Conflicts of interest under Swiss law

What board members need to know

Conflicts of interest in the boardroom are not rare exceptions – they are part of corporate reality. They can arise in many forms, whether that be a personal investment, a family connection or simply overlapping business roles. What matters is not their existence, but how they are recognized and managed to avoid any personal liability consequences.

With the corporate law reform of 2023, the legislation of Switzerland has taken an important step. For the first time, the Swiss Code of Obligations (CO) explicitly regulates conflicts of interest in Art. 717a CO, imposing clear duties on board members and executives. The reform underlines clearly that transparency is no longer a matter of best practice alone – it is a legal obligation.

1. Art. 717a CO: the new legal framework

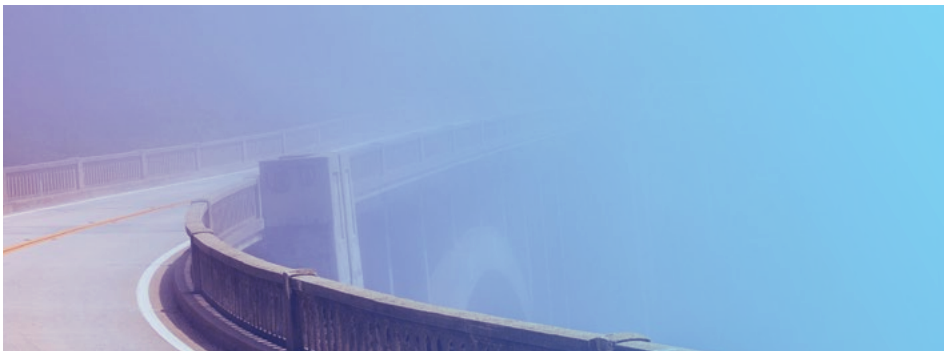
One crucial change introduced by the Swiss corporate law reform is the legal duty of board members to inform the board of directors immediately and fully of any conflicts of interest affecting them (Art. 717a CO). Previously, the duty to disclose was derived only from the general duty of loyalty set out in Art. 717 CO. Now this duty is explicitly set out in the law.

But what does this mean in practice?

"Immediately" does not simply mean "at the next convenient opportunity." A board member must speak up as soon as there is a concrete risk that a situation has moved beyond the usual background noise of everyday interests and has become relevant for the board's decision-making. The conflict does not have to be acute or irreconcilable; even potential conflicts must be disclosed once impartiality could reasonably be questioned.

"Comprehensively" must be understood in a functional sense. The disclosure should give the board a clear picture of the circumstances that create the conflict and how they might influence judgment. It is not about exhaustive detail, but about providing enough information so that the board can decide what measures are required.

In practice, this usually means that a board member makes an initial assessment when indications of a conflict appear, then discusses it confidentially with the chairperson or company secretary before formally informing the full board.



Equally important is what the law does not cover. Art. 717a CO does not impose an automatic recusal rule. Instead, it places the burden of responsibility on the board as a collective body. Once a conflict is disclosed, the board must decide how to safeguard the company's interests, whether by abstention, commissioning an independent expert opinion, seeking shareholder approval or defining other proportionate measures. The approach combines flexibility with accountability, meaning that conflicts can be managed according to their severity, but they cannot be ignored.

2. Duty of loyalty and the broader company interest

Conflicts of interest are closely tied to the board's duty of loyalty under Art. 717 CO. Board members must act in the interests of the company, not their own. Swiss law interprets this company interest broadly. It goes beyond pure shareholder value and embraces a wider stakeholder community, such as employees, customers, business partners, society and even the environment.

Against this backdrop, a conflict arises whenever the personal interests of a board member, or those of a closely related person or entity, could interfere with, or appear to interfere with, putting the company first. This can include financial interests (e.g., when a board member owns shares in a supplier or competitor); personal relationships (e.g., when a family member is being considered for a management position); or professional commitments (e.g., when a board member sits on multiple boards with overlapping business activities).

These situations are not always clear-cut. Sometimes conflicts are obvious, such as when a board member stands to benefit from a contract. Other times they are more subtle, such as when a long-standing friendship might unconsciously influence judgment. Even the appearance of divided loyalty can damage confidence in the fairness of decisions.

