
- A *situational* conflict of interest only affects the Board of Directors in certain individual cases. Due to the network of relationships in which most members of the Board of Directors find themselves, such conflicts occur frequently in practice and in a wide variety of forms.
 - On the other hand, conflicts of interest that arise directly from a person's function or dual role are *permanent*. They affect the Board of Directors on a permanent basis and therefore have a general influence on its decisions.²¹ Permanent or structural conflicts of interest often arise in the case of multiple mandates. The conflicted member of the Board of Directors is the "*servant of two masters*", as in the case of a majority shareholder in the middle of the Board of Directors, and is faced with a conflict of duties for which the Federal Supreme Court²² applies a strict standard.²³
- 45 Structural and individual conflicts of interest therefore differ in terms of the *trigger for the conflict*. In the former, it is the structure of the legal relationship; in the latter, it is a single event.²⁴
- 46 In both cases, however, the existence of a conflict of interest cannot be assessed a priori in the abstract on the basis of a person's legal position(s), but only *on the basis of the specific individual case*.²⁵

¹⁸ PETER BÖCKLI (2012) 364.

¹⁹ TSCHÄNI/DIEM (2016) 79.

²⁰ ZK OR-BÜHLER (2018) Art. 717 N. 129 f.

²¹ PETER BÖCKLI (2022) § 9 N. 808.

²² BGE 113 II 52 E. 3a.

²³ FACINCANI/SUTTER (2023) 89; PETER BÖCKLI (2022) § 9 N. 814 und 816; ROLF SETHE (2018) 376.

²⁴ ROLF SETHE (2018) 376.

²⁵ ZK OR-BÜHLER (2018) Art. 717 N. 130.

E. Measures to manage the conflict of interest

- 47 Against the backdrop of the principles on conflicts of interest developed by doctrine and case law, the question of *how to deal with conflicts of interest* in connection with the internal decision-making of the company, i.e. the debate and adoption of resolutions on certain transactions, is particularly relevant in the practice of board activities – as in the constellation under review here.²⁶
- 48 Art. 717 para. 1 CO stipulates that the members of the Board of Directors and third parties involved in the management of the company must perform their duties with all due care and safeguard the interests of the company in good faith. This duty of loyalty requires that the members of the Board of Directors and the Executive Board align their conduct with the interests of the company and put other interests aside. The interests of the company take precedence over the board member's own interests and the interests of third parties.²⁷
- 49 Since the last revision of company law, in force since January 1, 2023 (i.e. in force in the time periods relevant for this opinion), a specific regulation for dealing with conflicts of interest can be found in Art. 717a CO: according to this, the members of the Board of Directors have the obligation to inform the Board of Directors immediately and in full of any conflicts of interest affecting them. The Chairman then informs the Board of Directors if necessary. The Board of Directors shall *take the measures necessary to safeguard the interests of the company*, whereby the person concerned must abstain from voting on this measure.
- 50 Another basis for dealing with conflicts of interest in corporations are the relevant guidelines of the *Swiss Code of Best Practice for Corporate Governance*, which were last revised in 2023.²⁸ According to guideline no 19 SCBP 2023, the following applies:

²⁶ TSCHÄNI/DIEM (2016) 60.

²⁷ TSCHÄNI/DIEM (2016) 61.

²⁸ See for an overview CHRISTOPH B. BÜHLER (2023) 548 ff.

Dealing with conflicts of interest and advance information

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The board of directors and each member of the board of directors and executive board should ensure that conflicts of interest do not jeopardise the independent safeguarding of the company's interests.

- Each member of the board of directors and the executive board should arrange their personal and business affairs so as to avoid, as far as possible, conflicts of interest with the company. The member should neither conclude any investment or other transactions nor accept any benefits that may jeopardise their independent safeguarding of the company's interests.
- If a member of the board of directors or the executive board has personal interests that affect the interests of the company or has to safeguard such interests of third parties (proximity of interests), the member should inform the chairperson of the board concerned. The member should disclose all relevant circumstances so that the chairperson can assess the interests of the person concerned.
- If the member of the board of directors or the executive board has conflicting interests or if the member has to safeguard conflicting interests (conflict of interest), the board (or the member designated by it) should make a decision commensurate with the seriousness of the conflict of interests so that the independent safeguarding of the company's interests continues to be ensured. In particular, it should check whether the member of the board of directors or the executive board in question must not participate or whether a double resolution with and without the member of the board affected by the conflict is sufficient. It should consult the person concerned.
- In the event of the member not being permitted to participate, the board will decide whether the member – depending on the intensity of the conflict – only needs to not participate in passing the resolution or additionally also must not participate in the discussion. Instead of these measures or in addition to them, it can commission an independent third party to make a prior assessment of the transaction or submit this to the general shareholders' meeting for approval.
- In the case of an ongoing conflict of interest, the board of directors should decide whether the member concerned should be asked to resign or should no longer be nominated for re-election.
- Transactions between the company and members of the boards or between the company and shareholders controlling it or parties related to them should in all cases be carried out "at arm's length", must be in the interests of the company and must be disclosed to the board of directors. They should be concluded or approved without the participation of the parties concerned. If necessary, an independent assessment should be obtained.

- 51 The guiding principle of the regulation of conflicts of interest is that the Board of Directors and each member of the Board of Directors and Executive Management must ensure that conflicts of interest do not jeopardize the independent *safeguarding of the company's interests*.²⁹ In the event of a conflict of interest, the Board of Directors shall take a decision commensurate with the intensity of the conflict of interest in order to ensure the independent safeguarding of the company's interests.³⁰
- 52 Based on the recommendations of the "Swiss Code", the following applies in accordance with the organizational regulations of SoftwareONE for dealing with conflicts of interest:

²⁹ See also Glass Lewis 2024 Benchmark Policy Guidelines, pp. 7 and 10.

³⁰ BOHRER (2023) 11.

9 Conflicts of Interest/Exclusion

Each member of the Board or the Executive Board and any other executive body must conduct his/her personal and business/financial affairs in such a manner that conflicts with the interest of the Company or the Group are avoided.

If there is the possibility of a conflict of interest, the person in question shall inform the Chairman (or in case the conflict of interest is with the Chairman, the Vice-Chairman) in writing. The Chairman (or in case the conflict of interest is with the Chairman, the Vice-Chairman) shall call for a decision by the Board depending on the severity of the conflict. The Board shall deliberate and decide in the absence of the person concerned.

Members of the Board or the Executive Board shall abstain from voting and participating in the deliberations on matters or transactions which affect their own interests or the interests of individuals or entities connected or close to them. Such members shall not count towards the basis for determining the presence quorum of Art. 3.12 para. 1 of these Organizational Regulations. No person who has a permanent conflict of interests may be a member of the Board or the Executive Board.

53 According to the rules applicable to SoftwareONE, in the event of a conflict of interest, the Board of Directors must therefore decide on the measures to be taken to safeguard the interests of the company without the persons affected by the conflict of interest being present. In practice, the following *typical measures* are used to *manage situational conflicts of interest*:

- *Double resolution or approval* by the majority of the non-conflicted members. However, this method is generally only suitable in minor cases of conflict, as the influence of the biased members on the non-conflicted members remains in place.³¹ Furthermore, this procedure is of course only an option if not all Board members have a conflict of interest and are therefore unable to participate in the decision-making process.
- *Abstain from decision-making and resolutions*: Members who represent interests that conflict with those of the company may abstain from decision making and resolutions and, if information sharing alone could lead to damage, from discussions and receiving information.³² This measure is also not suitable if all members of the Board of Directors are in a conflict of interest.
- *Ordering a fairness opinion*: The Board of Directors may order a fairness opinion as a further measure. The opinion of neutral experts allows the assessment of the market and third-party conditions of a transaction under discussion that is critical in terms of conflicts of interest. However, a fairness opinion cannot also answer certain other questions that are important for the business decision: (i) Should the company enter into a legal transaction of

³¹ PETER BÖCKLI (2022) § 9 N. 834; BSK OR-WATTER (2024) Art. 717a N. 22.

³² ZK OR-BÜHLER (2018) Art. 717 N. 141 ff.

the proposed type at all, and if so (ii) when and to what extent, and finally (iii) what is the impact on the company's financial position?³³

- *Formation of a committee:* In principle, it is also possible to delegate a decision to a conflict-free committee, provided that the resolution does not relate to a subject of the non-transferable core competencies of the Board of Directors pursuant to Art. 716a para. 1 CO and the articles of association and organizational regulations permit this.³⁴ However, a delegation of authority is not permitted, particularly in the area of strategic issues within the overall management competence of the Board of Directors.
- *Approval by the Annual General Meeting:* Doctrine and jurisdiction³⁵ are partly of the opinion that, in individual cases, a solution could also be to submit a questionable transaction on which the Board of Directors has to decide to the General Meeting for approval. However, it is questionable and controversial whether the approval of legal transactions from the area of competence of the Board of Directors does not constitute a violation of the principle of parity applicable in company law and the list of competences in Art. 716a para. 1 CO, which is irrevocably granted to the Board of Directors. Even if, according to the view expressed here, there is no such infringement because the actual decision-making authority is not delegated to the general meeting, this measure is unlikely to be functionally suitable for recurring transactions and in public limited companies.³⁶
- *Appointment of a trustee:* Finally, it is conceivable that the decision may be transferred to an external party, particularly if there is a conflict of interest that is developing into an organizational deficiency.³⁷

54 However, if there is a *permanent conflict of interest*, the aforementioned measures are generally not suitable for resolving the conflict. In this case, the Board of Directors must decide whether the members of the Board of Directors concerned should be asked to resign or not be nominated for election.³⁸

³³ PETER BÖCKLI (2022) § 9 N. 842.

³⁴ BSK OR-ROLF WATTER (2024) Art. 717a N. 22; ZK OR-BÜHLER (2018) Art. 717 N. 148 ff.

³⁵ BGE 127 III 332 ff., E. 2.b.aa.

³⁶ PETER BÖCKLI (2022) § 9 N. 849; ZK OR-BÜHLER (2018) Art. 717 N. 155.

³⁷ Federal Supreme Court 4A_717/2014 of 29 June 2015, E. 2.5.2; see on organizational deficiency due to conflicts of interest of all Board members below N. 136

³⁸ Guideline no 19 para. 5 SCBP.

