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Minder Initiative approved – what happens next?

After years of parliamentary debate and numerous indirect and direct counterproposals, the Swiss have voted in favour of the so-called “Minder Initiative” on 3 March 2013, aiming to limit excessive executive pay. The decision of the electorate has far-reaching consequences for Swiss public companies. However, it is only once the transitional regulation of the Federal Council has been issued in the next few months and, at a later stage, the implementing legislation has been passed through Swiss Parliament that the full impact can be assessed. The Initiative will therefore continue to be a topic of discussion in Switzerland for some time.

Scope of application

The Minder Initiative only applies to Swiss public limited companies listed on a Swiss or foreign stock exchange. Privately owned joint stock companies and public corporations based abroad, including those listed on the Swiss stock exchange (e.g. Newron or Gottex), are not affected.

Content of the Initiative

After the approval of the Initiative, article 95 of the Federal Constitution shall be amended with a third paragraph. This paragraph contains “*principles*” that apply to Swiss public companies listed on a Swiss or foreign stock exchange. The aim of the principles and their legislative implementation is to “*protect the national economy, private ownership and shareholders*”, whereby the implementing regulation should be “*in line with a sustainable corporate governance*”.

The principles established in the Constitution apply to the following areas:

1. The exercise of voting rights at the general meeting

At the general meeting, shareholders will vote annually on the aggregate compensation amount of the board of directors, the executive management and, where applicable, the advisory board. The chairman of the board of directors, and, individually, every other member of the board of directors and every member of the compensation committee as well as the independent proxy will be elected annually by the shareholders. Pension funds must exercise their voting rights in the interests of their insured and disclose their voting patterns. Furthermore, the shareholders are allowed to vote electronically. Representation by the corporate proxy and the depositary proxy are no longer permissible.

2. Board members

Severance or “*other*” compensation payments, advance payments and transaction incentive payments to members of the board of directors, executive management or advisory board, as well as additional consulting or employment agreements with another group company, are prohibited.

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3. Statutory regulation of compensation and employment terms

The articles of association shall include specific compensation rules for board members concerning the following items: Credit facilities, loans, post-retirement benefits as well as bonus schemes and compensation plans. Furthermore, the number of mandates of a board member outside of the group and the term of employment contracts with the executive management must be regulated.

4. Criminal sanctions

Any violation of the above-mentioned principles shall be sanctioned with imprisonment of up to three years and/or a fine of up to six times the annual compensation.

Time frame

The new constitutional provision is not directly applicable; Swiss Parliament must first adopt the respective implementing legislation. However, the Federal Council must issue implementing provisions based on the constitutional principles within a year. These implementing provisions shall then be applicable until the implementing legislation comes into force. It is expected that the adoption of the implementing legislation in Parliament will take more than a year. The Initiative would therefore transitionally come into force according to the implementing provisions of the Federal Council after one year at the latest and will have an impact on the general meetings in 2014.

To Dos

The specific To Dos for Swiss public companies can thus only be assessed once the implementing regulation of the Federal Council is known in detail; it is, however, to be expected that the regulation will follow the wording of the Initiative very closely. Specific measures should not be taken until the Federal Council has issued the implementing regulation. Need for action will exist as follows:

1. Amendment to the articles of association and organisational regulations

Organisation of the company

- Annual election of the chairman of the board of directors at the general meeting of shareholders;
- Annual individual election of the members of the board of directors and compensation committee at the general meeting of shareholders.

Compensation matters

The articles of association must contain the relevant provisions regarding:

- credit facilities, amount of loans and post-retirement benefits of board members;
- bonus schemes and compensation plans for board members;
- the number of mandates of a board member outside of the group; and
- the term of employment agreements of the executive management.

The amendments have to be resolved with the majority of votes at the general meeting unless the articles of association already request increased quorums.

2. General meeting

Say-on-pay for shareholders

The shareholders will vote annually on the aggregate compensation amount of the board of directors, the executive management and, where applicable, the advisory board.

Conduct of the general meeting

- Representation by corporate proxy and depositary proxy are prohibited;
- Election of independent proxy by the general meeting;
- Opportunity for shareholders to vote electronically;
- Obligation for pension funds to vote in the interests of their insured and to disclose their voting patterns.

3. Other relevant provisions

Ban on severance pay

Severance and "other" compensation payments, advance payments, transaction incentive payments for board members, as well as additional consulting or employment agreements with another group company will be prohibited. In particular, the term "other compensation payments" is broadly defined, thus leaving considerable room for interpretation. It will be interesting to see precisely how the Federal Council or legislative authority (and eventually the judges) will construe this vague legal term.

Delegation of management

The management may not be delegated to a legal entity.