Not every divergence of interests, however, automatically creates a conflict. Swiss law does not demand absolute independence of board members and accepts that different interests may exist side by side. Only when these interests reach an intensity that could compromise impartial judgment does an actual conflict arise. Minor overlaps of interests – situations where a board member's role touches the matter without seriously affecting that member's judgment – do not usually trigger disclosure duties.

3. How boards can respond

While the law requires disclosure and action, it leaves the choice of measures at the discretion of the board. This flexibility makes sense, since conflicts differ in intensity and context.

In practice, boards have a toolbox of measures at their disposal, including:

- **Recusal:** the conflicted board member does not participate in the discussion or vote. Depending on the seriousness of the conflict, the board may decide that the member abstains only from the resolution itself or also from the discussion leading up to it.
- **Dual voting:** a decision is taken first with all members, and then again without the conflicted member, to ensure robustness and transparency.
- **Independent assessment:** for complex or sensitive matters, an independent expert opinion ("fairness opinion") may be obtained before the decision is taken.
- **Shareholders' meeting:** particularly significant transactions may be escalated to the shareholders for approval.
- **Special committees:** non-conflicted board members can form a committee to assess or negotiate the matter independently before reporting back to the full board.
- **Information barriers:** conflicted member's access to sensitive information may be restricted, especially in case of ongoing conflicts.
- **Persistent conflicts:** if a conflict cannot be resolved, the board may decide to ask the member to resign or not to stand for re-election at the next general meeting.

In all cases, transactions with board members, executives, controlling shareholders or related parties must always be conducted at arm's length, clearly in the interests of the company, and fully disclosed to the board. They should be approved without the participation of the conflicted parties, and if necessary, supported by an independent expert review.

The Swiss Code of Best Practice for Corporate Governance recommends that boards assess each situation in proportion to the seriousness of the conflict and actively consult the affected member when determining the right course of action. This ensures that conflicts are addressed in a way that protects the integrity of the board while safeguarding the company's interests.

4. Consequences of mishandling conflicts

The risks of ignoring conflicts are significant. Art. 717a CO does not provide penalties itself, but other provisions of Swiss law do.

If the company suffers a loss because a conflict was ignored, board members may face personal liability under Art. 754 CO. Courts often assume that undisclosed conflicts amount to a breach of duty, shifting the burden onto the board member to prove that the decision was still in the company's best interest. Where personal gain is involved, repayment may also be claimed under Art. 678 CO.

That said, civil liability cases are not easy to pursue. Often the damage only shows later, for example, a poorly negotiated contract that turns out to be disadvantageous years down the road. This makes it difficult to prove exactly how the non-disclosure caused the loss. Still, the reputational impact of such cases is often far more immediate and damaging than the legal process and liability itself.

In serious situations, criminal law may also apply. Approving a deal that clearly favors a board member or related party over the company can amount to disloyal management under Art. 158 of the Swiss Criminal Code – a criminal offence that carries personal consequences.

Ultimately, the most serious consequence may not be legal at all. Once shareholders, employees or the public believe that board decisions are tainted by undisclosed conflicts, trust evaporates. And as every board member knows, trust is the hardest currency to earn and the easiest to lose.

5. What this means for board members

With Art. 717a CO, Switzerland has placed conflicts of interest at the center of board governance. The law requires transparency and action but leaves room for judgment in each case.

For board members, the guiding principles are straightforward:

- **When in doubt, disclose.** Potential conflicts should be raised early with the chairperson or company secretary.
- **Keep it clear and precise.** The board must be able to understand the situation, not receive an overload of details.
- **Let the board decide.** Once disclosed, it is the collective responsibility of the board to choose the appropriate response.
- **Ensure documentation.** Properly recorded minutes protect both the company and the individuals involved.
- **Promote an open culture.** Boards that handle conflicts transparently strengthen trust and credibility.

Handled in this way, conflicts of interest do not weaken a board – they strengthen its legitimacy. And they provide an opportunity for board members to demonstrate what matters most: transparency, integrity and sound governance.

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