F. Legal consequences of a damage to the company due to a conflict of interest that was not properly managed

- 55 Resolutions of the Board of Directors are *not contestable*, and the nullity of a decision of the Board of Directors is only conceivable in exceptional cases;³⁹ this also applies to resolutions passed in unresolved conflicts of interest.
- 56 However, if the Board of Directors makes a decision under the influence of a conflict of interest, it may become *liable* if this results in damage to the company.⁴⁰ The legal consequences are derived from the breach of duty of the legally deficient resolution. If a resolution of the Board of Directors is passed that violates the interests of the company due to a relevant, intensive conflict of interest in its midst that has not been properly managed, the company can raise the *defense of abuse* if it acts in good time.⁴¹ An *action for restitution* under Art. 678 CO is also conceivable if the unjustified payment was made to a shareholder or board member.⁴² The *liability action* under Art. 754 CO is also available if the company has suffered damage outside of bankruptcy due to a conflict of interest that has not been properly managed.⁴³ The Federal Supreme Court has stated that *strict standards must be applied* if the Board of Directors is not acting in the interests of the company, but in its own interests or those of shareholders or third parties.⁴⁴ If no measures are taken despite the existence of a conflict of interest, this constitutes a breach of fiduciary duty, which in itself can lead to personal liability of the members of the Board of Directors under corporation law.⁴⁵
- 57 In connection with an action for liability, an unresolved conflict of interest on the board of directors may also play a role if a defendant wishes to invoke the *Business Judgment Rule* to protect itself.⁴⁶ According to the Business Judgment Rule, the courts must exercise restraint in the retrospective assessment of business decisions if they were reached in a proper decision-making process based on adequate information and *free of conflicts of interest*.⁴⁷ The application of the Business Judgment Rule presupposes that there was no relevant conflict of interest in

³⁹ Federal Supreme Court 4A_645/2017, E. 6.3; BSK OR-WATTER (2024) Art. 717a N. 28; PETER BÖCKLI (2022) § 9 N. 857; CHRISTOPH B. BÜHLER (2015) 49 ff.

⁴⁰ BSK OR-WATTER (2024) Art. 717a N. 25.

⁴¹ Federal Supreme Court 4C.402/1998 of 4 December 1999, in Pra 2000, Nr. 50.

⁴² TSCHÄNI/DIEM (2016) 100; BSK OR-WATTER (2014) Art. 717a N. 27; Federal Supreme Court 4A_208/2014, of 9 October 2014, E. 5.

⁴³ PETER BÖCKLI (2022) § 9 N. 858.

⁴⁴ BGE 113 II 52, E. 3a; see also Federal Supreme Court 4A_306/2009 of 8 February 2010 E. 7.2.4; BGE 130 III 213 E. 2.2.2.

⁴⁵ TSCHÄNI/DIEM (2016) 99 f.

⁴⁶ Federal Supreme Court 4A_74/2012 of 18 June 2012, E. 5.1.

⁴⁷ Federal Supreme Court 4A_72/2012 of 18 June 2012, E. 5.1; BGE 139 III 24; see ZK OR-BÜHLER (2018) Art. 717 N. 62 ff.; CHRISTOPH B. BÜHLER (2020) 29 ff.; GERICKE/WALLER (2014) 287 ff.

the matter when the decision was made.⁴⁸ *If the Board of Directors does not take the measures possible to manage a conflict of interest, the invocation of the Business Judgment Rule is generally excluded.*⁴⁹

58 In addition, the question arises as to what happens to the *power of representation* if a body representing the company is subject to a conflict of interest. In this regard, the Federal Supreme Court has stated that the mere conflict of interest does not exclude the power of representation from the outset for reasons of market safety, but only renders it void if the third party has also recognized or should have recognized the conflict of interest.⁵⁰

59 Serious conflicts of interest that cannot be managed with the available measures can ultimately also lead to the *inability of a board of directors to function*, and then to *organizational deficiency* proceedings with judicial intervention pursuant to Art. 731b CO.⁵¹

III. Conflict of interest of the board members proposed by the 29% Shareholder Group with regard to a possible takeover bid

A. Interests of the parties involved in the context of a possible takeover bid

60 If a possible public takeover offer in accordance with the provisions of Art. 125 et seq. FMIA, the previously largely aligned interests of the company's stakeholders may suddenly come into conflict with one another or become a legally relevant conflict of interest as described above.

1. Interests of the shareholders of SoftwareONE

61 The focus is initially on the *shareholders* of the target company, who are the addressees of the takeover bid. In addition to the 29% Shareholder Group, who represent 29% of the shares and have acted as Co-Bidders together with Bain Capital in a group until March 4, 2024, but in any case still wish to enforce a possible takeover offer, there is still a substantial stake of 71% or – excluding the 3% treasury shares – 68% held by other public shareholders. The success of the

⁴⁸ ROLF WATTER (2022) 254.

⁴⁹ TSCHÄNI/DIEM (2016) 100; VOGT/BÄNZIGER (2012) 614 and 619 f.

⁵⁰ Federal Supreme Court 4A-617/2013 of 30 June 2014, E. 5.1; Federal Supreme Court 4A_459/2013 of 22 January 2014, E. 3.2.1; Federal Supreme Court 4A_147/2014 of 19 November 2014, E. 3.1.1; BGE 126 III 361 E. 3.a; vgl. TSCHÄNI/DIEM (2016) 100; BÜHLER/SPICHTIN (2015) 157.

⁵¹ Federal Supreme Court 4A_717/2014 of 29 June 2015, E. 2.3 and 2.4; vgl. WHERLOCK/VON DER CRONE (2015) 544 ff. See below N. 135 ff.

takeover bid and thus the answer to the question of whether the control over the target company should be transferred to other hands depends on the decision of this majority of public shareholders. As a rule, the bidder attempts to influence this decision through targeted strategies and measures without the individual shareholder, who is under pressure to make a decision, being able to protect himself against the bidder's opportunistic behavior. This need for protection is primarily due to the fact that the public shareholders in the takeover context are generally inferior to both the bidder and the company management in terms of structure and information. On the one hand, this lack of information means that the offeror runs the risk of selling their shares too cheaply by accepting the offer. On the other hand, if the offer is accepted by the majority of the other shareholders, the individual shareholder runs the risk of a reduction in the value of his shareholding due to the behavior of the new majority shareholder.⁵² Here, in addition, the 29% Shareholder Group was locked-up with selling and talking restrictions, thereby potentially deterring third party bidders.

- 62 In contrast to the other public shareholders, the *29% Shareholder Group* has a different interest, which largely coincides with that of the bidder, as they originally even joined forces with the bidder as a group of Co-Bidders and together submitted a non-binding proposal of interest for a public takeover bid. The members of the 29% Shareholder Group are therefore in a different situation than the other public shareholders: *they would have the right to remain invested and therefore benefit from a low offer value and future value creation, whereas the public shareholders would not benefit from these and other advantages should the company be taken private.*⁵³

2. Interests of the Board of Directors of SoftwareONE

- 63 Although the *Board of Directors of the target company*, in this case the current Board of Directors of SoftwareONE, is not a party to the offer procedure, its interests are also accorded great importance in the regulation of public takeover bids. This is because the existing members of the Board of Directors of the target company are also latently involved in a certain conflict of interests with regard to the decision on the takeover bid. Although the board of directors of the target company is obliged to safeguard the interests of the company, its individual members may also be affected in their personal interests by a public takeover bid. After all, they must expect – with the exception of *Daniel von Stockar*, who is to be proposed for re-election in accordance with the proposal of the 29% Shareholder Group – to be replaced by persons of trust of the new majority shareholder after a successful takeover bid. According to the practice of the Takeover Commission on Art. 32 TOO, the fact that a board member must expect to lose his

⁵² ZK OR-BÜHLER (2018) Art. 717 N. 216 ff.; CHRISTOPH B. BÜHLER (2003) 9.

⁵³ See Media Release „SoftwareOne to combine the requested EGM with the upcoming AGM“ of 12 February 2024.

function after a successful takeover does *not* in itself constitute a conflict of interest. In addition, the choice of measures by the target company to prevent conflicts of interest for the offerees is a matter for the board of directors. In particular, the formation of an independent committee, the recusal of individual members or obtaining the opinion of an independent expert (fairness opinion) are recognized in practice as suitable measures in the event of a conflict of interest in a takeover situation. Here, the situation was aggravated by the fact that the 29% Shareholder Group, including Daniel von Stockar had entered lock-up obligations with the bidding partner, jeopardized a true market situation. The Board of Directors has taken such measures by accepting and continuing the recusal by Daniel von Stockar after the communication of the proposal, by obtaining an independent *fairness opinion* to assess the non-binding takeover bid and by mandating the *Nomination and Compensation Committee* to assess the newly proposed members of the Board of Directors, but the latter two measures were rejected by the 29% Shareholder Group. Given that Daniel von Stockar is proposed as Chairman, it can be assumed that there is no plan for him to continue to abstain from board work.

- 64 Takeover law and capital market law have also created a *regulatory corrective* here:⁵⁴ In order to avoid conflicts of interest, the legislator has imposed a limited prohibition of action on the board of directors of the target company by prohibiting it from taking and implementing certain measures on its own authority during the offer period that could frustrate the success of the offer. Pursuant to Art. 132 para. 1 FMIA, the Board of Directors must submit a report to the shareholders in which it makes a true and complete statement on the offer, and pursuant to Art. 132 para. 2 FMIA, the Board of Directors may not decide on any legal transactions that would significantly change the company's assets or liabilities between the publication of the offer and the publication of the result.⁵⁵

3. Interest of Bain Capital or the Co-Bidders respectively

- 65 The interest of the *bidder* as counterparty and potential acquirer of the shares of the target company – in this case originally the group of Co-Bidders consisting of Bain Capital and the 29% Shareholder Group and since March 4, 2024, the 29% Shareholder Group and potentially, according to rumours also Bain Capital (who however wrote to the Company that there is no prospect for an offer), is firstly that the price of the takeover can be kept as low as possible; secondly, the target company should also have the characteristics on which the bidder has based its calculation of the purchase price in order to achieve an optimal takeover profit.⁵⁶

⁵⁴ CHRISTOPH B. BÜHLER (2003) 20.

