

# New gender quotas for publicly listed companies and transparency rules for commodity sector enter into force

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## Introduction

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## Introduction

On 19 June 2020 Parliament adopted the revision of Swiss company law. The revision aims to:

- expand contemporary corporate governance regulations;
- create a more flexible and simpler design for the formation and capital adjustment provisions; and
- align corporate law with the new accounting law.

On 1 January 2021, as part of the new corporate governance regulations, the new provisions regarding gender quotas and transparency rules for the commodity sector entered into force. Consequently, listed companies should elect more women to boards of directors and executive boards and stricter transparency rules will apply to commodity companies. The Federal Council will determine on which date the other provisions of the revision will enter into force.

## More women in management of listed companies

### *New Article 734f of Code of Obligations*

Quotas for the representation of each gender on boards of directors and executive boards have been a current and much-discussed topic for several years. Internationally, there are clear efforts to increase the number of women on boards of directors and executive boards. A number of countries have enshrined a gender quota in law.<sup>(1)</sup>

In the revised Code of Obligations, a provision on the minimum quota for gender representation on boards of directors and executive boards has been introduced. However, this applies only to listed companies that also exceed two of the following thresholds in two successive financial years pursuant to Article 727(1)(2) of the Code of Obligations:

- a balance sheet total of Sfr20 million;
- a sales revenue of Sfr40 million; or
- 250 full-time positions on annual average.<sup>(2)</sup>

These thresholds will ensure that smaller listed companies will not fall within the scope of the new provision.

The new provision stipulates that if a listed company meets the abovementioned requirements, each gender must be represented at least with 30% on the board of directors and 20% on the executive board. The lower quota for the executive board is justified by the fact that more specific industry knowledge is required in the executive board. In addition, members of the executive board are often promoted internally and, on average, promotion to the executive board takes place only after approximately 13 years. Internal talent management should be given sufficient time to reach the executive management quota.<sup>(3)</sup> In the event of non-compliance, the company concerned must explain in the remuneration report the reasons why each gender is not represented as stipulated by the law and describe the measures intended to increase the representation of the underrepresented gender (Article 734f(2) of the Code of Obligations).<sup>(4)</sup>

The introduction of a gender quota is justified with reference to Article 8 of the Constitution. According to Article 8(3) of the Constitution, the law "shall ensure the legal and actual equality" of men and women. In

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addition, Article 8(2) of the Constitution grants protection against discrimination because of, among other things, gender. According to the dispatch of the Federal Council regarding the revision of company law, women are underrepresented on the boards of directors and executive boards of listed companies and therefore equality is not guaranteed, which legitimises the legislature's intervention based on the Constitution.<sup>(5)</sup>

Article 4 of the transitional provisions of the Code of Obligations stipulates that the reporting obligation in the event of non-compliance with the gender quota in boards of directors will apply only from the financial year that begins five years after the new law has entered into force (ie, as of the financial year 2026). In the case of executive boards, this applies only from the financial year that begins 10 years after the new provisions have entered into force (ie, as of the financial year 2031).

### ***Violation of provision***

The provision pursues a so-called 'comply-or-explain' approach. This concept is used primarily in financial market regulation. In a comply-or-explain provision, the normative requirement underlying the provision is relativised to the extent that the addressees can evade it by giving reasons. Thus, the comply-or-explain approach creates greater scope for special cases and tends to increase the acceptability of the provision.<sup>(6)</sup> The comply-or-explain approach pursued is proportionate, as it does not excessively interfere with the freedom of organisation or the constitutional economic freedom of companies.<sup>(7)</sup>

As concerned companies must explain in the remuneration report the reasons why each gender is not represented as stipulated by the law (Article 734f(1) of the Code of Obligations), the new provision should create a certain pressure to ensure a more balanced representation of gender in their top management bodies.

## **More transparency for companies in commodity sector**

### ***New Article 964a of Code of Obligations***

Internationally, there is a trend towards greater transparency in payments made by companies active in the extraction of raw materials to state bodies.<sup>(8)</sup>

On 1 January 2021 the new transparency provisions for companies in the commodity sector entered into force. According to these provisions, companies that must undergo an ordinary audit pursuant to Article 727(1) of the Code of Obligations (for the prerequisites of the ordinary audit, see above) and are active themselves or through a company controlled by them in the extraction of minerals, oil or natural gas or in the harvesting of timber in primary forests, must prepare an annual report on payments to state bodies.<sup>(9)</sup> It is irrelevant whether the extraction of raw materials is reflected in the statutory purpose of the company. Such extraction need not be the exclusive or main activity of the company. A one-off (eg, project-based) activity in the field of raw material extraction is sufficient.<sup>(10)</sup> Notably, the activities of controlled group companies in the extraction of raw materials are also covered by the personal scope of application of the new provisions.<sup>(11)</sup> Further, companies that trade raw materials will not fall within scope of the new provision.<sup>(12)</sup>

