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Federal Department of Justice and Police FDJP

Federal Office of Justice BJ

Private law department

Federal Office for the Commercial Register

Summary of the opinions on the preliminary draft of the regulation against rip-off

Berne, September 4, 2013

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1 Initial situation and hearing

On March 3, 2013, the people and the cantons clearly approved the popular initiative "against rip-offs".1 No later than one year after the referendum, the Federal Council must issue a new ordinance to implement Art. 95 Para. 3 of the Federal Constitution (BV)2 (Art 197 No. 10 BV). The FDJP has planned the implementation work in such a way that the Federal Council can put the ordinance into effect on January 1, 2014.3

On June 14, 2013, the EJPD opened the written hearing on the preliminary draft of the ordinance against cheating, which lasted until July 28, 2013.4 71 statements were submitted (Annex). The new ordinance should contain provisions on stock corporations with listed shares (Art. 1 et seq.) and on pension funds (Art. 22 f.). In addition, there are provisions under criminal law (Art. 24 f.) and transitional provisions (Art. 26 ff.).

2 Main Findings of the Hearing

2.1 General

The most important results of the written hearing on the preliminary draft of the ordinance against rip-offs are recorded in Sections 2.2–2.11 below.

2.2 Rapid entry into force and interpretation close to the letter

A number of participants in the hearing welcome the fact that Art. 95 Para. 3 BV is to be implemented quickly and relatively closely to the wording.5

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1 See http://www.admin.ch/ch/d//pore/va/20130303/index.html (68 percent yes votes; approval of all cantons).
2 Federal Constitution of the Swiss Confederation of April 18, 1999 (BV, SR 101).
3 FDJP media release of March 26, 2013 (http://www.ejpd.admin.ch/content/ejpd/de/home/dokumentation/mi/2013/2013-03-261.html).
4 The documents for the hearing can be found at: http://www.admin.ch/ch/d/gg/pc/past.html (2013, Federal Department of Justice and Police). See also the FDJP media release of June 14, 2013 (http://www.ejpd.admin.ch/ejpd/de/home/dokumentation/mi/2013/2013-06-141.html).
5 i.a. SVP, FDP, BDP, SPS, SwissHoldings, Treuhand/Suisse, SVIG, economiesuisse, Nestlé,

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The preliminary draft regulation fulfills the objectives of the constitutional provision; it is practical and balanced.[6]

2.3 Title and Scope

The title of the future regulation is clearly criticized. It is classified as non-factual and neutral.[7]

The relation of the ordinance to Art. 762 (participation of public corporations [in private joint-stock companies])[8] and Art. 763 (exclusion of the application of the law [company law] to public-law institutions)[9] of the Code of Obligations[10] should be specified.

Companies that are listed abroad and have relocated or will relocate their registered office to Switzerland should not fall within the scope of the Ordinance ("opting out").[11]

2.4 Election of the members of the Board of Directors

The provisions on the election of the members of the Board of Directors, the Chairman of the Board of Directors and the members of the Compensation Committee are generally welcomed (Art. 2-5, 7). The provisions are selectively criticized:

- The board of directors should be able to appoint the deputy president itself.[12]
- In the event of a vacancy, the Board of Directors should be able to determine who will be appointed as Chairman of the Board of Directors for the remaining months of the one-year term of office.[13]

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[6] i.a. Nestlé, VVP, KV Switzerland, Switzerland. Employers' association, SKPE, zCapital, Treuhand/Suisse, Actares, scienceindustries, economiesuisse, FER, Minder/Kuster, Schellenberg Wittmer.

[7] SVP, BDP, Switzerland. Employers' Association, FDP, SwissHoldings, economiesuisse, SGV, Swiss Re, ASA, CVP, scienceindustries, THK, Conference BVG, FER, BCGE, Nestlé, Bär & Karrer, Meyerlustenberger, Mosbacher.

[8] Canton of Vaud, Canton of Geneva, BLS, Romande Energie, BCGE, SIX, Bär & Karrer.

[9] Canton of Zug, Canton of Vaud, Canton of Geneva, BCV, BCGE, SIX, Bär & Karrer.

[10] Federal law of March 30, 1911 regarding the supplement to the Swiss Civil Code (Part Five: Code of Obligations; OR, SR 220).

[11] Swiss-American Chamber of Commerce, Berries & Carts.

