New Provisions in Swiss Corporate Law and Changes to the Commercial Register Ordinance

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This legal update is part of a series summarizing the most important upcoming amendments to Swiss corporate law in a condensed form as relevant for legal practitioners. Previously published legal updates can be found on our website at Swiss Corporate Law Reform 2020. New legal updates on the corporate law reform are regularly e-mailed to our newsletter subscribers and published on our website.

Key takeaways

As of 1 January 2021, the first provisions of the revision of Swiss corporate law as well as revised provisions regarding the commercial register entered into force:

- **Gender quotas require that, in large listed companies, each gender be represented to a degree of at least 30% on the board of directors and 20% on the executive committee. The long transition periods are intended to prevent hasty reorganisation of the board of directors and executive committee.**
- **New transparency provisions in the commodities sector require Swiss companies operating in the extraction of natural resources to disclose payments to government entities of CHF 100,000 or more per financial year. This disclosure requirement applies for the first time for the 2022 financial year. However, as commodity trading is not covered by the provisions, the significance of the transparency requirements remains low.**
- **In addition to significant cost reductions in connection with commercial register entries, the group of persons eligible to sign commercial register applications for companies will be expanded. Commercial register suspensions can no longer be applied for at the commercial register, but must be obtained by way of an interim measure under the provisions of civil procedure law.**

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Introduction

On 19 June 2020, the Swiss Parliament adopted the final text on the revision of Swiss corporate law. While the entry into force of the entire revision of corporate law is not expected until 2023 according to current estimates by the Federal Office of Justice, a few provisions of the revision have entered into force as of 1 January 2021. These are the provisions on gender quotas and transparency in the commodities sector. In addition to these novelties in Swiss corporate law, revised provisions of commercial register law have also come into force.

Gender quotas

The representation of both genders on the board of directors and executive committee has been a much-discussed topic for some time. The latest figures from the Schilling Report 2020, which examines the composition of management bodies at the 100 largest Swiss employers, show that the proportion of women on executive committees has risen on average from 4% to 10% and on boards of directors from 10% to 23% since 2010.

The gender quotas newly codified in Art. 734f Swiss Code of Obligations (CO) pursue the goal of further promoting these positive developments in the representation of both genders. The new provision stipulates that, in principle, each gender must be represented to a degree of at least 30% on the board of directors and 20% on the executive committee of listed companies domiciled in Switzerland.

However, only listed companies that exceed two of the following thresholds in two consecutive financial years fall within the scope of the new provision: (i) total assets of CHF 20 million, (ii) sales revenue of CHF 40 million, (iii) 250 full-time positions on an annual average (Art. 727 para. 1 no. 2 CO). Thus, smaller listed Swiss companies do not fall within the scope of the new provision.

The statutory minimum quotas are not designed as binding obligations. Instead, the legislator has opted for what is known as the “comply or explain” approach: Listed companies falling within the scope of the provision that do not comply with the minimum quotas of Art. 734f CO must explain in the remuneration report pursuant to Art. 5 in conjunction with Art. 13 et seqq. Ordinance against Excessive Remuneration in Listed Stock Corporations (“Verordnung gegen übermässige Vergütungen bei börsenkotierten Aktiengesellschaften” or "VegüV") or, once the entire revision of the corporate law came into force, Art. 716a no. 8 newCO, why the genders are not represented according to the gender quotas (Art. 734f no. 1 CO). Furthermore, they must list the measures planned or already implemented to promote the less represented gender (Art. 734f no. 2 CO). This means that deviations from the gender quotas are still possible without adverse legal consequences.

The reporting obligation in the compensation report applies with regard to the board of directors no later than five years, and with regard to the executive committee no later than ten years, after the entry into force of the new provision (Art. 4 Transitional Provisions CO), i.e. from 1 January 2026 and 1 January 2031, respectively. According to the dispatch of the Swiss Federal Council, the long transition periods provide the affected companies with sufficient time to carefully implement the gender quotas and the associated reorganisation.

New transparency requirements in the commodities sector

Effective as of 1 January 2021, Swiss companies that operate in the extraction of natural resources are required to disclose payments to government entities of CHF 100,000 or more per financial year. These new transparency provisions (Art. 964a-f CO) are intended to contribute to responsible corporate conduct by increasing transparency and thus combating mismanagement as well as corruption. Furthermore, the provisions contribute to a uniform regulatory framework by aligning them with existing provisions in European and US law.

The new disclosure requirement apply only to Swiss companies that fulfil the following two cumulative conditions:

On the one hand, it is required that the company concerned is subject to ordinary audit pursuant to Art. 727 para. 1 CO, i.e. that it is listed on a stock exchange or that it has exceeded two of the thresholds pursuant to Art. 727 para. 1 no. 2 CO (balance sheet total of CHF 20 million, sales revenue of CHF 40 million, 250 full-time positions on annual average) in two successive financial years.

On the other hand, it is required that the company concerned operates in the extraction of natural resources. According to Art. 964a para. 4 CO, this includes all corporate activities in the fields of exploration, prospecting, discovery, development and extraction of minerals, oil and gas deposits as well as the felling of timber in primary forests. However, the activity of extracting natural resources does not need to be mentioned in the statutory purpose of the company, nor does the actual activity have to be exclusively or mainly oriented towards this in order to trigger the duty to report. A one-time activity (e.g. project-based) in the field of natural resource extraction is sufficient. It is further irrelevant whether the company concerned carries out the activity itself or through a subsidiary controlled by the company.