In the future, Swiss companies active in the extraction of raw materials will have to disclose payments to state bodies of Sfr100,000 or more per fiscal year and publish them electronically in a report. The report on payments to state bodies is a separate report. It is not part of the management report that larger companies must prepare pursuant to Article 961(3) of the Code of Obligations.<sup>(13)</sup> The report must provide information on all payments to state bodies made in connection with the extraction of raw materials. The term payment is defined in Article 964b(1) of the Code of Obligations and is formulated conceivably broad. Payments also include, for example, payments for production rights, use charges, rental and access fees or other considerations for permits or concessions and payments for improvements to the infrastructure.<sup>(14)</sup> After mandatory approval by the board of directors, the report must be published electronically (eg, on the company's homepage) no later than six months after the end of the financial year according to Article 964d(1) of the Code of Obligations. Thereafter, the report must be publicly accessible for at least 10 years (Article 964d(2) of the Code of Obligations).

The transparency rules – unlike those on gender quotas – already apply as of the financial year beginning one year after the new law entered into force (Article 7 transitional provisions of the Code of Obligations). This means that corresponding reports will already have to be prepared and published as of the financial year beginning in 2022 for the companies affected. Therefore, action is already required in the near future with regard to the implementation and preparation of these reports.

### ***Violation of provisions***

The violation of the provisions concerning the reports of payments to state bodies for companies active in the extraction of raw materials will be qualified as a felony according to the Criminal Code and punishable with a fine (so-called 'contravention' according to Article 103 of the Criminal Code). The new provision in the Criminal Code,<sup>(15)</sup> which is not yet in force, contains two punishable acts. Any person who wilfully makes false

statements in the report on payments to state bodies pursuant to Article 964c of the Code of Obligations or omits the reporting in whole or in part will be liable to a fine.<sup>(16)</sup>

The new provisions for companies active in the extraction of raw materials create more transparency and thus contribute to responsible corporate conduct in this sensitive field of business. By enacting appropriate transparency provisions, international pressure and reputational risks for Switzerland can be reduced.

For further information on this topic please contact [Sebastian Hepp](#) or [Markus Dörig](#) at [BADERTSCHER Rechtsanwälte AG](#) by telephone (+41 44 266 20 66) or email ([hepp@b-legal.ch](mailto:hepp@b-legal.ch) or [doerig@b-legal.ch](mailto:doerig@b-legal.ch)). The [BADERTSCHER Rechtsanwälte AG](#) website can be accessed at [www.b-legal.ch](http://www.b-legal.ch).

## Endnotes

- (1) Dispatch of the Federal Council regarding the Amendment to the Code of Obligations dated 23 November 2016, Revision of Company Law, S 453.
- (2) Article 734f of the Code of Obligations.
- (3) Dispatch of the Federal Council regarding the Amendment to the Code of Obligations dated 23 November 2016, Revision of Company Law, S 455.
- (4) Articles 734f(1) and 734f(2) of the Code of Obligations.
- (5) Von der Crone and Angstmann, "Kernfragen der Aktienrechtsrevision", *SZW / RSDA*, 1/2017, S 17; Dispatch of the Federal Council regarding the Amendment to the Code of Obligations dated 23 November 2016, Revision of Company Law, S 454.
- (6) Müller and Forrer, "Geschlechterraichtwerte im Entwurf für ein neues Aktienrecht", *AJP* 2019, S 1024.
- (7) Dispatch of the Federal Council regarding the Amendment to the Code of Obligations dated 23 November 2016, Revision of Company Law, S 454.
- (8) Dispatch of the Federal Council regarding the Amendment to the Code of Obligations dated 23 November 2016, Revision of Company Law, S 468; Forstmoser and Kuchler, *SCHWEIZER AKTIENRECHT 2020*, EF 1-2/16, S 96.
- (9) Article 964a(1) of the Code of Obligations.
- (10) Dispatch of the Federal Council regarding the Amendment to the Code of Obligations dated 23 November 2016, Revision of Company Law, S 621.
- (11) Article 964a(2) of the Code of Obligations.
- (12) Forstmoser and Kuchler, *SCHWEIZER AKTIENRECHT 2020*, EF 1-2/16, S 96.
- (13) Dispatch of the Federal Council regarding the Amendment to the Code of Obligations dated 23 November 2016, Revision of Company Law, S 621.
- (14) Article 964b(1) of the Code of Obligations.
- (15) New Article 325bis of the Criminal Code.
- (16) Dispatch of the Federal Council regarding the Amendment to the Code of Obligations dated 23 November 2016, Revision of Company Law, S 645; Kämpf and Härtner, "Gesellschaftsrecht", *Wirtschaftsrecht Schweiz – EU, Überblick und Kommentar*, 2018/2019, S 82.

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