⁵⁵ SK-FinfraG LUCHSINGER GÄHWILER/AMMANN/MONTANARI (2017) Art. 132 N. 68 ff.

⁵⁶ CHRISTOPH B. BÜHLER (2003) 12.

66 It should be noted above all that the provider's financial resources are tied up for the duration of the takeover bid and are therefore not available for more profitable investment opportunities. If the company takeover is financed by a third party, higher interest payments will accrue over the longer term. It is also in the bidder's interest to be able to take control of the target company as quickly as possible and with minimal financial outlay. The bidder is not only interested in a short offer period because this reduces the risk of the target company receiving serious competing offers in the meantime, which could increase its defenses.⁵⁷

B. Conflict of interest of the proposed board members in the takeover context with regard to a takeover bid under takeover law

1. Preliminary remarks

67 In the context of a takeover situation, in addition to the principles of corporation law already outlined, the takeover law provisions on conflicts of interest must also be observed.⁵⁸

2. Conflicts of interest to be disclosed in the report of the Board of Directors

68 Conflicts of interest have always been of particular importance in takeover law and are the subject of extensive practice. The starting point is the report that the board of directors of the target company must submit with the offer (art. 132 para. 1 FMIA and art. 30 TOO et seq.). In this report, any existing conflicts of interest between members of the board of directors and the management of the target company and the interests of the target company or the offerees must be pointed out (art. 32 para. 1 TOO).⁵⁹

69 Therefore, if the proposal of the 29% Shareholder Group were to be accepted and the existing Board of Directors were to be voted out with the reservation of Daniel von Stockar and the proposed new Board of Directors elected, the new Board of Directors would also have to disclose any existing conflicts of interest of these new members of the Board of Directors in the corresponding report in the event of a new takeover offer in which it takes a position on the offer.

⁵⁷ STEPHAN WERLEN (2001) 46; CHRISTOPH B. BÜHLER (2003) 12.

⁵⁸ TSCHÄNI/DIEM (2016) 67, 82.

⁵⁹ GERICHKE/WIEDMER (2020) Art. 32 N. 10.

3. Constellations of presumed conflicts of interest pursuant to Art. 32 para. 2 TOO

- 70 In contrast to company law, which does not define conflicts of interest in more detail, takeover law describes the *constellations in which a conflict of interest is (presumably) present* in considerable detail (art. 32 para. 2 TOO). This concerns potential collisions between the interests of the company or the interests of the offerees on the one hand and the interests of the bidder on the other.⁶⁰
- 71 According to the practice of the Takeover Board, members of the board of directors of the target company are presumed to have a conflict of interest if they are dependent on the offeror pursuant to Art. 32 para. 2 TOO.⁶¹ Accordingly, a member of the Board of Directors is presumed to be subject to a conflict of interest in the following cases:
- The member of the Board of Directors has entered into *contractual agreements or other connections with the provider*;⁶²
 - The member of the Board of Directors was *elected at the request of the provider*;⁶³
 - The member of the Board of Directors is to be *re-elected*, which contradicts the general expectation that the Board of Directors is replaced after a change of control;⁶⁴
 - The member of the Board of Directors is an *executive body or employee of the bidder* or of a company that has significant business relations with the provider;⁶⁵
 - The member of the Board of Directors shall exercise his mandate *in accordance with the instructions of the offeror*. (Art. 32 para. 3 lit. d TOO).⁶⁶
- 72 This catalog of possible conflicts of interest is *not exhaustive*.⁶⁷ In the *Genolier Swiss Medical Network SA* case, FINMA stated the following in general terms:

⁶⁰ TSCHÄNI/DIEM (2016) 66; GERICKE/WIEDMER (2020) Art. 32 N. 8.

⁶¹ Recommendation 0274/01 *Generali (Schweiz) Holding* of 6 April 2006, E. 6.2.2.2.

⁶² Art. 32 para. 2 lit. a TOO. See Order 0576/01 *Nobel Biocare Holding AG* of 29 September 2014, E. 8.1, Report of the Board of Directors of *Schmolz+Bickenbach AG* of 5 August 2013 with regard to the takeover bid of *Venetos Holding AG*, N. 4; vgl. TSCHÄNI/DIEM (2016) 82, Fn. 146.

⁶³ Art. 32 para. 2 lit. b TOO. Report of the Board of Directors of *Schmolz+Bickenbach AG* of 5 August 2013 with respect to the takeover bid of *Venetos Holding AG*, Ziff. 4.

⁶⁴ TSCHÄNI/DIEM (2016) 83; GERICKE/WIEDMER (2020) Art 32 N. 19.

⁶⁵ Art. 32 para. 2 lit. c TOO.

⁶⁶ Art. 32 para. 2 lit. d TOO.

⁶⁷ GERICKE/WIEDMER (2020) Art. 32 N. 13; TSCHÄNI/DIEM (2016)

« A conflict of interest arises when a person sees two interests for which he or she is responsible in conflict. This is the case not only where there are special ties with the bidder (expressly referred to in Art. 32 para. 2 of the Takeover Ordinance), but also where other factors demonstrate that the director is unable to provide an objective assessment of the bid in the interests of the company and its shareholders, for example because of a conflict of personal interest.»⁶⁸

4. Assessment of conflicts of interest of the proposed members of the Board of Directors in relation to a takeover bid by Bain Capital or the Co-Bidders

73 The question arises as to whether the members of the Board of Directors proposed by the 29% Shareholder Group in accordance with the motion of February 5, 2024 have a conflict of interest in light of this list of presumed facts.

a) Contractual agreements or other connections with the bidder or Co-Bidders

74 According to the practice of the Takeover Board, *material business relationships* of individual members of the board of directors with the offeror or with a person *acting in concert with the bidder* are presumed to constitute a conflict of interest to be disclosed under this title.⁶⁹ In particular, the conclusion of a transaction agreement between the bidder and the target company in which the relevant members of the Board of Directors undertake to recommend the offer for acceptance can also lead to a conflict of interest.⁷⁰ SoftwareONE and the Undersigned are not aware whether and to what extent individual members of the Board of Directors proposed by the 29% Shareholder Group have such relationships with the 29% Shareholder Group or with Bain-Capital. It is undisputed that *Daniel von Stockar* and *René Gilli* in any case would have a conflict of interest with regard to the potential takeover bid, because they not only represent the applicant 29% Shareholder Group, but the 29% Shareholder Group even belonged to the group of Co-Bidders, at least until the press release of 4 March 4 2024. The fact that the 29% Shareholder Group and especially Daniel von Stockar himself see it this way is made clear by the fact that Daniel von Stockar did not participate in discussions of the Board of Directors any more after the launch of the non-binding takeover proposal.

⁶⁸ Order of FMSA regarding *Genolier Swiss Medical Network SA* of 6 April 2011 N. 48 (free translation by the Undersigned from the original French text). See also Order 468/03 of TOB regarding *Genolier Swiss Medical Network SA* of 10 March 2011 N. 6.

⁶⁹ Order 637/02 of TOB regarding *ACRON HELVETIA VII Immobilien AG* of 7 October 2016, E. 7.1; Order of FMSA *Genolier Swiss Medical Network SA* of 6 April 2011, N. 55 f.

⁷⁰ Order 478/01 of TOB regarding *Edipresse SA* of 27 May 2011, E. 8.2 N. 20.

- 75 *Dr. Till Spillmann*, who is also proposed by the 29% Shareholder Group as a new member of the Board of Directors, was a partner at the law firm Niederer Kraft & Frey until the end of 2022, which – as far as can be seen – is or was active in an advisory capacity for Bain Capital⁷¹, also in this matter. With regard to Till Spillmann, there would therefore also be at least the appearance of a certain bias in relation to a possible takeover bid by Bain Capital.
- 76 But also with regard to the other members of the Board of Directors proposed by the 29% Shareholder Group, it must be assumed, based on the applicants' reasoning and the circumstances, that they are to some extent acting directly or indirectly in concert with the bidder or the Co-Bidders respectively, and in this respect are also likely to have "*another connection to the bidder*" within the meaning of the presumption of Art. 32 para. 1 lit. a TOO. In any case, a corresponding "*instruction of the bidder*" within the meaning of Art. 32 para. 1 lit. e TOO is likely to exist in this respect, which suggests a conflict of interest.⁷² This is, for example, illustrated by their joint and orchestrated refusal to undergo the regular nomination assessment procedure of the Company.

b) Election at the request of the bidder

- 77 A conflict of interest is then also assumed for those members of the board of directors who are elected *at the request of the bidder*. If the new members of the Board of Directors proposed by the 29% Shareholder Group are actually elected, it must be assumed that the 29% Shareholder Group at least de facto controls the target company of the public takeover bid. It submitted its application for the election of the new members of the Board of Directors to the Board of Directors on 5 February 2024, i.e. at a time when they acted as a group with the bidder Bain Capital as Co-Bidders. Thus, the members of the Board of Directors proposed for election by the 29% Shareholder Group would be elected in coordination with the bidder within the meaning of Art. 32 para. 2 lit. b TOO. According to the practice of the Takeover Board, even board members who do not sit on the board as representatives of the controlling shareholder (in this case the 29% Shareholder Group) as so-called "independent" members are not free from conflicts of interest in such situations. This is because the controlling shareholders have the option of removing or not re-electing a particular member of the Board of Directors at any time, which means that they can in fact influence the behavior of the Board of Directors in question. For this reason, the Takeover Board assumes that if the bidder controls the target company either directly or – as in this case – indirectly through joint agreement with the 29% Shareholder Group

⁷¹ See <https://www.nkf.ch/news/deals-cases/bain-and-cinven-acquire-lonzas-specialty-ingredients-business-and-operations/>

⁷² See below section e).

and the de facto independent board members were elected with the votes of the controlling shareholders, they are at least in a potential conflict of interest.⁷³

- 78 Moreover, even if the bidder is *not yet the majority shareholder*, a member of the board of directors elected at the proposal of the bidder may create the appearance of a conflict of interest within the meaning of Art. 32 para. 2 lit. b TOO.⁷⁴ This presumption can, of course, be rebutted if the members of the Board of Directors concerned demonstrate that there are no business relationships or other connections between them and the provider or a bias founded in other reasons.⁷⁵

c) Re-election

- 79 Pursuant to Art. 32 para. 2 lit. c) TOO, a conflict of interest is also presumed if a member of the board of directors is to be re-elected, as this contradicts the general expectation that the board of directors will be replaced after a change of control.⁷⁶ This also applies to cases in which the board members in question were already elected at the request of the bidder (as representatives of the majority shareholder of the target company) prior to the publication of the offer and are to continue to exercise their mandate after completion of the takeover.⁷⁷ This presumption is fulfilled in the present case with regard to *Daniel von Stockar*, who, according to the proposal of the 29% Shareholder Group, should remain as the sole member of the Board of Directors on the newly proposed Board of Directors and even assume the chairmanship there.

d) Executive body or employee of the bidder

- 80 If a member of the Board of Directors is an officer or employee of the offeror or of a person acting in concert with the offeror or of a company with which the offeror has a material business relationship, there is also a presumption of a conflict of interest that must be disclosed in the report of the Board of Directors in connection with a takeover offer.⁷⁸ The Undersigned is not aware whether the persons proposed by the 29% Shareholder Group for election to the Board of

⁷³ Order 427/01 of TOB regarding *Canon [Schweiz] AG* of 29 September 2009, E. 6.2 N. 14; Order 699/01 of the TOB regarding *Bank Cler AG* of 31 July 2018, E. 8.1.1; see also GERICKE /WIEDMER (2020) N. 17.