In view of these two conditions, the scope of application of the new transparency provisions is rather limited: Firstly, only large companies are subject to the new provision. Secondly, companies exclusively operating in the area of commodity trading are not subject to the new transparency requirements. In this context it is important to note, however, that Art. 964f CO contains a delegation norm, allowing the Swiss Federal Council to extend the transparency provisions to companies operating in the area of commodity trading as well. The use of this competence by the Swiss Federal Council would significantly expand the scope of application.

A company that is subject to the new provisions is required to prepare a public and electronically accessible report within six months after the end of each financial year. The report must provide information on payments that (i) amount to at least CHF 100,000 per financial year, (ii) are made to governmental entities, and (iii) are related to the extraction of natural resources.

"Governmental entities" in the meaning of the new provisions are not only national, regional or local authorities of a third country, but also companies controlled by such authorities (Art. 964a para. 5 CO). The term "payment" is also broadly defined and includes, in addition to payments for production claims and royalties, other payments such as, signing, discovery and production bonuses, license, rental and access fees or other payments for permits or concessions (Art. 964 para. 1 CO). It is irrelevant whether the payments are single payments or

payments in several instalments. The only relevant factor is whether the payments relate to the same object of performance and reach or exceed the total amount of CHF 100,000 per financial year.

The report must be written in one of Switzerland's national languages or in English (Art. 964c para. 4 CO). A tabular presentation showing the recipient of the payment, the payment date and the reason for payment is sufficient. The board of directors of the company concerned must approve the report (Art. 964c para. 4 CO). Furthermore, the report must be available to the public in electronic from (e.g. on the homepage of the company concerned) for at least ten years (Art. 964d para. 2 CO).

Companies whose payments to government entities are already included in a consolidated report prepared in accordance with Swiss or equivalent law may dispense with a separate report. In this case, it is sufficient for the company concerned to state in the notes to the financial statements the name of the group company, which reported on such payments and to publish this report (Art. 964a para. 3 CO).

For companies that fall within the scope of the new transparency provisions, action is already indicated in the near future: The disclosure obligation applies for the first time in the financial year that begins one year after the new provisions enter into force (Art. 7 Transitional Provisions CO). Consequently, affected companies are already required to prepare and publish a corresponding report for the 2022 financial year.

Revision of the Ordinance on the Commercial Register (OCR)

The revision of the OCR as of 1 January 2021 is intended to address the needs of users more effectively. Alongside the most important amendment, being the removal of the blocking of the commercial register based on the OCR, fees are reduced on the one hand and administrative simplifications are introduced on the other. Finally, the revision leads to the adaptation of some provisions of the OCR and/or their transfer to the CO, respectively the creation of new provisions.

As of 1 January 2021, the blocking of the commercial register to prevent entries in the daily register must be applied for directly and exclusively at the competent court. Under the new law, a letter to the Commercial Register Office is no longer sufficient; instead, an application for an ex-parte interim measure must be filed with the competent court (Art. 262 lit. c in conjunction with Art. 265 Civil Procedure Code). For the measure or the blocking of the register to be granted, the applicant must shown credibly that (i) there is a favourable prognosis for the main case ("Hauptsachenprognose") and a prognosis of disadvantages ("Nachteilsprognose"), (ii) there is special urgency and (iii) the measure required is proportionate.

With the simultaneous revision of the Ordinance on Fees for the Commercial Register ("Verordnung über die Gebühren für das Handelsregister"), the cost recovery and equivalence principle is introduced. The Commercial Register Offices will therefore be compensated according to their expenses. As a result, the fees will be reduced by about one third.

The revision also expands the group of persons who are authorised to file applications with the Commercial Register Office. As of 1 January 2021, not only the members of the board of directors are entitled to file applications, but also the persons authorised to sign for the legal entity concerned in accordance with their authority to sign. Exceptions to this rule, such as applications for the registration of authorised signatories or the new registration of a company, which must also be made by the board of directors in the future, remain reserved (Art. 17 para. 1 OCR in conjunction with Art. 720 CO). The application may also be filed by an authorised third party such as a lawyer or notary public. The corresponding power of attorney for such person must be signed by one or more members of the board of directors, in line with their authority to sign. The power of attorney must explicitly mention that the authorized person is authorised to file applications with the Commercial Register Office.

The “Stampa Declaration”, in which the founders of a company, or the members of the board of directors in the case of capital increases, previously had to submit a confirmation with regard to contributions in kind, acquisitions in kind, offsetting items or special benefits, is abolished as a separate document. Corresponding declarations now have to be made in the public deed of the act of formation (Art. 629 para. 2 no. 4 CO) or the declaratory resolution of the board of directors on the capital increase (Art. 652g para. 1 no. 4 CO).

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No legal or tax advice

This legal update provides a high-level overview and does not claim to be comprehensive. It does not represent legal or tax advice. If you have any questions relating to this legal update or would like to have advice concerning your particular circumstances, please get in touch with your contact at Pestalozzi Attorneys at Law Ltd. or one of the contact persons mentioned in this Legal Update.

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