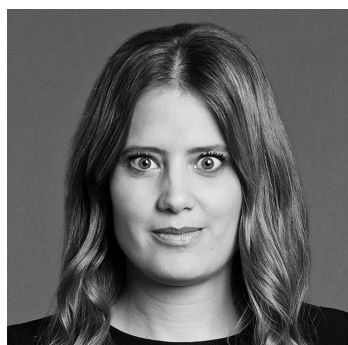


# Corporate governance in Switzerland: new ESG disclosure rules, gender quotas and related developments



## Dr Urs Kägi

Partner, Bär & Karrer AG  
Urs.Kaegi@BaerKarrer.ch

## Dr Vera Naegeli

Senior associate, Bär & Karrer AG  
Vera.Naegeli@BaerKarrer.ch

In our article, we will highlight recent developments and key issues for corporate governance in Switzerland. Several developments are driven by the new corporate law reform that has been passed last year. This includes a new gender quota, fine-tuning of executive compensation regulation, and other corporate governance topics. In addition, we will discuss the new disclosure regime for environmental, social and governance (ESG) matters which has been introduced in part by a separate bill (a counter-proposal to the popular initiative for responsible business) and which is relevant for (i) listed companies and certain other larger companies generally; (ii) companies trading or processing conflict minerals; and (iii) commodity companies.

### Recent corporate governance developments in Switzerland

In June 2020, the Swiss parliament has adopted a general corporate law reform. While most of the new provisions in the Swiss Code of Obligations (CO) will presumably enter into force in 2022, some individual provisions have already entered into force at the beginning of this year. As part of the reform, several new corporate governance requirements will be introduced or are fine-tuned, including:

- A gender quota (new article 734f CO) is introduced on a comply-or-explain basis for the board and executive management of listed companies exceeding certain thresholds. While the new provisions have already formally become law, they are subject to quite long transition periods. Accordingly, each gender must be represented at least by 30% on the board of directors starting from 2026 and by 20% in the executive management starting from 2031. There are no sanctions in the event of failure to achieve the targets, but the reasons for the failure and the measures to be taken must be disclosed in the compensation report.
- So far, the Ordinance against Excessive Compensation (OaEC) contained say-on-pay rules and regulation of board and executive compensation for listed companies, including an annual binding say-on-pay vote by shareholders. These provisions will now transfer to the CO. While most of the rules are maintained, a few adjustments have been made, including a stricter regulation of post-contractual non-compete agreements (total compensation now capped at the annual average compensation of the last three years, regardless of the length of the non-compete).
- Also other corporate governance rules are fine-tuned and expanded, including shareholder rights (eg new, mostly lower thresholds to put an item on the agenda), shareholder powers (eg new requirement to approve a de-listing by shareholders), and rules on general meetings (eg a new option to have virtual meetings and facilitation of electronic distribution of documents).

### A new disclosure and due diligence regime for ESG matters for all listed and certain other larger companies

Separately from the corporate law reform, new reporting obligations regarding ESG matters will be introduced with an amendment to the CO that is expected to enter into force within the next few months. This amendment was a counterproposal to the more far-reaching responsible business initiative. That initiative proposed to introduce new liability rules for ESG matters and was rejected by Swiss voters in November 2020 (albeit reaching a tight majority of the popular vote). Currently, Swiss law does not contain specific legal disclosure regulations on such issues. Companies can, however, include certain information in their annual report on a voluntary basis. Companies with a primary listing on the SIX Swiss Exchange may opt in a sustainability report according to an internationally recognised

standard, which is published on the SIX Swiss Exchange website and binds the issuer.

The new rules will require companies of public interest domiciled in Switzerland, eg listed companies and prudentially supervised large companies in the financial sector, to publish annual reports on ESG matters. These non-financial reporting obligations are analogous to the Non-Financial Reporting Directive of the European Union (Directive 2014/95/EU) and they must, among other things, describe the overall approach applied to ESG matters, any due diligence measures taken and their effectiveness, as well as the main risks in connection with ESG matters. The report on ESG matters must be approved by the board of directors and the shareholders' meeting like the annual financial statements, but the report must not be audited.

Failure to comply with the new obligations regarding ESG matters may result in criminal liability (fines up to CHF100,000). Companies whose financial year corresponds to the calendar year will presumably have to publish their first report on ESG matters in 2023 (covering the financial year 2022).

### Special reporting and due diligence rules for companies trading or processing conflict minerals

Additionally, the amendment regarding ESG disclosure introduces a special human rights due diligence and reporting obligation for all companies with their registered office, central administration or principal place of business in Switzerland regardless of their size that (i) import or process tin, tantalum, tungsten, or gold containing minerals or metals from conflict or high-risk areas (conflict minerals) or (ii) offer products or services giving rise to a justified suspicion that they were manufactured or provided using child labour are required to conduct due diligence and to report annually on their due diligence activities.

These obligations are also subject to the same criminal liability (fines up to CHF100,000) and are anticipated to be

applicable at the same time (ie 2022, with a report to be published in 2023 covering the financial year 2022) as the other ESG requirements.

### Special transparency rules for commodity companies

Further, independently from the ESG disclosure mentioned above and as part of the corporate law reform mentioned before, new ESG-related transparency rules for certain commodity companies have entered into force (new articles 964a to 964f CO). Companies that, directly or indirectly through a controlled entity, extract minerals, oils, natural gas or primary forest wood and which are subject to an ordinary audit (listed companies, companies exceeding two of the following thresholds in two consecutive financial years: i) a total of CHF20m in assets, ii) CHF40m turnover, iii) 250 FTEs on annual average, and companies that are required to prepare consolidated accounts), will have to publish a special report, approved by the board of directors, with respect to certain payments of an aggregate amount of CHF100,000 or more to governmental authorities.

Such special reports will have to be published for the financial year commencing one year after the entry into effect of the new rule, ie the first time in 2023 for financial years starting from 1 January 2022 onwards.

### Next steps regarding the new corporate governance requirements

Corporate governance requirements under the new legislation are in final shape and expected to enter into force soon, but with few exceptions, the exact date of entry into force remains to be seen and should be further observed. Swiss companies should closely follow the development of the entry into force of the corporate law reform and depending thereon, consider starting to prepare for implementation in the second half of this year. In contrast, the date of application of gender quotas is already known, but leaves sufficient lead time to prepare and consider in the context of succession planning.

With respect to the new ESG requirements in particular, we recommend the following next steps:

- Swiss companies should clarify whether they will have to publish a report on ESG matters. Those falling within the scope of the new regulations should set up or assess their current business relationship control framework. They will have to establish, to the extent not already existing, and maintain, a sound reporting process on ESG matters. Some companies in scope of the new reporting obligations on ESG matters do already publish corporate and social responsibility reports that are based on the corresponding EU directive. In such cases, an analysis should be performed to identify potential gaps regarding the requirements under Swiss law. All newly established procedures and requirements should be sufficiently documented and discussed by the governing bodies, including the board of directors.
- Further, all Swiss companies must analyse whether they trade with or process conflict minerals or offer products or services that prompt a justified suspicion of an involvement of child labour. Unless an exemption applies, which will be determined in the implementing ordinance, such companies must adhere to the additional human rights' due diligence and reporting requirements, which involves a check of their compliance by an independent expert.
- Finally, Swiss companies should analyse whether they qualify as commodity company under the new regulations, and if yes, they should prepare for the required disclosure in 2023 (covering the financial year 2022). ■