⁷⁴ GERICKE/WIEDMER (2020) Art. 32 N. 17a; MATTHIAS GLATTHAAR (2007) 210.

⁷⁵ Order 651/02 of the TOB regarding *LifeWatch AG* of 28 March 2017, E. 1.1.1, N. 5; Order 551/01 of the TOB regarding *Tornos Holding SA* of 25 November 2013, E. 7.1; see also GERICKE WIEDMER (2020) N. 17a.

⁷⁶ TSCHÄNI/DIEM (2016); GERICKE/WIEDMER (2020) Art. 32 N. 19.

⁷⁷ GERICKE/WIEDMER (2020) Art. 32 N. 19; see report of the Board of Directors of ACRON HELVETIA VII Immobilien AG regarding the takeover bid of ACRON Swiss Premium Assets AG of 10 October 2016.

⁷⁸ MATTHIAS GLATTHAAR (2007) 124; GERICKE/WIEDMER (2020) Art. 32 N. 20; TSCHÄNI/DIEM (2016) 83 f.; see Order 623/01 of TOB regarding *Kuoni Reisen Holding AG* of 25 February 2016, E. 81., N. 75; Order of FMSA regarding *Genolier Swiss Medical Network SA* of 6 April 2011, N. 55.

Directors hold a position within or relation to Bain Capital or the 29% Shareholder Group, who is likely acting in concert with a potential bidder, or whether they are in an employment relationship with the latter.

e) Instructions of the bidder

- 81 Finally, pursuant to Art. 32 para. 2 lit. E) TOO, the members of the Board of Directors are also presumed to have a conflict of interest if they exercise their mandate *in accordance with the instructions of the offeror*.
- 82 In the case under review here, it is initially obvious that the 29% Shareholder Group and Bain Capital have been (or still are) *acting in concert with respect to a takeover bid*. Until the correction in the press release of 4 March 2024, the 29% Shareholder Group and Bain Capital had also expressly acted as Co-Bidders. It is also clear from the press release of 5 February 2024 and the reasons for the request of 4 February 2024 that the existing members of the Board of Directors are to be voted out of office because they rejected a value indication proposed by the 29% Shareholder Group and Bain Capital, and that the newly proposed members of the Board of Directors are to be elected to the Board of Directors precisely *because* they are to support the takeover by a Bidder and help it to succeed:

«The Founding Shareholders fundamentally disagree with the Board of Director's conclusion of the strategic review and are of the opinion that the contemplated public-to-private transaction should have been pursued and presented to the shareholders. [...]»⁷⁹

*«The founding shareholders **therefore** request [...] the removal of the current Chair as well as all current members of the Board, with the exception of Daniel von Stockar, who did not participate in the Board discussions since the launch of the recent approach for a going-private transaction. [...] The Founding Shareholders believe that the right conditions for SoftwareONE's next phase of growth are best provided in a private context, and that a going-private transaction with the right partner is in the best interest of SoftwareONE and all stakeholders. [...]»⁸⁰*

- 83 Even if there is no or no written transaction or mandate agreement between the 29% Shareholder Group and the potential bidder Bain Capital (anymore), it is obvious from the

⁷⁹ Request by 29% Shareholder Group to the SoftwareONE Board of Directors on 4 February 2024; Media release by Daniel von Stockar, B. Curti Holding AG and René Gilli dated 5 February 2024.

⁸⁰ Media Release from Daniel von Stockar, B. Curti Holding AG, René Gilli of 5 February 2024 (Emphasis added).

reasons given by the applicants and the circumstances that the 29% Shareholder Group are only proposing the other new members of the Board of Directors for election ahead of time at an extraordinary general meeting because they are to support a potential takeover bid by Bain Capital or another financial sponsor and the planned going-private transaction. The members of the Board of Directors to be elected to the Board of Directors in accordance with the proposal of the 29% Shareholder Group therefore take over their function with the clear "*mission*" of pushing through a transaction (public takeover and subsequent going-private) in the interests of the 29% Shareholder Group and Bain Capital. In relation to this transaction, there is therefore at least an *informal and indirect "instruction" to and publicly instituted pressure to behave accordingly* on the relevant new members of the Board of Directors to be elected. Therefore, a conflict of interest within the meaning of Art. 32 para. 2 lit. e) TOO must be assumed.

5. Result on the question of the conflict of interest of the proposed board members in relation to a potential takeover bid from the perspective of takeover law

- 84 Due to the 29% Shareholder Group's proposal to replace the entire Board of Directors of SoftwareONE, with the exception of Daniel von Stockar from their own ranks, and their justification that the change is necessary in order to implement the public-to-private transaction they have in mind, *all members of the Board of Directors proposed for election by the 29% Shareholder Group are presumably in a conflict of interest under takeover law with regard to the potential takeover bid*. This conflict is most evident in the case of *Daniel von Stockar*, who not only belongs to the 29% Shareholder Group and had already agreed with Bain Capital on the non-binding takeover proposal, but who is also to be re-elected by the 29% Shareholder Group as the only existing member of the Board of Directors. From a takeover law perspective, a conflict of interest can also clearly be assumed in relation to *René Gilli*, as he is also a member of the 29% Shareholder Group. There is also a certain appearance of a conflict of interest with regard to *Dr. Till Spillmann*, as he and his law firm, where he was a partner, apparently had or still have a business relationship with the bidder Bain Capital in this very matter. However, the other members of the Board of Directors proposed for election by the 29% Shareholder Group, *Dr. Annabella Bassler*, *Jörg Riboni* and *Andrea Sieber*, are also presumed to have a conflict of interest under takeover law, simply because they are proposed for election to the Board of Directors of the target company by the 29% Shareholder Group acting in concert with the bidder and, according to the 29% Shareholder Group's own official justification, are apparently to take over this function with the "*mission*" of helping the planned public-to-private transaction to achieve a breakthrough.

C. Conflict of interest of the proposed board members in the takeover context under corporate law

1. Relevance of the principles of takeover law on conflicts of interest also for the assessment under corporation law

85 If one looks at the statutory list of presumptions pursuant to Art. 32 para. 2 TOO, takeover law appears at first glance to require – at least in part – a lower level of intensity than is required under company law with regard to the presumption of a conflict of interest on the part of a member of the board of directors. Thus, as mentioned, a conflict is already indicated under takeover law if a member of the board of directors was *elected at the request of the bidder* or is to be *re-elected* as part of the takeover bid, or if *contractual agreements or other connections with the bidder* exist.⁸¹

86 According to prevailing doctrine, however, the *principles of takeover law also provide indications for the assessment under corporation law* outside of takeover law situations as to when a legally relevant conflict of interest is to be assumed in a planned transaction and how it is to be dealt with.⁸² In contrast to takeover law, however, stock corporation law does not establish a catalog of presumptions of typical conflicts of interest, but rather requires a *case-by-case assessment* with regard to the qualification of a conflict of interest.

2. Conflict between the long-term interests of the company and the special short-term interests of the 29% Shareholder Group

a) Preliminary remark

87 As already explained above, the prevailing doctrine⁸³ and best practice⁸⁴ in company law presuppose for a genuine conflict of interest that there are *opposing interests in a specific constellation*, in such a way that the interests of the company and the special interests of the member of the Board of Directors, whether personal or on behalf of third parties, *run counter to each other*. Only such conflicting interests constitute a "*disabling conflict*" relevant under corporation law.⁸⁵

⁸¹ TSCHÄNI/DIEM (2016) 84.

⁸² TSCHÄNI/DIEM (2016) 67, 82.

⁸³ PETER BÖCKLI (2012) 364; DANIEL DAENIKER (2005) 115 et seq.; WHERLOCK/VON DER CRONE (2015) 546.

⁸⁴ Guideline no 19 para. 3 SCBP «opposing interests».

⁸⁵ TSCHÄNI/DIEM (2016) 76; DANIEL DAENIKER (2005) 116.

b) Relevant corporate interest

- 88 From the perspective of corporation law, the first question that arises in the present case is what the *relevant corporate interest* is to which the Board of Directors of SoftwareONE must align its actions and against which the interests of the 29% Shareholder Group and the bidder are to be measured when assessing a possible conflict of interest. In theory and practice, it has long been accepted that the interests of the company are initially based on and limited by the *purpose defined in the articles of association*, but in terms of content are the result of weighing up the *long-term interests of all stakeholders in the company*. The interests of the company, to which the duty of loyalty of the board of directors must be aligned, must therefore not only be based on the "shareholder value" concept and thus solely on the interests of the shareholders or even the interests of a group of main shareholders, but must also take into account the interests of the company's other stakeholders (employees, customers, creditors, suppliers, etc.). Today, it is even required that major companies and public companies also behave in a socially responsible and environmentally friendly manner (so-called "*corporate social responsibility*") and disclose compliance with ESG (environment-social-governance) criteria as part of their non-financial reporting.⁸⁶
- 89 In its case law, the *Federal Supreme Court* has also always described the interests of the company as the guiding principle for the activities of a public limited company. In its view, a corporation is embedded in an economic activity that is intended to maintain and sustainably develop the value of the company, *while also taking appropriate account of the medium and long-term interests of other stakeholders*, i.e. customers, suppliers, employees, creditors and the state as a tax creditor, in sustainable business and earnings growth.⁸⁷
- 90 The *Swiss Code of Best Practice for Corporate Governance*, which was last updated in February 2023 and is also used by SoftwareONE as a guideline,⁸⁸ also emphasizes that good corporate governance must be geared towards the *sustainable interests of the company*. The "Swiss Code" defines the sustainable corporate interest as follows⁸⁹

"Business activities are sustainable when the interests of different stakeholders in the company are taken in to account and economic, social and environmental goals are pursued holistically."

