



October 23, 2020

November 29: Good intentions – wrong solution

Vote “No” to the Corporate Responsibility Initiative! Enable the indirect counter-proposal to enter into effect.

On November 29, Swiss voters will go to the polls to vote on the “Initiative for Responsible Companies – for the protection of people and nature”. This initiative was initiated four years ago by some 120 NGOs who on a daily basis do a lot of good around the world in favor of people and nature. This initiative, however, is misguided at best, but in all likelihood dangerous for all concerned; the people in developing countries, the citizen of Switzerland and all companies based in Switzerland who provide jobs and finance our social systems. The initiative would amend the Swiss constitution with a demand that Swiss companies be held accountable for human rights and environmental misconduct abroad. So far the initiators would have my vote.

What is the problem with this initiative?

The overwhelming majority of Swiss companies carry on exemplary engagements around the world. They are regularly mentioned as some of the most diligent and ethical companies. They would now all be held hostage by an initiative wrought with misconstruction

- **Scope of liability** goes way beyond the individual company to include all independent subsidiaries, joint ventures, important suppliers and sub-suppliers along the entire value chain. In other words: Swiss companies become liable for companies abroad where they have zero control.
- **Reversal of proof** is a major element of the initiative demanding that companies prove that they have done everything to avoid suspected human rights and environmental misconduct. The elements of the proof will then often lie with foreign government and independent companies who will have little impetus to deliver such information. In other words, the initiative demands proof from the accused who will often not be in a position to deliver such proof. “Mr. Smith, you were speeding down the highway at 200 km/h.” “No officer, that is not true.” “Well, prove it!”. Reversal of proof is not compatible with the Swiss legal system and is contrary to the old adage of “innocent until proven guilty”. This would leave companies open to extortionist fantasy accusations, leaving them the choice of paying the blackmailers or risk massive fines and shaming in public.
- **Extra-territorial application of Swiss law:** In case of lawsuits according to the initiative, a Swiss court will deliberate on the case applying Swiss law. It would disregard the sovereignty, the national laws and the courts of the country where the alleged misconduct has happened, in a process that strongly reeks of colonialism. The proponents of the initiative thus disqualify all courts and laws in such countries as incapable and corrupt. Wouldn't it be ironic that after complaining for many years about extra-territorial application of US laws, Switzerland would now do the exact same to other countries?
- **Subsidiarity of the legal forum:** In international law, local courts always take precedence. According to the initiative, plaintiffs, probably US lawyers working for NGOs, could totally bypass local courts and directly make their case in Swiss courts. Another blow to the integrity and sovereignty of foreign countries.
- **Unique liability burden:** In a world of international business, complex value chains crossing many borders, and strong competition on a global scale, Swiss companies would face an incomparable level of liability and administrative burden. This would strongly challenge such companies in the global competition.



What are the consequences of an approval of the initiative?

- 1) Many companies would terminate activities in difficult countries in Africa and Asia. Many such activities are negligible in terms of sales or profit, but they are key from the perspective of sustainability and development. Such activities include education and professional training for local people, well-paying jobs and relatively good working conditions. Terminating such activities would lead to closure or to the sale of the operations to other companies with little respect for human rights and protection of the environment. Lives of local people will take a massive hit.
- 2) Certain companies currently based in Switzerland will deem the risks as real and threatening, and they will move to other business locations.
- 3) Most companies will start planning for the future but wait for the results of the law making process and only then take decisions. But it seems rather clear that no companies will consider moving large operations into Switzerland in the meantime.
- 4) And generally, the trust of companies in a business-friendly Switzerland will take a serious hit!

What is the right way?

The Federal Council and both chambers of the Swiss Parliament have ratified an indirect counterproposal which foresees a reporting obligation by companies on environmental (incl. CO2-targets), social and employee matters, respect for human rights and anti-corruption matters in line with the European Union Directive 2014/95/EU on nonfinancial reporting. Further, the counterproposal introduces a due diligence and reporting obligation in the areas of “conflict minerals” and “child labor”, subject to review by an independent third party.

If the initiative is rejected, this law would automatically and immediately enter into effect, avoiding a long law-making process and thus improving planning certainty for the companies. It will leave everybody better off – people in developing countries, Swiss companies, the Swiss economy and the Swiss people with its expensive social system.

What needs to be done?

Please talk to your colleagues, your employees, your neighbors, your family members, anybody who is allowed to vote. Too many people take the title of the initiative at face value without knowing about the inherent “poison pills” or about the very reasonable alternative proposed by the Federal Council and both chambers of the Swiss Parliament. Ask all your contacts to read up on the details and to go vote. The polls may look unfavorable for a rejection of the initiative, but much can happen in the coming five weeks.

Thank you for your support

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