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Progress towards gender equality in corporate governance in Switzerland?

On the occasion of the reform of limited company law resulting from the “Minder” initiative which was adopted in 2013, the Swiss Federal Council wishes to take the opportunity of this reform to add a provision establishing a gender quota for the corporate bodies of Swiss listed companies.

However, this desire for gender equality in executive positions is not new. Since its 2014 revision, the “*Swiss Code of Best Practice for Corporate Governance*” developed by Economiesuisse contains in its twelfth note a reference to membership of the Board of Directors and the representation of both genders. If the proposal for review of the Swiss Code of Obligations (hereinafter “CO”) is adopted, this principle will in future likewise be enshrined in a formal law.

The Federal Council plans to introduce this change through Art. 734f of the draft CO revision (hereinafter “P-CO”). This article stipulates quotas of 30% and 20% respectively on the Board of Directors and Executive Board of companies fulfilling the conditions of Art. 727 para 1 no. 2 CO. For the record, companies which achieve two of the three following figures fall within the scope of application of this provision: (i) balance sheet total: 20 million francs; (ii) turnover: 40 million francs; (iii) staff: 250 full-time employees.

In our view, incorporation of Art. 734f into the CO represents an equitable measure in the application of Art. 8 para 3 of the Constitution which stipulates that the legislator is required to ensure *de jure* and *de facto* equality between the genders, especially in the field of employment. This reform must therefore not be seen as any kind of discrimination against the male gender through these quotas, but as a real advance towards gender equality in the professional environment.

It would be exaggerated to suppose that this project represents a Swiss innovation. The same topic is also on the agenda of the European Union, and some of our neighbours are even ahead of us in this area. In 2012, the European Commission approved a draft directive seeking to increase to 40% the share of the under-represented gender on the corporate bodies of listed companies. Precursor countries include Norway and Germany which introduced similar quotas in 2003 and 2016 respectively for the representation of women on supervisory boards. The position of the Federal Council is therefore a logical continuation of the European trend.

Opponents criticise the threat to the liberal nature of the CO. In their view, the introduction of quotas accompanied by penalties restricts the freedom of action of the companies on which they are imposed. According to the Federal Council, self-regulation has not so far enabled a balanced representation of the genders to be achieved, so justifying the introduction of a legal framework. The “*apply or explain*” principle set out in Art. 734F P-CO is proportionate and only endangers to a very limited degree the organisational and economic freedoms that are guaranteed by our Constitution. In the opinion of our government, this reform likewise enables problems linked to population ageing and growing skills shortages to be mitigated.

In conclusion, we take the view that this is a bold position on the part of the Federal Council, which is in sharp contrast to its usual tendency to favour self-regulation. However, the scope of this reform remains limited because the proposed penalties are practically non-existent. Moreover, the aim of achieving these quotas within 5 years of the possible entry into force of the proposal seems utopian given that we are so well short of attaining it at this juncture.

Source :
<https://www.wg-avocats.ch/en/news/commercial-law/progress-towards-gender-equality-in-corporate-governance-in-switzerland/>