⁸⁶ Art. 964a ff. CO.

⁸⁷ BGE 130 III 213, E. 2.2.2; BGE 113 II 52, E. 3a.; BGE 100 II 384, E. 4.

⁸⁸ Corporate Governance Report SoftwareONE 2022, p. 40.

⁸⁹ SCBP (2023) p. 6. See DAVID FRICK (2022), 1 ff.; PETER BÖCKLI (2022) § 13 N. 87; ERICH HERZOG (2023) 5; CHRISTOPH B. BÜHLER (2023) 548 ff.

- 91 Good corporate governance – according to the Swiss Code – therefore serves the goal of sustainable corporate interests. This is an essential prerequisite for business success and a sustainable increase in the value of the company:⁹⁰

“Sustainable growth of company value is not just in the interests of shareholders as the beneficial owners and/or risk capital providers of the company, but also in the interest of other stakeholders.”

c) Corporate interest of SoftwareONE

- 92 In its media release dated July 24, 2023, SoftwareONE announced that it was also rejecting the second non-binding proposal from the Co-Bidders. The Board of Directors justified this by stating that the Co-Bidders' second indicative offer also did not value the company appropriately and is not in the best interests of the company and the majority of shareholders. At the same time, SoftwareONE announced at this time that the Board of Directors would initiate a strategic review:

⁹⁰ SCBP (2023) p. 6.

SoftwareOne Board of Directors rejects revised offer from Bain Capital and initiates strategic review

Stans, Switzerland | 24 July 2023 – **The Board of Directors of SoftwareOne Holding AG (“SoftwareOne” or “the Company”), a leading global software and cloud solutions provider, today announced the initiation of a strategic review process to ensure the Company has considered all options for value creation, including continuing to operate as a public company, a merger or sale of the Company, as well as other possible strategic transactions.**

The strategic review comes in response to a second indicative, unsolicited and non-binding offer from Bain Capital for the acquisition of 100% of the Company in the range of CHF 19.50-20.50 per share, subject to various conditions. The indicative offer is supported by Daniel von Stockar, B. Curti Holding AG, and René Gilli, together holding approximately 29% of the Company’s share capital (together the “Founding Shareholders”).

The Board, excluding Daniel von Stockar who had recused himself from all matters relating to the indicative offer, has carefully reviewed the second indicative offer with the support of its legal and financial advisors. The Board unanimously agreed that the second indicative offer does not adequately value the Company and is not in the best interest of SoftwareOne and the majority of its shareholders.

Since 2022, SoftwareOne has improved governance and transparency and demonstrated resilience. The Board is confident in the Company’s business strategy. The Company delivered group revenue growth of 14% YoY ccy in 2022, driven by growth across both business lines and reported an adjusted EBITDA margin of 23.8% of revenue, reflecting tight cost controls. Earlier this year, the Board unanimously voted to appoint Brian Duffy as CEO and shareholders elected Adam Warby as Chairman, to transition the Company into a new phase of operational excellence and growth, leading to future value creation.

In response to the second indicative offer by Bain Capital and considering the significant progress made under the new leadership team, the Board believes that a strategic review of all potential options that drive value is in the best interest of the Company and all shareholders. The Board is open to proactively discuss options that substantially reflect the fundamental value of the Company, including with Bain Capital. At the same time, the Board will actively look at other options for value creation.

The Board wishes to provide a fair and equal setting for reviewing all alternatives consistent with its responsibility and fiduciary duty to maximise value for all shareholders. Therefore, the Board expects the Founding Shareholders to act in the best interest of the Company and all stakeholders and to support, rather than block, the highest value alternative. As part of their commitment to value creation, the Board and management team will continue to seek constructive input from shareholders throughout the process. Once the review is completed, the Board will recommend what it believes is in the best interest of the Company, and all its stakeholders.

The Board will provide updates on relevant developments as it pursues this path of action. While the process is ongoing, the Company remains focused on delivering results and maintaining the strong momentum from the operational excellence programme, which will lay the foundations for improved future performance.

- 93 Finally, this media release also quotes the Chairman of the Board of Directors, *Adam Warby*, who stated the following in this context:

“At SoftwareONE, we are deeply committed to delivering value to all our shareholders, while acting in the best interest of all stakeholders. We have decided to launch a strategic review to ensure we deliver on this commitment – by considering all potential options and making the decisions that will maximise shareholder value, enhance our operations, and position

the Company for growth. The fast-growing software and cloud market offers attractive opportunities, and we want SoftwareONE to be in the best possible position to capitalise on these and gain market share worldwide.”

- 94 On 8 January 2024, SoftwareONE provided information on the status of the strategic review:

SoftwareOne response to media reports and update on strategic review

Stans, Switzerland | 8 January 2024 – **In response to media reports, the Board of Directors of SoftwareOne Holding AG, a leading global software and cloud solutions provider, confirms that, as part of its ongoing strategic review, it continues to be in discussions with Bain Capital following an extensive due diligence process, discussions which may or may not lead to an offer.**

- 95 On 15 January 2024, SoftwareONE announced that it had completed its review of all strategic options and would present the results of the strategy review at the "Capital Markets Day 2024" on 15 February 2024:

SoftwareOne concludes strategic review

Stans, Switzerland | 15 January 2024 – **The Board of Directors of SoftwareOne Holding AG, a leading global software and cloud solutions provider, today announces the conclusion of its strategic review launched in July 2023, and that SoftwareOne will remain a standalone public company.**

- 96 On 15 February 2024, SoftwareONE presented its Vision 2026 and its strategy up-date together with the annual results at the "Capital Markets Day 2024" as follows:⁹¹

⁹¹ Media Release „SoftwareONE launches Vision 2026 – a new chapter of growth, together with FY 2023 results at ist Capital Markets Day 2024“ of 15 February 2024.

Vision 2026 – A new chapter of growth

To deliver on Vision 2026, SoftwareOne will leverage its value proposition, pursue key growth priorities and sharpen execution of its strategy.

Value proposition and updated strategy

SoftwareOne is uniquely positioned with its integrated offering of software and services. Based on its deep competencies around software & cloud procurement and managing spend, SoftwareOne intends to focus on leveraging its “lead” offering, helping clients with providing cloud access, maximizing ROI of their spend and enhancing workforce productivity across all customer segments. In addition, the company will “expand” in selected high-growth segments serving mid-market clients, including application modernisation and data & AI.

Strategic growth priorities

To drive revenue acceleration, SoftwareOne will capitalise on the strong momentum in its serviceable addressable market (SAM), which is expected to grow at 17% CAGR to US\$149 billion by 2026. This includes the additional market opportunity unlocked by Client Portal, raising the growth rate for Software & Cloud Marketplace from 9% to 15% CAGR by 2026.

The company will also deliver on five key growth priorities:

- **Deepen partnerships with hyperscalers** – SoftwareOne is a trusted partner to hyperscalers, with expert certifications across Microsoft, AWS and Google. The company will deepen these relationships by driving higher consumption through integrated solutions
- **Drive global Copilot roll-out** – SoftwareOne estimates a mid-term revenue opportunity of c. CHF 100 million and is already seeing strong traction around its first-to-market Copilot offering
- **Capitalise on Data & AI** – with its extensive capabilities, Intelligence Fabric offering and partnerships with market leaders, SoftwareOne is well-positioned to capitalise on the fast-growing data & AI market
- **Execute on focused ISV strategy** – by focusing on the largest vendors with dedicated global and regional teams, SoftwareOne will capture the large opportunity and drive results in other ISVs
- **Leverage Client Portal** – SoftwareOne Client Portal offers a compelling value proposition for both vendors and clients as a self-serve one-stop-shop

Sharpened execution

As part of its updated strategy, SoftwareOne will focus on sharpening execution through a transformed go-to-market approach. Specifically, the company will implement a new client segmentation and coverage model and drive commercial excellence, including pricing realisation. Together with continuous portfolio innovation, delivery excellence and talent management, SoftwareOne will deliver best-in-class business outcomes for clients and performance.

New financial targets

With Vision 2026, SoftwareOne sets new financial targets reflecting a transitional period in 2024, followed by an acceleration of growth and margin expansion by 2026.

2024 outlook and Vision 2026 targets

	Outlook 2024	Vision 2026
Revenue growth (YoY ccy)	8-10%	Mid-teens
Adjusted EBITDA margin	24.5-25.5%	Approaching 28%
Dividend policy	30-50% adjusted profit	30-50% adjusted profit

- 97 On the same day, SoftwareONE announced that it has entered into a strategic partnership with Google Cloud:

SoftwareOne Partners with Google Cloud to scale AI and data analytics solutions across major European markets

Stans, Switzerland | 15. February 2024 – **SoftwareOne, a global provider of end-to-end software and cloud technology solutions, today announced an extended global strategic partnership agreement with Google Cloud. Under the terms of the agreement, SoftwareOne will deliver Google Cloud products worldwide with a particular focus on offerings across Europe, including AI and Data Analytics, Infrastructure Modernisation, App Modernisation and Google Workspace. With Google Cloud, SoftwareOne will enable clients to significantly increase operational performance and drive innovation.**

- 98 It is clear from the statements made by SoftwareONE's Board of Directors, its revised strategy and the establishment of long-term strategic partnerships in the core business that it is focusing its actions on *medium and long-term business and earnings growth*⁹² thus primarily on the *sustainable interests of the company, which should benefit all of the company's stakeholders.*

d) Special interest of the 29% Shareholder Group

- 99 The sustainable corporate interest pursued by the incumbent Board of Directors as described above obviously conflicts with the *special economic short term interests of the 29% Shareholder Group*,⁹³ who, according to their own media releases and their justification for the proposal to hold an extraordinary general meeting, intend to carry out a public-to-private transaction; in the course of this transaction, the company is to be delisted from the market by means of a control transaction, without the other shareholders:⁹⁴

“The Founding Shareholders continue to be convinced that the right conditions for SoftwareONE’s next phase of growth are best provided in a privat context.”

