

White Collar Crime - Switzerland

Criminal liability for granting or accepting excessive compensation

Contributed by **CMS von Erlach Henrici Ltd**

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Introduction
Scope
Criminal liability
Comment

Introduction

In March 2013 Swiss voters approved a referendum against rip-off salaries, which called for constitutional rules regarding the control of executive pay and the improvement of corporate governance in Swiss listed companies (the 'fat cat initiative'). Because the initiative was not directly applicable, it required the Federal Council to adopt an interim ordinance to give its rules direct legal effect. The Ordinance against Excessive Compensation entered into effect on January 1 2014 and remains applicable until Parliament has debated and adopted a bill in order to amend ordinary Swiss legislation.

The ordinance aims to limit remuneration of executives in Swiss listed companies by improving corporate governance and giving shareholders increased influence over the amount and form of executive compensation. The new ordinance is particularly striking as it includes penal provisions and provides for the criminal liability of executives who grant or accept certain kinds of excessive compensation.

Scope

The applicability of the ordinance is limited to companies domiciled in Switzerland and (fully or partly) listed on a Swiss or foreign exchange. Private companies not listed on any exchange need not comply with the new rules on executive pay. Based on its limited scope, it is estimated that around 240 Swiss listed companies are affected by the fat cat initiative and ordinance.

Criminal liability

Pursuant to the wording of the fat cat initiative, certain violations of its rules are to be punished under criminal law with imprisonment of up to three years and a monetary penalty of up to six years of annual remuneration. However, the initiative does not say who will be criminally liable for the violations. In this regard, the ordinance provides clarification.

Prohibition of certain categories of payments

Pursuant to Article 24(1) of the ordinance, a member of the board of directors, executive board or advisory board will be criminally liable if he or she grants or accepts the following payments and thereby acts with direct unlawful intent (ie, against better knowledge):

- severance or other compensation payments when leaving the company (eg, 'golden parachutes' or other severance packages) – payments made by a Swiss listed company based on an ordinance-compliant employment contract and becoming due before the end of the contractual relationship are permissible and do not give rise to criminal liability (Article 20(1));
- pre-payments before joining a Swiss listed company (eg, 'golden handshakes' or payments made before actually starting to work); and
- bonuses for acquisitions or divestitures of subsidiaries or parts thereof by the Swiss listed company or entities directly or indirectly controlled by a Swiss listed company.

The penalty for such offences is imprisonment for up to three years and a monetary penalty of up to six years of annual remuneration. Accordingly, a perpetrator faces not only the risk of imprisonment, but also a monetary penalty.

Authors

Bernhard Lötscher



Alain Friedrich



Criminal liability for granting or accepting payments cannot be circumvented by having a group company render the payments. For the purpose of Article 24, all payments by companies directly or indirectly controlled by the Swiss listed company are considered to be payments made by the controlling company and are thus subject to the criminal provisions of the ordinance (Article 21).

Violations of corporate governance rules

Members of the board of directors are further criminally liable if, with direct unlawful intent (ie, against better knowledge), they:

- delegate management functions to another legal entity, with the exception of asset management, which can be delegated to another legal entity;
- appoint a member of the Swiss listed company's governing bodies or some other associate of the company to the shareholder to represent their voting rights at the general meeting;
- appoint a custodian to exercise the participation rights attached to the shares in the Swiss listed company; or
- actively impede the implementation of the ordinance at the company level (eg, by impeding the amendment of the articles of association as required by the ordinance).

These offences are subject to imprisonment for up to three years or a monetary penalty of up to six years of annual remuneration (Article 20(2)). Accordingly, in contrast to Article 24(1), the perpetrator is subject to either imprisonment or a monetary penalty, depending on the severity of the perpetrator's fault.

Advisers may become criminally liable

Although the ordinance provides for criminal liability of board, executive board or advisory board members only, it is possible that, based on general criminal law, professionals advising these potential perpetrators, such as consultants or lawyers, may be prosecuted for incitement or aiding and abetting. Accordingly, people advising company executives must be aware of the implications of the ordinance and need to familiarise themselves with the respective rules on executive pay.

Comment

Although, at first sight, the ordinance's criminal provisions are quite rigid and seem to put executives of Swiss listed companies under increased responsibility, their practical significance is expected to remain limited.

Whereas the initial fat cat initiative provided for criminal liability if the offences were committed wilfully, the ordinance is more lenient in this respect. Pursuant to the ordinance, criminal liability arises only if the perpetrator acts with direct unlawful intent. Direct unlawful intent requires the perpetrator to consciously grant or receive payments that are not compliant with the ordinance (Article 24(1)), or to consciously infringe particular provisions of the ordinance against better knowledge (Article 24). To become criminally liable under the ordinance, the perpetrator must thus not only regard the realisation of the act as being possible and accept such possibility, but also act against better knowledge. It is unlikely that there will be many cases in which a board member consciously acts against the provisions of the ordinance. Nevertheless, the ordinance's criminal provisions should not be taken lightly. They put the compensation of company executives under increased scrutiny and provide for a thus far unknown criminal liability of board, executive board or advisory board members for their remuneration decisions.

For further information on this topic please contact [Bernhard Loetscher](#) or [Alain Friedrich](#) at CMS von Erlach Henrici Ltd by telephone (+41 44 285 11 11), fax (+41 44 285 11 22) or email (bernhard.loetscher@cms-vep.com or alain.friedrich@cms-vep.com). The CMS von Erlach Henrici AG website can be accessed at www.cms-vep.com.

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