

NewsLetter

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Swiss Corporate Boards are Opened to EU and EFTA Citizens

Article 708 of the Swiss Code of Obligations ("CO") requires that a majority of the members of the board of directors of a Swiss corporation be Swiss citizens who are legally resident in Switzerland. This provision is partially incompatible with the bilateral agreement on the free movement of persons between Switzerland and the EU and its respective member states and the revised EFTA Convention. Therefore, the Federal Commercial Register (*Eidgenössisches Amt für das Handelsregister*) has issued a circular letter (*Kreisschreiben*) to the cantonal commercial register offices prescribing equal treatment with Swiss citizens for EU or EFTA citizens who are legal residents of an EU or EFTA member state.



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Requirements as to Citizenship and Legal Residence

According to Article 708, paragraph 1 of the CO, the majority of the members of a corporation's board of directors must be Swiss citizens who have their legal residence (*Wohnsitz*) in Switzerland. If the board consists of a single person,

then this requirement applies to the single director (Article 708, paragraph 2 of the CO). Furthermore, the members of the board of directors legally resident in Switzerland must have actual authority to act on behalf of the corporation, whether under joint signature authority or acting alone (single signature authority). The law's aim is to ensure that the corporation's directors are subject to civil and criminal liability for their actions, to ensure the payment of social security contributions, to improve supervision under money laundering legislation and to ensure a minimal personal connection between the corporation and its place of domicile.

Treaties with EU and EFTA

The provision of Article 708, paragraph 1 of the CO, although often criticized, survived the reform of the

Swiss corporation law in 1992. It has, however, come under renewed pressure following the entry into force on 1 June 2002 of the agreement on the free movement of persons between Switzerland and the EU and its member states (the "Free Movement Agreement") and a parallel revision of the EFTA Convention. The Free Movement Agreement and the revised EFTA Convention each explicitly contain (i) the principle of non-discrimination based on nationality and (ii) the guarantee of the right to seek and hold employment on the basis of equal treatment with Swiss citizens. Both the Free Movement Agreement and the revised EFTA Convention are directly applicable. This means that no local transitional rules are necessary and conflicting national laws are overruled by the treaties' provisions. The consequences for EU and EFTA citizens are:

- Any direct discrimination based on nationality is forbidden;
- Indirect discriminations are forbidden, i.e. any hidden form of discrimination which is linked to criteria other than nationality but which has the same result as illegal discrimination based explicitly on nationality. Indirect discrimination is allowed, however, if it is based on objective reasons which are independent of nationality and which are proportional to the legitimate governmental goal.

Equal Treatment of Citizens

On 25 July 2003, the Federal Commercial Register issued a circular letter to the cantonal commercial registers that includes directives on the future application of Article 708 CO. The German, French, and Italian versions of the circular letter can be downloaded from the Federal Office of Justice's homepage (www.ofj.admin.ch) using the link "*Handelsregister*", "*Registre du commerce*" or "*Registro di commercio*" respectively.

This circular letter states that the requirement of Swiss citizenship for membership on a Swiss corporate board

of directors is not compatible with the Free Movement Agreement or the revised EFTA Convention. It must not be applied against citizens of EU or EFTA member states and they must be treated equally in this regard with Swiss citizens.

The Federal Commercial Register does not view the requirement that a majority of the members of a corporate board of directors be legally resident in Switzerland as contrary to the principles of Free Movement Agreement or the revised EFTA Convention because the governmental goals of (i) subjecting corporate directors to civil and criminal liability for their actions and to liability for social security payments, (ii) improving supervision under money laundering legislation and (iii) ensuring a minimal personal connection between the corporation and its place of domicile are all deemed objective reasons for retaining the legal residency requirement, which is itself proportional to these governmental goals. Thus, a majority of the members of a board of directors still must be legally resident in Switzerland.

According to the circular letter, the first sentence of Article 708, paragraph 1 of the CO has to be read as follows:

- The members of the board of directors must consist of a majority of persons who are legally resident in Switzerland and who have either Swiss citizenship or citizenship of one of the member states of the EU or the EFTA.

This principle of equal treatment applies to members of the board of directors of a corporation (*Aktiengesellschaft*), a corporation with unlimited partners (*Kommandit-Aktiengesellschaft*) and a cooperative (*Genossenschaft*). Equality of treatment with Swiss citizens is only granted, however, if the EU or EFTA citizen is legally resident in one of the member states of the EU or the EFTA. Citizens of countries other than EU or EFTA member states will not be granted equal treatment regardless of where the person legally resides. The same applies if a EU or EFTA citizen is not legally resident in one of the member states.

The interpretation made by the Federal Commercial Register applies only to citizens of states which were member states of the EU or the EFTA, respectively, at the time of the execution of Free Movement Agreement or the relevant EFTA Convention amendments. These are the EU member states of France, the United

Kingdom, Ireland, Spain, Portugal, Sweden, Denmark, Finland, Germany, Austria, Italy, Greece, Belgium, Luxembourg and the Netherlands and the EFTA member states of Norway, Iceland and Liechtenstein. Citizens of countries which will become members of the EU or the EFTA in the future will not automatically benefit from equal treatment with Swiss citizens unless Switzerland concludes new treaties with the respective states.

New Rules in the Course of the revision of the limited liability company law

In its summer session of 2003, the Swiss parliament has decided that Article 708 of the CO and the corresponding provisions for corporations with unlimited partners and cooperatives should be amended. The new provisions will presumably be set out in an appendix to the revised law regarding the limited liability company (*Gesellschaft mit beschränkter Haftung, GmbH*) and will likely be consistent with the Federal Commercial Register's circular letter.

NewsLetter

The ww&p NewsLetter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this NewsLetter should seek specific advice on the matters which concern them.

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