- 100 The members of the 29% Shareholder Group are in a different situation than the other public shareholders, as they would have the choice to pursue an economic short term interest with the intended public-to-private transaction or further remain invested: *«They would have the right to remain invested and therefore benefit from a low offer value and future value creation, whereas the public shareholders would not benefit from these and other advantages should the company*

⁹² BSK OR-WATTER/ROTH PELLANDA, Art. 717 N. 16; TSCHÄNI/DIEM (2016) 77.

⁹³ PETER BÖCKLI (2012) 364; TSCHÄNI/DIEM (2016) 77.

⁹⁴ Media Release from Daniel von Stockar, B. Curti Holding AG, René Gilli of 4 March 2024.

*be taken private».*⁹⁵ In contrast to the interests of the other shareholders, who want to achieve the highest possible return on their investment, and the interests of the stakeholders in the medium and long-term business and earnings growth of SoftwareONE, the 29% Shareholder Group has a different *short term special economic interest*. This special interest of the 29% Shareholder Group is diametrically opposed to the interests of the company, especially since the realization of the direct economic interest in the implementation of the planned transaction at the lowest possible purchase price would benefit the 29% Shareholder Group to practically the same extent as it would harm the other shareholders and thus indirectly the company.

e) Interests of the members of the Board of Directors proposed for election by the 29% Shareholder Group

101 As the above analysis from a takeover law perspective has shown, the members of the Board of Directors proposed for election by the 29% Shareholder Group are, by implication and at least by appearance, also to be assigned to the sphere of interests of the 29% Shareholder Group. This has already been reflected to some extent by their orchestrated reaction on SoftwareOne's candidate review process taking note of the intention to replace the Board. As mentioned, the presumption of a conflict of interest under takeover law in a takeover context also provides clear indications for the legal assessment of a possible conflict of interest *from the perspective of corporation law*.⁹⁶ The general presumption under takeover law is also plausible here from the point of view of corporation law in the specific case, especially since the removal of the existing board members (with the exception of Daniel von Stockar) and the members proposed by them for election to the board of directors obviously serves the purpose of pushing through the public-to-private transaction planned by them, according to the 29% Shareholder Group's own justification:⁹⁷

*"The Founding Shareholders fundamentally disagree with the Board of Directors' conclusion of the strategic review and are of the opinion that the contemplated **public-to-private transaction** should have been pursued and presented to the shareholders. The Founding Shareholders have **lost confidence in the current members of the Board of Directors.**"*

102 The 29% Shareholder Group's press release of 5 February 2024 then went on to say:

"SoftwareONE's Founding Shareholders fundamentally disagree with the Board of Directors' conclusion of the strategic review and are of

⁹⁵ See Media Release „SoftwareOne to combine the requested EGM with the upcoming AGM“ of 12 February 2024.

⁹⁶ TSCHÄNI/DIEM (2016) 67.

⁹⁷ Request of the 29% Shareholder Group to the Board of Directors of SoftwareONE dated 4 February 2024 (emphasis added).

*the opinion that the recent non-binding offer for a **going-to-private transaction** should have been presented to shareholders. The Founding Shareholders therefore request the convening of an EGM, proposing the **removal of the current Chair as well as all current members of the Board**, with the exception of Daniel von Stockar, who did not participate in the Board discussions since the launch of the recent approach for a going-private transaction. Annabella Bassler, Jörg Ribboni, Andrea Sieber and Till Spillmann are proposed as **new independent Board members**, whereby Andrea Sieber will be Vice Chair and act as Lead Independent Director. Daniel von Stockar and René Gilli will stand for election as Chair and as an additional Board member, respectively. [...]*

103 The members of the Board of Directors proposed for election by the 29% Shareholder Group – if elected – are also obliged to safeguard the long-term interests of the company and thus the interests of all stakeholders of the company due to their duty of loyalty to the company as members of the highest management body. However, due to their dual role as "representatives" of the interests of the 29% Shareholder Group, who, by electing the new Board of Directors, is, according to their own statements, aiming precisely to help the intended public-to-private transaction achieve a breakthrough, the proposed members of the Board of Directors are *at least implicitly (and publicly) instructed by the 29% Shareholder Group to support and enforce the interests of the 29% Shareholder Group in the implementation of this transaction*. However, this special interest of the 29% Shareholder Group is diametrically opposed to the interest of all stakeholders in the sustainable business and earnings growth of SoftwareONE, as explained above. It is also the duty of the Board of Directors to keep the interests of all shareholders in mind, at least as a partial aspect of the interests of the company, and it is also not in the short-term interests of the other public shareholders to have to accept too low a purchase price for their shareholding. With regard to the planned transaction, the members of the Board of Directors proposed for election would therefore be under pressure to represent not only the interests of the company, but also the interests of the company's direct opponents.⁹⁸

104 The persons proposed by the 29% Shareholder Group for election to the Board of Directors would therefore – if elected – be typical "*servants of two masters*" in the sense of the practice developed by doctrine and case law and would therefore also be in a "disabling conflict" under corporation law with regard to the question of a takeover bid and the implementation of the public-to-private transaction planned by the 29% Shareholder Group and would therefore have to step aside in connection with the relevant decision-making and decision-making process.

⁹⁸ TSCHÄNI/DIEM (2016) 76.

3. Result on the question of the conflict of interest of board members proposed by the 29% Shareholder Group in the takeover context from the perspective of company law

- 105 The principles of takeover law also provide indications for the assessment under company law as to when a legally relevant conflict of interest exists in a planned transaction. In contrast to takeover law, however, corporation law does not provide a list of presumptions of typical conflicts of interest, but requires a *case-by-case assessment* of the qualification of a conflict of interest. It is assumed that the members of the Board of Directors are also pursuing a special interest in relation to the takeover in question that *runs counter* to the company's long-term interests.
- 106 With its proposal to vote out the existing Board members (with the exception of member of the 29% Shareholder Group Daniel von Stockar himself) and to elect the new Board members proposed by them, the 29% Shareholder Group is, according to its own statements, aiming to help the intended public-to-private transaction achieve a breakthrough. The proposed members of the Board of Directors are thus *implicitly and unequivocally instructed to pursue the special interests of the 29% Shareholder Group on the Board of Directors*. However, as members of the Board of Directors, they are also obliged to safeguard the interests of the Company and all stakeholders in the medium and long-term business and earnings growth of SoftwareONE in good faith.
- 107 This means that the members of the Board of Directors proposed by the 29% Shareholder Group are "*servants of two masters*": Due to their dual role as "representatives" of the opposing special interest of the 29% Shareholder Group and as members of the Board of Directors of SoftwareONE committed to the interests of the company, which includes the interests of all stakeholders (including those of the other public shareholders), the members proposed by the 29% Shareholder Group for election to the Board of Directors are *also in a legally relevant conflict of interest from a corporate law perspective with regard to the assessment and decisions of a public-to-private transaction*.

IV. Conflict of interest of the board members proposed by the 29% Shareholder Group with regard to other actions of the board of directors

A. Preliminary remarks

- 108 The legal analysis and answers of the first two expert questions have shown that the members of the Board of Directors proposed for election by the 29% Shareholder Group – if elected – would find themselves in a legally relevant conflict of interest with regard to an assessment and

decisions in connection with a public takeover bid by the Co-Bidders (or one of these bidders or a third party related), both from a takeover law and a corporation law perspective.

109 The question that remains to be answered is whether the members proposed by the 29% Shareholder Group for election to the Board of Directors would also be in a conflict of interest *with regard to other actions falling within the area of responsibility of the Board of Directors*. The analysis relates to the hypothetical period between the possible election of the proposed new Board members and the subsequent implementation of the public-to-private transaction requested by the 29% Shareholder Group, i.e. a possible takeover of the company and subsequent delisting.

B. Generally no application of the principles of takeover law

110 In the absence of any reference to a takeover bid or a takeover situation, this third question must be examined solely from the perspective of corporation law. The provisions of takeover law are neither directly applicable here nor are they able to provide indications for the assessment under stock corporation law.

111 The general requirements for the assumption of a conflict of interest under corporation law outside of a specific takeover context have already been set out above. Essentially, a legally relevant conflict of interest presupposes the existence of *opposing interests* in such a way that the interests of the company and the special interests of the members of the board of directors, whether personal or on behalf of third parties, must conflict and be of a *certain intensity*.⁹⁹

C. Conflict of interest of the proposed Board members due to their "mission" of going private also in relation to other actions of the Board

1. Personal or business connections between the 29% Shareholder Group and the new members of the Board of Directors proposed for election

112 The Undersigned is not aware of any personal or business connections between the 29% Shareholder Group and the persons proposed by it for election to the Board of Directors. Only *Daniel von Stockar* and *René Gilli* must indisputably be regarded as the actual "representatives" of the 29% Shareholder Group, especially since they themselves submitted the corresponding motion to hold an Extraordinary General Meeting. With regard to *Dr. Till Spillmann*, due to his previous history as a partner in the law firm NKF, there is at least the appearance that he could have direct or indirect business connections with the 29% Shareholder Group or Bail Capital as a

⁹⁹ See above N. 41.

provider.¹⁰⁰ With regard to the other members of the Board of Directors, however, it is not known whether such connections exist.

2. No conflict of interest relevant under corporation law solely due to the election proposal of the 29% Shareholder Group

113 Outside of a takeover context, the members of the Board of Directors proposed by the 29% Shareholder Group are not in a permanent conflict of interest under corporation law *per se* or solely due to this election proposal with regard to all future decisions. The legal situation would be different if the proposed new Board members had made a legally binding commitment to the 29% Shareholder Group to follow specific or general instructions and, in particular, to carry out their Board mandate in its interests. In this case, the new members of the Board of Directors, as "servants of two masters" from the outset, would always find themselves in a potential conflict with the interests of the company, which they must also pursue in good faith as members of the Board of Directors.