[12] FDP, BDP, SwissHoldings, economiesuisse, Canton of Vaud, Swiss Re, Niederer Kraft & Frey, Zurich Insurance Company, Romande Energie, BCV, Bär & Karrer, Meyerlustenberger.

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- The duties and responsibilities of the Compensation Committee should be defined in the Organizational Regulations or in a compensation regulation in order to uphold the principle of parity. At most the principles should be contained in the statutes.14

2.5 Transfer of Management

Art. 6, which regulates the transfer of management to natural persons, is generally welcomed.15 Its deletion is demanded in isolated cases.16

Either the listed investment companies are to be excluded from the scope of application of the ordinance, or Art. 6 is to state that the activity of an asset or investment manager is not part of the management according to the ordinance. Art. 18 of the Collective Investment Schemes Act17 precludes a natural person from obtaining approval as an external asset manager for collective investment schemes.

2.6 Independent Proxy

There are both favorable and critical opinions on the provisions on the independent proxy (Articles 8-11); however, none of the opinions question the proposed concept as such:

- The dismissal of the independent proxy should only be possible with regard to the end of the next General Meeting.18
- If the company does not have an independent proxy, the board of directors should be able to appoint one.19
- The design of electronic remote voting ("indirect voting") is welcomed.20

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13 Economiesuisse, Zurich Insurance Company; see also Minder/Kuster, Bär & Karrer, Glanzmann, Meyerlustenberger.
14 Economiesuisse, BCGE, BCV, SwissHoldings, Minder/Kuster, Niederer Kraft & Frey, Homburger, Bär & Karrer, Meyerlustenberger.
15 SwissHoldings, Nestlé, Schellenberg Wittmer.
16 Trust/Suisse, Häusermann.
17 Federal law of June 23, 2006 on collective investment schemes (Collective Investment Schemes Act, CISA, SR 951.31).
18 Economiesuisse, science industries, Minder/Kuster, Homburger, Meyerlustenberger.
19 Minder/Kuster, Glanzmann, BCV.

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- In the case of new motions, the independent proxy should decide for himself how to vote, or theory and practice should find solutions. Art. 9 para. 2 should therefore be deleted.[21]
- The deletion of Art. 10 Para. 2 is requested. This stipulates that the independent proxy must abstain from voting if he has not received any instructions.[22]
- The granting of permanent powers of attorney is to be expressly prohibited.[23]

2.7 Approval of Rewards

The approval of the remuneration and the consequences of the rejection of the remuneration by the general meeting are clearly criticized:

- The basic authorization model according to Art. 18 Para. 1 has been criticized. In particular, the fixed and variable remuneration must be specified.[24] Due to the different periodicity of the fixed and variable remuneration, other amounts than those shown in the remuneration report are inevitably voted on.[25]
- The alternative approval model in accordance with Art. 18 Para. 3 is welcomed.[26] It is to be included in the ordinance on the basic approval model.[27]
- The regulation of the consequences of non-approval (Art. 18 Para. 2) is assessed as problematic or impractical.[28] In particular, the possibility of a second application is to be deleted.[29]

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[20] SwissHoldings, economiesuisse, Nestlé.
[21] FDP, BDP, SwissHoldings, economiesuisse.
[22] SwissHoldings, ASA, Romande Energie, scienceindustries, economiesuisse, Bär & Karrer.
[23] Less/Kester.
[24] CVP, BCV, Lenz & Staehelin, Kellerhals, Glanzmann.
[25] THK.
[26] FDP, SwissHoldings, economiesuisse, Minder/Kuster, Nestlé, Swiss Re, Niederer Kraft & Frey, Homburger, TEMENOS, Bär & Karrer, scienceindustries, Schellenberg Wittmer, THK, Lenz & Staehelin.
[27] Niederer Kraft & Frey.
[28] SwissHoldings, economiesuisse, FDP, Nestlé, Roche, Treuhand/Suisse, TEMENOS, Zurich Insurance Company, Moser-Harder, Minder/Kuster, Hermes EOS.
[29] Economiesuisse, Swiss Re, Niederer Kraft & Frey, Homburger, Fondation Ethos, TEMENOS, Actares, scienceindustries, Hermes EOS.

