

# Global Business and Human Rights

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# Switzerland

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## LOCAL HUMAN RIGHTS ENVIRONMENT

Switzerland's Federal Constitution (as completely revised in 1999 and as amended from time to time) guarantees the protection of a broad set of human rights and provides a direct basis for claims in the event of violations. These fundamental rights are, in principle, not designed to govern the relationship between or the behaviour of individuals and private entities, but rather the relationship between individuals and the state. An important exception to this principle applies to the right to the equal compensation of male and female employees within private enterprises. A 2010 study commissioned by the Swiss government demonstrated that a meaningful level of economic discrimination persists in the Swiss private sector.

Switzerland is also a party to the European Convention on Human Rights. The set of human rights protected by the European Convention are directly applicable in Switzerland and rank *pari passu* with constitutional fundamental rights. As is the case with constitutionally protected rights, European Convention rights are designed to apply to state actions as they relate to private parties.

In addition, Switzerland has ratified all but one of the seven United Nations human rights conventions (the un-ratified convention being the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families). However, unlike the European Convention, the United Nations conventions cannot be directly applied in Switzerland and, therefore, do not grant individuals and legal entities direct claims against the Swiss state.

Swiss domestic laws must comply with the Federal Constitution, as well as with the European Convention on Human Rights, with the limitation that appeals may not be lodged against Federal acts for non-compliance with either the Federal Constitution or the International Conventions. Switzerland has developed an extensive body of statutory and regulatory rules that either directly or indirectly cover most aspects of human rights, and that also apply to private entities. Examples include the Gender Equality Act of 1996, the labour law legislation and an ordinance adopted in January 2010, which incorporates into domestic law the UN Convention on the Elimination of All Forms of Racial Discrimination.

Levels of compliance and enforcement of human rights in Switzerland are generally high by global standards. However, in 2009, Switzerland attracted international attention and criticism when a national constitutional referendum resulted in the prohibition of new minaret construction. In

its 2009 country report on Switzerland, the UN Human Rights Committee criticised the Swiss government for allowing the referendum proposal to be admitted for a national vote.

It is worth noting that the majority of Swiss court decisions dealing with human rights occur with reference to some form of international context. Typical examples include decisions related to asylum, extradition and the issuance of residence permits to foreign nationals. In addition, criminal proceedings that seek procedural protections are not uncommon. These include rights guaranteed in the European Convention, such as the right to be heard before an independent court. Switzerland became a member state of the UN only recently (in 2002), but has since taken an active role in UN activities intended to protect human rights on a global basis. Switzerland was actively engaged in the creation of the UN Human Rights Council in Geneva in 2006, promoting the strengthening of the tools at the disposal of this body, and sits as a member to the Council.

In 2008, Switzerland launched the 'Agenda for Human Rights' in Geneva. This body is composed of an international panel and has identified eight areas of central concern with respect to the status of human rights globally. These central concerns include, among others, the impact of climate change on human rights; migration and human rights; and health and human rights.

## **INTEREST IN GLOBAL BUSINESS AND HUMAN RIGHTS**

Public interest in the relationship between global business and human rights has grown consistently over the past several years. Following an initial focus on multinational groups, public discourse has begun to address international business activities more generally, including those carried out by the many small and medium-sized corporations which exist in Switzerland. The presence of the World Economic Forum (WEF) in Switzerland has also contributed to an increased public interest on topics related to global business and human rights. Of particular note is the fact that a large number of national and international non-governmental organisations (NGOs) have developed a strong interest in using the WEF's annual gathering in Davos as a platform to promote the adoption of human rights principles in the operation of business activities globally.

The organisation of human rights responsibilities and activities within Swiss governmental bodies is decentralised. Several independent government departments are dealing with aspects of human rights and economic matters both domestically and abroad. Although close coordination is said to exist among the relevant departments on these matters, a number of NGOs and the UN Human Rights Committee have highlighted that a unified central body would improve the impact of existing principles and mechanisms intended to support the development of human rights within global business activities. The major governmental departments dealing with human rights issues are detailed below.

Within the Federal Department of Foreign Affairs, the Directorate of Political Affairs Division IV deals with the protection of human rights in an international context and is responsible for membership of the UN

Human Rights Council and other political and diplomatic activities. This directorate is also accountable for issues relating to the responsibility of commercial enterprises in global markets and implements the UN Global Compact learning platform as it relates to Swiss corporations (including small and medium-sized enterprises). It advises companies, finances research projects and supports the increased focus of the IMF and World Bank programmes on combating poverty. The Department of Development and Cooperation, a sub-department of the Federal Department of Foreign Affairs, is engaged in improving the global human rights situation through international cooperation.

Several other sub-departments and commissions, such as the Federal Commission against Racism and the Federal Department for Health, are involved in implementing human rights in the various areas of state activities (eg, employee health and safety).

The Federal Department of Foreign Affairs has expressed a clear view regarding private commercial activities and human rights. Namely, that the business community and the state are jointly responsible for promoting human rights globally, and that compliance with human rights standards will benefit corporate economic interests and reputational development given increasing levels of consumer and stakeholder awareness of human rights issues.