3. Assessment based on the specific circumstances of the present constellation: "mission" to implement the going-private strategy

114 Since the assessment of a conflict of interest under corporation law must be made on a case-by-case basis,¹⁰¹ the specific circumstances and the particular constellation in connection with the nomination of the new Board members must also be taken into account here. As already explained,¹⁰² it is clear from the 29% Shareholder Group's media releases of 5 February and 5 March 2024 and the reasons for its motion to convene an Extraordinary General Meeting on 4 February 2024 that the existing members of the Board of Directors (with the exception of Daniel von Stockar) are to be voted out, and the proposed members of the Board of Directors are to be elected instead, primarily because the existing Board of Directors does not support the public-to-private strategy they envisage. In contrast, the implicit message is that the new Board of Directors should support the 29% Shareholder Group in implementing their strategy and realizing the planned transaction, the sale of the company – in accordance with the original non-binding offer to Bain Capital – and the subsequent delisting of the company. The explanations of the 29% Shareholder Group cannot be interpreted in any other way than as an *implicit, public and clear instruction to the newly elected members of the Board of Directors to pursue the delisting strategy*. The 29% Shareholder Group states that it is dissatisfied with the Board of Directors' current strategy and pursuit of its objectives. Instead, the proposed new members of

¹⁰⁰ See above N. 75.

¹⁰¹ See above N. 86.

¹⁰² See above N. 103.

the Board of Directors should pursue what they consider to be the "right" strategy for the company, namely a public takeover followed by a delisting:¹⁰³

«The Founding Shareholders fundamentally disagree with the Board of Director's conclusion of the strategic review and are of the opinion that the contemplated public-to-private transaction should have been pursued and presented to the shareholders. [...]»¹⁰⁴

*«The founding shareholdres **therefore** request [...] the removal of the current Chair as well as all current members of the Board, with the exception of Daniel von Stockar, who did not participate in the Board discussions since the launch of the recent approach for a going-private transaction. [...] The Founding Shareholders believe that the right conditions for SoftwareONE's next phase of growth are best provided in a private context, and that a going-private transaction with the right partner is in the best interest of SoftwareONE and all stakeholders. [...]»*

115 Due to the nomination of the new members of the Board of Directors in combination with this justification, which links the election proposal with clear expectations of the future behavior of the proposed members of the Board of Directors, they are put under pressure by the 29% Shareholder Group with regard to their strategic decisions to primarily pursue their interests and thus the going private strategy instead of primarily keeping an eye on the sustainable interests of the company. In other words, the unmistakable message is that the new Board members are being nominated primarily for the purpose and with the mission of implementing precisely the strategy preferred by the 29% Shareholder Group. Any other interpretation would not be plausible, especially since the new members were nominated by the current Board of Directors as a direct consequence of the two-time rejection of the takeover by Bain Capital. From the perspective of stock corporation law, this immediately raises the question of whether the members proposed for election in question are not in an irresolvable conflict of interest with regard to the performance of their core duties.

116 It appears that the 29% Shareholder Group, or its legal advisors, has now also noticed that it has sent clear signals with its proposal and has thus implicitly issued clear instructions to the newly elected members of the Board of Directors, which in turn raises the question of their freedom from conflict. As a result, it emphasized in a new media release on 4 March 2023 that the proposed Board members were "independent" and would assess a going private "impartially" if they were elected. However, this announcement does not invalidate the fact that in all previous

¹⁰³ Media Release from Daniel von Stockar, B. Curti Holding AG, René Gilli of 5 February 2024 (Emphasis added).

¹⁰⁴ Request of the 29% Shareholder Group to the Board of SoftwareONE of 4 February 2024; Media Release of Daniel von Stockar, B. Curti Holding AG and René Gilli of 5 February 2024.

announcements and in the explanatory memorandum to the motion for removal or election of 4 February 2024, the nomination was inextricably linked to the new strategy to be pursued.

117 Even in its statement of 4 March 2024, the 29% Shareholder Group continued to justify the new election of the Board of Directors with the going-private strategy to be pursued in its view:¹⁰⁵

*«The Founding Shareholders continue to be convinced that the right conditions for SoftwareONE's next phase of growth are best provided **in a private context.**».*

118 At the same time, they emphasize that under the current circumstances – i.e. the current composition of the Board of Directors – there would be no prospect of a successful going private:¹⁰⁶

*«Since the **current Board of Directors** of SoftwareONE rejected Bain Capital's latest offer in January 2024, **it has been clear that there is no scope for a going-private transaction under the current circumstances.**».*

119 It is therefore clear that the new Board members would have to pursue precisely this going private strategy, as otherwise they would not have been proposed for election or their election would not change the circumstances that prevent a going private. The statement on the "independence and impartiality" of the proposed BoD members appears implausible in light of these words.

120 This is particularly true in light of the fact that the supposedly "independent or impartial" proposed members of the Board of Directors are already clearly behaving as a coordinated group – in the run-up to their election – and are acting as representatives of the 29% Shareholder Group who is *implicitly and at least factually bound by instructions*. For example, the proposed new members were individually invited by the company to interviews with the Nomination Committee, as is standard practice in good corporate governance. However, the proposed Board members did not respond individually to this invitation. Instead, only one of the candidates responded and declared on behalf of all the proposed Board members that they were not interested in conducting interviews.

121 Moreover, the fact that the term of office of the current members of the Board of Directors would have ended at the 2024 Annual General Meeting anyway, or that they would have had to be re-elected, is a further indication that the proposed members of the Board of Directors are at least de facto bound to the strategy of the 29% Shareholder Group. However, this would obviously have taken too long for the 29% Shareholder Group, which is why it requested that new elections be added to the agenda now. One obvious explanation for this is that the takeover

¹⁰⁵ Media Release from Daniel von Stockar, B. Curti Holding AG, René Gilli of 4 March 2024 (Emphasis added).

¹⁰⁶ Media Release from Daniel von Stockar, B. Curti Holding AG, René Gilli of 4 March 2024 (Emphasis added).

pursuit by Bain Capital – which was not called off at the time of the request for inclusion on the agenda – caused time pressure. In other words, at the time of the request for inclusion on the agenda, the 29% Shareholder Group hoped to be able to launch a takeover bid by Bain Capital as quickly as possible following the new election of the Board of Directors. The new Board of Directors would then support this on the basis of the "mission" imposed on it. Only if the 29% Shareholder Group assumed that it would be able to implement a new takeover offer in a timely manner by means of a new appointment to the Board of Directors would it make sense to convene an extraordinary general meeting to elect a new Board of Directors before the ordinary end of the term of office of the current members.

122 Finally, the 29% Shareholder Group was unwilling to enter discussions on a balanced Board and insisted on needing a new Board for its purposes.

123 As an interim result, it can therefore be stated that the members of the Board of Directors proposed for election have been implicitly committed to pursuing the interests of the 29% Shareholder Group. The scope of this finding must be examined in more detail below.

4. Permanent conflict of interest of the proposed Board members due to their commitment to the going-private strategy of the 29% Shareholder Group also with regard to other strategic decisions of the Board of Directors

124 Due to the *pressure* generated by the 29% Shareholder Group and the *associated latent de facto obligation of the proposed new board members to pursue the strategy of the 29% Shareholder Group*, the board members concerned – if elected – would permanently find themselves in a conflict of interest not only with regard to the planned public-to-private transaction, but also with regard to all other directly or indirectly related strategic decisions of the board of directors.

125 The going-private strategy pursued by the 29% Shareholder Group not only has implications for the direction of the *overall corporate strategy*, but also for the *main tasks of the Board of Directors*, which are summarized under the term "*ultimate management*" pursuant to Art. 716a para. 1 CO and which substantiate this competence and are assigned to the Board of Directors in a non-transferable and irrevocable manner.

126 The ultimate responsibility of the Board of Directors pursuant to Art. 716a CO includes:¹⁰⁷

- The definition of *objectives* with the *strategy* for achieving them and the definition of corporate policy as well as the determination of what the company does not do;

¹⁰⁷ PETER BÖCKLI (2022) § 9 N 365 ff.; ZK OR-BÜHLER (2018) Art. 716a N. 39 ff. with further references.

- The choice of *means to achieve the objectives*, with the constant endeavor to achieve financial equilibrium (the balance between objectives and means) in the defined risk profile and in the ups and downs of the course of business;
- The basic *instructions to the management* as to how it should strive to achieve the objectives and use the resources, but also what it must forego.

127 The *strategic management* of the company comprises the selection and delimitation of specific business areas, the definition of entrepreneurial priorities and the business model with the risk profile.

128 According to Art. 716a para. 1 and Art. 14 of SoftwareONE's Articles of Association, the Board of Directors has the following non-transferable and inalienable duties, among others:

- the determination of the *organization*,
- the organization of accounting, financial control and planning (*financial responsibility*),
- the *appointment and dismissal* of persons entrusted with the *management* and representation of the company
- the *ultimate supervision* of the persons entrusted with the management of the company, in particular with regard to compliance with laws, articles of association, regulations and directives (*compliance*)
- the preparation of the *annual report* and the *remuneration report* as well as the preparation of the General Meeting and the implementation of its resolutions.

129 The *going-private strategy* pursued by the 29% Shareholder Group, which is geared towards its special interests, would not only affect the proposal for delisting to be submitted to the General Meeting in accordance with Art. 704 para. 1 no. 12 CO, but would also have *implications for the entire future strategic direction of the company* and the decisions to be made in various areas of the company. Due to the de facto instruction of the 29% Shareholder Group to implement the going-private strategy, the newly elected board of directors would be under constant pressure to always keep the scenario of a privately held company in mind in practically all decisions falling within its remit, for example:

- Decision to *appoint or dismiss new members of the management board*: the requirements of a public company and a private limited company differ;
- Decision on the *remuneration system* and the granting of *long-term incentives* to management.
- Decision on the *type of financing and refinancing* of the company's further growth;
- Decision on the proposal of *dividend* to the shareholders for the attention of the AGM;

- Decision on the entry into *new business areas* or *geographical expansion* into new markets;
- Decision on entering into *strategic partnerships* by means of long-term contracts or a joint venture;
- Decisions on the *restructuring*, acquisition or sale of parts of the company or subsidiaries (M&A).