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2.8 Improper Compensation in the Company

The opinions on the impermissible remuneration in the company (Art. 20) turned out to be very different:

- Sign-on bonuses and excessive compensation for non-competition clauses should also be prohibited.30
- The distinction between payments in advance/signing bonuses and thus the basic admissibility of signing bonuses is welcomed;31 likewise the basic admissibility of compensation for non-competition clauses.32.
- It should be proven in detail what disadvantages a recipient of a signing bonus has as a result of changing jobs stand.33
- The regulation should contain "safe harbor clauses". These state that certain types of remuneration in particular are not covered by the Ban on severance payments.34
- The inadmissible remuneration should be described in more detail.35

2.9 Voting and Disclosure Obligations of Pension Funds

A number of participants in the hearing consider the provision on compulsory voting (Art. 22) to be sensible and easy to implement.36 Overall , however, the statements were controversial:

- The area of application (pension institutions that are subject to the Vested Benefits Act37) is partly welcomed38, partly criticized39.

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30 SPS, SGB, Swiss employees, GPS, Moser-Harder, Minder/Kuster.

31 FDP, SwissHoldings, Swiss Re, Nestlé, scienceindustries.

32 FDP, Schellenberg Wittmer.

33 Actares.

34 Economiesuisse, Homburger, Niederer Kraft & Frey, Kellerhals, TEMENOS, Zurich Insurance Company, Bär & Karrer, THK, Swiss Re, Schellenberg Wittmer.

35 SwissHoldings, Employés Suisse, Häusermann, Schellenberg Wittmer, Alcan, Treuhand/Suisse, Meyerlustenberger.

36 FDP, Switzerland. Employers' association, BVG subsistence benefit foundation, Patronal Centre, economiesuisse, Nestlé, SKPE, SwissHoldings, ASA, Bär & Karrer, Schellenberg Wittmer, FER, Arpip.

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- The waiver of an absolute voting requirement is both welcomed40 and criticized41.
- The restriction of voting requirements to directly held shares is partly welcomed42, partly rejected43.

The provision on the duty of disclosure (Art. 23) is also controversial. Some participants find the provision sensible and easy to implement.44 Others demand a detailed report on the voting behavior of the pension funds.45 In a few cases, the obligation to make annual disclosures is rated as insufficient.46

2.10 Penalty Provisions

The general penal provision (Art. 24) is heavily criticized:

- A milder penalty is required for all or at least some of the offenses contained in Art. 24 Para. 1. In some cases, there are even calls for certain facts to be deleted. The criticism is based on the principle of proportionality and the specificity requirement for criminal provisions.47

- A person should only be liable to prosecution if, for example, he pays or receives prohibited remuneration against his better knowledge.48

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37 Federal law of December 17, 1993 on vested benefits in occupational old-age, survivors' and disability benefits (Vested Benefits Act, FZG, SR 831.42).

38 ASIP, SKPE, Innovation second pillar, KGAST, PUBLICA.

39 The investment foundations and the AHV compensation fund should also be recorded: Fondation Ethos, Actares, Minder/Kuster, Häusermann. Only registered pension schemes should fall within the scope: BVG Conference.

40 ASIP, SKPE, FDP, ASA, FER, PUBLIC.

41 Fondation Ethos, GPS, Actares, Minder / Kuster, PK-Netz, SPS, Arpip, Gebhardt, Hermes EOS.

42 KV Switzerland, SFAMA, SKPE, KGAST, ASA, PK-Netz, PUBLICA. The voting obligation should also cover shares held by a single investor fund (zCapital).

43 SGB, GPS, Minder/Kuster.

44 Economiesuisse, PUBLICA Foundation BVG Substitute Fund, Center Patronal, SGB, KV Schweiz, Switzerland. Employers' association, ASIP, SKPE, SwissHoldings, ASA, Nestlé, Bär & Karrer, PK-Netz.

45 GPS, Fondation Ethos, Actares, Minder / Kuster, Arpip.

46 Moser-Harder, Minder / Kuster.

47 CVP, BDP, Federal Public Prosecutor, Procureur général Vaud, economiesuisse, SwissHoldings, Treuhand/Suisse, Roche, Swiss Re, Niederer Kraft & Frey, Homburger, Bär & Karrer, scienceindustries, Schellenberg Wittmer, Lenz & Staehelin, Glanzmann, Meyerlustenberger, Häusermann.

