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Board quotas: soon to be a normative reality

The European Union has just set quotas for women on the boards of listed private companies with headquarters in the EU. By mid-2026, these companies must have at least 40% of non-executive seats allocated to women, or at least 33% of executive and non-executive seats.

Negotiators from the 27 EU Member States and the European Parliament announced on Tuesday evening (7 June) that they had reached a compromise to increase the proportion of women on the boards of European companies by introducing quotas.

The new Swiss law on limited companies (société anonyme – SA) had taken the lead in the same direction, but with a little more flexibility.

Thus, the new Article 734f of the Swiss Code of Obligations (CO) will provide in a few months that unless the representation of each sex reaches at least 30% on the board of directors and 20% in the management, the remuneration report of companies that exceed, during two successive financial years, the values set out in Article 727 para. 1 no. 2 CO (at least two of the following three values: balance sheet total: more than 20 million Swiss francs; turnover: more than 40 million Swiss francs; number of employees: 250 full-time jobs on average per year) must state 1. The reasons why the representation of each gender does not reach the minimum expected and 2. The measures to promote the gender that is represented the least.

This provision will come into force with the package of the new law on public limited companies on 1 January 2023. However, this obligation will only have to be complied with at the latest as of the financial year beginning five years after the entry into force of the new law, i.e., as of 1 January 2028, as far as the board of directors is concerned, and ten years, i.e. as of 1 January 2033, as far as the management is concerned. The major Swiss companies are already considering these deadlines. In our view, this trend is irreversible.

It should be noted that this obligation will apply not only to listed Swiss companies but also to unlisted Swiss companies meeting the above criteria.

Under Swiss law, there are no specific sanctions for non-compliance.

Under future EU law, according to press releases available to date, “companies that do not meet these targets will have to “apply transparent and gender-neutral criteria” to address the problem and “give priority to the under-represented sex when two candidates of different sexes have the same qualifications,” the press release states. Member States will also have to put in place a system of penalties for companies that do not comply with the rules. However, it must be noted that these are not precise rules but a legislative framework that is still broad and to be defined, unlike current Swiss law.

In view of the above, what is the most appropriate solution? As an advocate of measures to promote greater gender parity in corporate governance bodies and executives, we believe that the solution currently offered by Swiss law is the most successful. It has the merit of clarity, predictability and flexibility. The European solution certainly goes a little further in the requirement of parity and in the sanctions, but is still vague and above all uncertain as to its final form. We believe, however, that Swiss law should expect to be further clarified in order to make it more conducive to predictable and effective parity over the next decade. The Swiss solution is thus

perfectible. Like the hare in the fable, Swiss law must not rest on its laurels to avoid being overtaken by the European “tortoise”.

Source : <https://www.wg-avocats.ch/en/actualites/company-law/board-quotas-soon-to-be-a-normative-reality/>