130 The actual or presumed interests of the members of the 29% Shareholder Group, as shareholders of the future, privately held company, and of Bain Capital would sit at the table for practically every material decision: Could this financing complicate the acquisition? Is this joint venture or partnership in line with Bain Capital's strategy and its investment strategy in this area? Will the upcoming dividend payment make it difficult to pay interest in the future? Is the acquisition opportunity against the interests of future private shareholders?

131 Due to the clear expectations of the 29% Shareholder Group and Bain Capital, the newly elected Board of Directors would be restricted in its freedom of decision in all of these Board of Directors' matters and would not be able to base its decision-making on the long-term interests of the company. The members of the Board of Directors proposed by the 29% Shareholder Group would therefore be *permanently in a latent and structural conflict of interest*. This conflict of interest would first have to be disclosed in accordance with art. 717a CO, and the Board of Directors would then have to decide on suitable measures. This would involve assessing whether there is a disabling conflict, i.e. conflicting interests of sufficient intensity between the interests pursued by the 29% Shareholder Group and the interests of the company. However, this legally prescribed procedure for dealing with a conflict of interest would not be of any use in the present constellation, as *all* members of the Board of Directors proposed by the 29% Shareholder Group would be in a conflict of interest. The other practical measures to be taken by the Board of Directors to deal with conflicts of interest (double resolution, walk out, committee, fairness opinion, approval by the General Meeting, etc.) would not be effective here either.

132 That potential for intense conflict of interests is further supported by the fact that Daniel von Stockar, member of the 29% Shareholder Group and current member of the Board of Directors of SoftwareONE, did not participate in the Board of Directors discussions since the 29% Shareholder Group announced that it, together with Bain Capital, intends to take over the company and subsequently delist it.

*«...with the exception of Daniel von Stockar, who did not participate in the Board discussions since the launch of the recent approach for a going-private transaction.»).*¹⁰⁸

133 The abstaining was therefore not limited to meetings in which the Board of Directors debated the respective non-binding purchase offers from Bain Capital, but also to *all other business of the Board of Directors* since the announcement of the purchase interest and the going private strategy pursued.

134 It goes without saying that the question of whether there is not only a *potential* conflict of interest, a mere *contact of interest* or a *disabling conflict* in the sense of intensely opposing interests can ultimately only be conclusively assessed in each individual case. However, due to the fundamental course set by the going-private strategy pursued by the 29% Shareholder Group and Bain Capital, the question of a conflict of interest would, as shown, arise in future with practically every strategically relevant decision of the newly elected Board of Directors.

5. Organizational deficiency in the legal sense due to a conflict of interest in all strategic matters

135 If no measure for the internal management of a conflict of interest is practicable or if all members of the Board of Directors are not in a position, due to their bias, to ensure that the company's interests are independently safeguarded, the conflict of interest on the Board of Directors can lead to its *inability to function as a body* and thus to an *organizational deficiency according to art. 731b CO*. This is widely recognized in doctrine and case law.¹⁰⁹

136 However, an organizational deficiency can only be assumed in those cases in which the interests of the company can only be safeguarded by means of measures ordered by a court because the existing interests preclude the board of directors from acting in accordance with interests of the company.¹¹⁰ However, if *all members of the board of directors* pursue conflicting special interests in practically *all strategic issues* within the board of directors' area of competence, neither a fairness opinion nor other conflict resolution measures are sufficient to solve the problem. For example, a third-party assessment may be decisive for the appropriateness of a valuation and the other conditions, but not for answering the decisive question in a business decision as to whether a certain measure should be taken at all; the function of entrepreneurial decision-

¹⁰⁸ See Media release from Daniel von Stockar, B. Curti Holding AG, René Gilli of 5 February 2024 (Emphasis added).

¹⁰⁹ Federal Supreme Court 4A_412/2020 of 16 September 2020, E. 4.3.2; Federal Supreme Court 4A_717/2014 of 29 June 2015, E. 2.5.2; WHERLOCK/VON DER CRONE (2015) 543 ff.; ZK OR-BOHRER/KUMMER (2018) Art. 731b N. 43; CHRISTOPH B. BÜHLER (2018) 447; GUY MUSTAKI (2019) 200; DALLA PALMA/VON DER CRONE (2020) 582 f.; PETER BÖCKLI (2022) § 9 N. 851 und § 14 N. 273 ff.; BSK OR-WATTER/DUSS (2024) Art. 731b N. 6.

¹¹⁰ WHERLOCK/VON DER CRONE (2015) 549.

making cannot be ceded to the expert.¹¹¹ If timely or rapid action is required in a matter, as is usually the case with management decisions, the convening of a *general meeting* of shareholders for the purpose of obtaining an approval resolution is also ruled out. In such a case, the Board of Directors is unable to function, which can only be remedied by the appointment of an administrator by the court at the request of a shareholder.¹¹² Dissolution of the company pursuant to Art. 731b para. 1 no. 3 CO or for important reasons pursuant to Art. 736 no. 4 CO, on the other hand, should only be considered as a last resort.¹¹³

137 If a board of directors refuses to resign when a structural conflict of interest exists or refuses to take measures to safeguard its interests despite the possibility of doing so, the conduct of the board of directors in breach of its duties may lead to a *liability* for damages on the part of the offending members of the board of directors within the meaning of liability under company law pursuant to Art. 754 CO, without the *business judgment rule* being invoked in this case.¹¹⁴

6. Result on the question of the conflict of interest of the proposed Board members with regard to further actions of the Board of Directors

138 As a result, it can therefore be concluded that the members proposed by the 29% Shareholder Group for election to the Board of Directors – should they be elected – would probably also find themselves in a permanent or structural conflict of interest due to their implicit obligation to pursue the going-private strategy of the 29% Shareholder Group (the "mission") with regard to almost all other conceivable strategic decisions in the core competence area of the Board of Directors that are directly or indirectly related to this mission. They would have to disclose their conflict practically all the time, and conventional conflict management measures would be ineffective in this constellation. Since, in this constellation, *all members* of the board of directors would find themselves *permanently* in a legally relevant conflict of interest in *practically all decisions*, the company would basically no longer be able to make decisions and function at all. According to the relevant Federal Supreme Court rulings and prevailing doctrine, this situation could even result in a *organizational deficiency* within the meaning of Art. 731b CO, which could then only be resolved by the court appointment of a custodian at the request of a shareholder.¹¹⁵

¹¹¹ PETER BÖCKLI (2022) § 14 N. 275.

¹¹² Federal Supreme Court 4A_717/2014 of 29 June 2015, E. 2.5.2; WHERLOCK/VON DER CRONE (2015) 542 ff.; CHRISTOPH B. BÜHLER (2018) 447; GUY MUSTAKI (2019) 200; PETER BÖCKLI (2022) § 14 N. 275.

¹¹³ WHERLOCK/VON DER CRONE (2015) 550.

¹¹⁴ DALLA PALMA/VON DER CRONE (2020) 585; WHERLOCK/VON DER CRONE (2015) 550; vgl. see above N. 56 f.

¹¹⁵ Federal Supreme Court 4A_717/2014 of 29 June 2015, E. 2.5.2; WHERLOCK/VON DER CRONE (2015) 542 ff.; CHRISTOPH B. BÜHLER (2018) 447; GUY MUSTAKI (2019) 200; PETER BÖCKLI (2022) § 14 N. 275.

PART 3: CONCLUSIONS

139 Based on the legal analysis, the Undersigned has come the following conclusions:

1. Due to the 29% Shareholder Group's request of 4 February 2024 to replace all members of the Board of Directors of SoftwareONE except for their own representative on the Board of Directors, and the justification that the change is necessary to implement the public-to-private transaction they are considering, ***all members of the Board of Directors proposed for election by the 29% Shareholder Group are presumably in a legally relevant conflict of interest from a takeover law perspective with regard to a potential takeover bid by Bain Capital or the Co-Bidders respectively.***
2. The principles of takeover law also provide indications for the assessment *under corporate law* as to when a legally relevant conflict of interest exists in a proposed transaction. From a corporate law perspective, the existence of a conflict of interest requires that the members of the board of directors, when considering the individual case in relation to the specific takeover in question, also pursue a *special interest that runs counter to the long-term interests of the company*. With their motion to vote out the existing Board members (with the exception of Daniel von Stocker himself) and to elect the new Board members proposed by them, the 29% Shareholder Group is, according to its own statements, *aiming to help the intended public-to-private transaction achieve a breakthrough*. The proposed members of the Board of Directors are thus *implicitly and unequivocally instructed to pursue the special interests of the 29% Shareholder Group on the Board of Directors*. However, this special interest runs counter to the interests of other stakeholders in the company, namely those of the other public shareholders, as they are in a different situation to the members of the 29% Shareholder Group: *they would have the right to remain invested and therefore benefit from a low offer value and future value creation, whereas the public shareholders would not benefit from these and other advantages should the company be taken private*. However, as members of the Board of Directors, they are also obliged to safeguard the interests of all stakeholders in the medium and long-term business and earnings growth of SoftwareONE in good faith. The members of the Board of Directors proposed by the 29% Shareholder Group would therefore be "*servants of two masters*": Due to their dual role as "representatives" of the opposing special interest of the 29% Shareholder Group and as members of the Board of Directors of SoftwareONE committed to the Company's interest, which includes the interests of *all stakeholders* (including those of the other public shareholders), ***the members proposed by the 29% Shareholder Group for election to the Board of Directors are also in a legally relevant conflict of interest from a corporate law***

perspective with regard to the assessment and decisions in connection with a possible takeover bid by Bain Capital or the Co-Bidders respectively.

3. The members proposed by the 29% Shareholder Group for election to the Board of Directors would – if elected – likely be in a ***permanent or structural conflict of interest*** due to their implicit obligation to pursue the 29% Shareholder Group's going-private strategy (the "mission") ***also with regard to almost all other conceivable strategic decisions in the core competence area of the Board of Directors*** that are directly or indirectly related to this mission. They would have to disclose their conflict practically all the time, and the conventional measures for conflict resolution would not be effective in this constellation. Since in this constellation all members of the Board of Directors would find themselves in a legally relevant conflict of interest in practically all decisions, *the company would basically no longer be able to make decisions or function at all.* According to the relevant Federal Supreme Court rulings and prevailing doctrine, this situation could even result in an *organizational deficiency* within the meaning of Art. 731b CO.

Basel, 18 March 2024



Prof. Christoph B. Bühler, LL.M.