48 Economiesuisse, Swiss Re, Homburger, TEMENOS, Meyerlustenberger.

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- Only a few participants in the hearing consider the prison sentences in the preliminary draft to be unconstitutional.[49]
- The concept of annual remuneration in Art. 24 Para. 2 is too imprecise.[50]

The milder penal norm for the pension funds is welcomed.[51] However, Art. 25 is sometimes considered to be too strict and not differentiated enough[52], partly classified as insufficient[53] .

2.11 Transitional Provisions

No fundamental criticism was made regarding the transitional provisions (Articles 26-32). Some of the transitional periods are classified as too short or too long.[54] It is occasionally stated that the various periods of the transitional provisions are not yet sufficiently coordinated.[55]

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[49] SVR, Swiss Re, Baer & Karrer.
[50] KSBS, Attorney General Vaud, Häusermann.
[51] CVP, Swiss Employees, ASIP, Innovation zweite Säule, Center Patronal, FER, PUBLICA.
[52] SGB, KV Schweiz, PK-Netz, Arpip, Prévoyance.ne.
[53] Less/Kester.
[54] i.a. economiesuisse, SwissHoldings, Minder/Kuster, BVG Conference, Publica, Bär & Karrer.
[55] Schellenberg Wittwer.

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3 Appendix: List of the 71 participants in the hearing

Political parties represented in the Federal Assembly

BDP (Civil Democratic Party of Switzerland)
CVP (Christian Democratic People's Party)
FDP (FDP.The Liberals)
GPS (Swiss Green Party)
SPS (Swiss Social Democratic Party)
SVP (Swiss People's Party)

All-Swiss umbrella organizations of the economy

economiesuisse (Association of Swiss Companies)
KV Switzerland (Commercial Association Switzerland)
Swiss Employers Association
SGB (Swiss Confederation of Trade Unions)
SGV (Swiss trade association)

Other interested organizations/hearing participants

Actares (shareholders for sustainable business)
Alcan (Alcan Holdings Switzerland AG)
Arpip (Association of staff representatives in provident institutions)
ASA Swiss Insurance Association

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ASIP Swiss Pension Fund Association
Baer & Karrer Lawyers
BCGE (Cantonal Bank of Geneva)
BCV (Cantonal Vaudoise Bank)
BlackRock Investment Management (UK) Limited
BLS AG
federal prosecutor
BX Berne eXchange (Bern Stock Exchange Association)
Employer Center
Swiss employees
FER (Federation of French-speaking businesses)
Ethos Foundation (Ethos – Swiss Foundation for Sustainable Development)
Gebhardt Peter
Glanzmann Lukas (Baker & McKenzie Switzerland)
Hauserman Daniel
Hermes EOS (Hermes Equity Ownership Services Limited)
Homburger AG
Innovation second pillar
Canton of Geneva
Canton of Vaud
Canton of Zug
Kellerhal's attorneys
KGAST (Conference of Directors of Investment Foundations)

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Conference BVG (conference of the cantonal BVG and foundation supervisory authorities)
Conference of cantonal justice and police directors
KSBS (Conference of Law Enforcement Authorities of Switzerland)
Lenz & Staehelin
Minder Thomas/Kuster Claudio (co-initiators of the popular initiative "against rip-off")
Mosbacher Esra
Moser-Harder Brigitta (co-initiator of the popular initiative "against rip-off")
Nestlé SA
Niederer Kraft & Frey AG
PK network 2nd pillar
Prévoyance.ne (Public Service Pension Fund of the Canton of Neuchâtel)
Attorney General of the Canton of Vaud
PUBLICA (federal pension fund)
Roche (F. Hoffmann-La Roche AG)
Romande Energie SA
Schellenberg Wittmer AG
scienceindustries (business association chemistry pharma biotech)
SIX Swiss Exchange AG
SKPE (Swiss Chamber of Pension Fund Experts)
BVG Substitute Fund Foundation
SVIG (Swiss Association of Investment Companies)
SVR (Swiss Association of Judges)
SFAMA (Swiss Funds & Asset Management Association)

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Swiss Re AG
Swiss-American Chamber of Commerce (inkl. ACE Limited; Allied World Assurance Company, Ltd; Foster Wheeler AG; Garmin Ltd., Pentair Ltd.)
SwissHoldings
TEMENOS Group AG
THK (Trustee Chamber Swiss Chamber of Auditors and Tax Experts)
Trust/Suisse
VVP (Association of Management Experts for Employee Benefits)
zCapital AG
Zurich Insurance Company Ltd