Voters reject popular initiative to tighten responsibilities of Swiss-based companies

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Introduction

On 29 November 2020 Swiss voters rejected a popular initiative that aimed to tighten the responsibilities of Swiss-based companies with respect to their global activities. One key element of the initiative was the introduction of a legal obligation on Swiss-based multinationals to respect international environmental standards in all of their business activities worldwide, combined with principles for its enforcement (for further details please see "Environmental responsibility of Swiss-based companies and related popular initiative").

Objectives of Responsible Business Initiative

The Responsible Business Initiative focused primarily on companies' obligation to respect human rights in all of their business activities in Switzerland and abroad. Thereby, it qualified environmental law as the third generation of human rights (ie, the right to a safe, healthy and sustainable environment). The initiative aimed to:

- introduce a general principle into the Constitution, according to which the confederation would have to take measures to strengthen the respect for human rights and the environment in the Swiss economy;
- introduce a duty of diligence of Swiss-based multinationals with respect to international environmental standards, combined with principles for its enforcement (by developing an environmental management system to monitor the environmental impacts of business activities);
- introduce an obligation to provide transparent information on the measures taken in case of a violation of environmental standards;
- cover all affiliates of a group of companies, as the duty of diligence would have applied to any domestic and foreign controlled undertaking of a Swiss-based company;
- introduce a right for victims of any violation to claim damages from Swiss-based companies before the Swiss courts (ie, Swiss-based companies would be liable for the misconduct of foreign subsidiaries or economically dependent suppliers); and
- introduce enforcement measures consisting of damage compensation claims and further measures to stop existing and prevent future violations of the abovementioned standards.

Parliament's counter-proposal

Both the federal government and Parliament considered the initiative to be too far reaching, particularly with respect to the proposed introduction of an extensive form of liability for Swiss-based companies for any foreign subsidiaries or economically dependent suppliers. Therefore, Parliament has presented a counter-proposal that is supported by the federal government and has the following key elements:

- A new reporting obligation is proposed for companies of public interest with respect to non-financial matters involving:
    - the environment;
    - social and employment issues;
    - human rights; and
    - corruption.

  These obligations shall apply to listed companies and financial institutions (eg, banks and insurers) of a certain size (with at least 500 full-time employees and either assets of Sfr20 million or revenues of Sfr40 million in two subsequent business years).

- New due diligence and reporting obligations are proposed for all Swiss-based companies (not only companies of public interest) which import or process certain minerals from conflict regions and exceed certain import or processing amounts. The due diligence obligations shall also apply to Swiss-based companies which offer products or services where child labour is suspected.
- Foreign subsidiaries and economically dependent suppliers shall be liable before a foreign court, as under the current legal regime.
- Swiss companies shall not be liable for the misconduct of foreign subsidiaries or economically dependent suppliers.
- A failure to comply with the reporting obligations shall be a criminal offence. Companies shall incur a fine up to Sfr100,000 in cases of intentional non-compliance and up to Sfr50,000 in cases of negligence.

As this was an indirect counter-proposal, it has not been submitted to voters. Rather, it became relevant because the original initiative was rejected. The counter-proposal will enter into force if no referendum is held within the 100-day deadline.

A referendum is not expected and it is likely that the counter-proposal will enter into force in 2021 or 2022. Compliance with the new rules is required as of the business year starting one year after the new rules enter into force.

Comment

The scope of the counter-proposal is clearly defined, so voters know exactly what is coming if it enters into force.

In contrast, the initiative was not self-executing. The constitutional text of the initiative set out certain framework conditions, requirements and consequences. However, it did not define the scope of applicability of the new rules precisely enough and the legal consequences remained too vague to allow individual companies to act accordingly. Therefore, specifications by the legislature would have been required – for example, to define thresholds to determine which companies were considered 'small' and 'medium' and to define the new obligations of the concerned companies. Against this background, both the implementation and the consequences of the initiative were not entirely foreseeable for voters.

While the initiative was adopted by a small majority of voters, it was rejected by a considerable majority of the cantons. As a result, the initiative was rejected because a majority of both the voters and the cantons was required for it to pass. This led to a discussion of whether the requirement of a double majority of voters and cantons is appropriate. Arguably, it is appropriate because it creates an important balance between heavily and lightly populated cantons and ensures that smaller cantons are not regularly outvoted. Regardless, any attempt to abolish the double majority requirement would likely fail because such an initiative would also require a double majority of voters and cantons to accept it.

Another important discussion that is now required relates to the tax privileges of non-governmental organisations (NGOs). In contrast to political parties and interest groups, NGOs are considered non-profit organisations and benefit from tax privileges. The heavy political involvement of NGOs in initiatives such as the Responsible Business Initiative and the costs invested in the political campaign raise the question of whether this is compatible with their tax privileges. For example, political parties do not benefit from tax privileges because they do not pursue public interests, but rather the interests of their members. Such unequal treatment is questionable, especially if the political engagement of certain NGOs is a considerable part of their overall activities.

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