

Wilhelm Gilliéron

AVOCATS



Auteur: Wilhelm Avocats | Le : 19 February 2017

Excessive remuneration - Is the legislator really respecting the will of the people?

On 3 March 2013, the Swiss people voted in favour of the "Minder" initiative against excessive remuneration in listed companies. Following that vote, the Federal Council had adopted an ordinance of the same name (hereinafter "ORAb") which entered into force on 1 January 2014.

Now that the law on limited companies is being revised, this is a good time for the legislator to transpose the essence of this popular initiative into a formal law. As many observers pointed out when the ordinance was being drafted, the Federal Council had not remained faithful to the text of the initiative and had taken the liberty of going even further. Now that transposition into the Swiss Code of Obligations is scheduled, we unfortunately observe the same difficulty which is dangerous to legal certainty and binding on the companies concerned.

During the consultation procedure on the preliminary draft, many voices of professional and economic associations spoke out against certain stipulations proposed by the Federal Council. They take the view that excessively binding legislation is unfavourable to the Swiss financial centre and recommend preparation of a draft which would go no further than the present provisions of ORAb. Moreover, they call for the regulatory provisions applicable to listed companies not to be extended to their unlisted counterparts.

For the record, the popular initiative focused on three major proposals: (I) making the General Meeting responsible for setting the remuneration of the corporate bodies; (II) prohibiting various allowances and other bonuses; (III) imposing a stipulation in the articles of association of the amounts of pensions, bonus plans and share-ownership plans, as well as loans granted to members of the corporate bodies (non-exhaustive list). When ORAb was drawn up, the Federal Council had taken certain liberties with transposition of the text of the initiative by sometimes emphasising or omitting certain points (on this subject see our article of 7 January 2014).

Although the Federal Council has abandoned certain additions and more stringent provisions which had initially been included in the preliminary draft, the proposal forwarded to Parliament on 23 November last takes over the main content of the ordinance. It has also taken the liberty of adding new provisions concerning in particular external mandates of the management which were not the subject of ORAb. The fears raised in our article published in 2014 have therefore proved justified.

We regret the fact that our government has not taken this opportunity to revert to the terms of the initiative. By departing from its initial text, the Federal Council is creating dissatisfaction in both camps. Among the initiators first of all with more flexible conditions for granting bonuses on recruitment and allowances for the prohibition of competition, and also among opponents in particular in respect of the provisions adopted on the subject of the remuneration report and its submission for verification by the auditors.

Some participants in the consultation procedure take the view that transposition of ORAb into a formal law is not in itself an urgent matter and, in the light of this proposal, that it would be appropriate to delay these changes. They stress the fact that, in the present economic situation, it would be more appropriate to observe the application of ORAb over a longer period before transposing it in the most appropriate possible manner. In a desire for legal certainty, they would also like to see removal of the elements which go beyond the framework of the ordinance. The main aim here is to avoid imposing new costs on companies. In the light of the elements put forward in this article, we cannot support this proposal.

Source :
<https://www.wg-avocats.ch/en/news/commercial-law/excessive-remuneration-is-the-legislator-really-respecting-the-will-of-the-people/>