Oversight of corporate social responsibility (CSR) issues, including the support of soft law for private corporations on national and international levels, is located with the State Secretariat for Economic Affairs. This body is also in charge of implementing and monitoring compliance with Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises. As part of its policy of promoting the economic interests of Swiss commercial enterprises abroad, the Swiss government reportedly excludes from its diplomatic support those companies that have been involved in corrupt practices or that possess a weak record with regards to the application of human rights and labour policy principles. However, these diplomatic policy guidelines have not been communicated publicly. The Swiss export credit agency, SERV, encourages adherence to the OECD Guidelines, but does not systematically conduct human rights impact assessments (HRIAs). With respect to government procurement contracts, the Swiss government does not require a CSR policy and annual reporting for companies to be eligible. Domestic efforts carried out by the State Secretariat for Economic Affairs include the on-going monitoring of Swiss companies with respect to CSR developments, and efforts to assist these companies in their efforts to comply with CSR guidelines (eg, the OECD Guidelines, the UN Global Compact or the International Labour Organisation Tripartite Declaration). However, the State Secretariat for Economic Affairs has emphasised that CSR compliance should remain the responsibility of private enterprise and that government intervention will be limited. As such, the State Secretariat for Economic Affairs does not intend to introduce a CSR reporting requirement for Swiss companies. In short, it appears that the policy of the Swiss government

with respect to human rights in the commercial sector is focused on active participation in international initiatives, and the promotion of soft law processes. It appears unlikely that Switzerland will take unilateral action to impose new formal rules on Swiss companies with respect to their compliance with human rights. The focus is, therefore, likely to remain on the application of existing international standards and the creation of additional information dissemination structures for Swiss commercial enterprises regarding compliance with, in particular, standards prescribed within the OECD Guidelines and the UN Global Compact.

We should mention a number of particular initiatives, which underpin the awareness of Swiss institutions and the public at large, regarding human rights issues in international business.

The State Secretariat for Economic Affairs is the administrative body that represents Switzerland's participation in the Kimberley Process, a multilateral political agreement that has established a certification system for legally mined rough diamonds. Despite the fact that the Kimberley Process is without binding effect, Switzerland has implemented certain provisions supporting the concept of the Kimberley Process in its customs laws and regulations. These provisions ban the import of non-certificated rough diamonds in Switzerland. Recently, the question of whether serious human rights abuses shall in fact preclude a Kimberley Process certification has caused controversy with respect to diamonds mined in Zimbabwe's Marange fields, where allegations of serious human rights abuses have been made repeatedly by international organisations. This matter is of particular relevance for Switzerland since the customs free ports in Zurich and Geneva are important for the international diamond trade and contain substantial inventories of rough diamonds.

Other recent developments include national funding for the creation of the Swiss Competence Centre for Human Rights, which is due to open in 2011. This new centre will combine the efforts in human rights related research activities of the universities of Bern, Fribourg, Neuchâtel and Zurich. Currently, the University of Zurich runs its own Competence Centre for Human Rights, as well as a Centre for Corporate Responsibility and Sustainability. The aims of the Zurich centre include the coordination of research, academic doctrine and transfer of knowledge. The objective of the national centre will be to bring such activities into a single, centralised academic institution. In addition, the Swiss government appears supportive of the work of the Special Representative, Professor John Ruggie, and is in favour of an extension of his mandate.

Switzerland is host to a relatively large number of NGOs. Of particular note is MultiWatch, an umbrella organisation for NGOs, political parties and labour unions in Switzerland, which monitors the CSR record of multinational corporations domiciled in Switzerland. MultiWatch is a member of the European Coalition for Corporate Justice, which is supported by several member states of the European Union, and which is engaged in the development of internationally agreed standards on CSR. Human Rights Watch is also represented in Switzerland with advocacy committees

in Geneva and Zurich, and Amnesty International maintains offices in Berne and Zurich. The Berne Declaration issues an annual statement and award that coincides with the World Economic Forum's annual meeting in Davos. The Berne Declaration's Public Eye Award highlights corporations that stand out for their poor CSR performance.

Finally, an increasing number of Swiss multinational corporations have openly acknowledged the importance of complying with global human rights standards in their international business operations. The pharmaceutical manufacturer Novartis can be considered a leader in the implementation and monitoring of business practices that comply with human rights, and in providing transparent insights into its activities in these areas. Novartis has published its Guidelines on Human Rights and the Novartis Guidelines on Third Party Management. In addition, Novartis has implemented the Human Rights Compliance Assessment Tool (developed by the Danish Institute for Human Rights) into its internal corporate monitoring processes. In a joint initiative with the UN Global Compact and the Office of the UN High Commissioner for Human Rights, Novartis also launched a corporate programme named Business Leaders Initiative on Human Rights, which has resulted in the creation of an online tool called the Guide for Integrating Human Rights into Business Management. Swiss Re is another Swiss multinational firm that has exhibited an early and consistent commitment to human rights compliance in the conduct of business. ABB has also demonstrated a strong commitment to human rights compliant business activities that includes monitoring the business activities of its suppliers and third party contractors.

## **CORPORATE AND DIRECTORS' DUTIES**

Swiss law does not include any provisions that specifically entail a duty to comply with international human rights standards that are not currently reflected in domestic legislation or that are directly applicable to private entities.

In general, the fiduciary duties of directors of Swiss corporations oblige directors to act in the best interests of the company and to adhere to the corporate duties of care and loyalty. Corporate interests, as such, are not limited to shareholders' interests, and include the interests of other stakeholder groups such as employees, customers, suppliers, and communities affected by the company's business operations. In situations where the interests of the various stakeholder groups diverge, economic considerations most frequently become the predominant decision making factor.

The corporate duty of care includes the obligation to establish and monitor corporate compliance systems. A specific element of this obligation includes the duty of reasonable assurance that the corporation is in compliance with all applicable legal provisions in any jurisdiction where business is conducted.

To the extent that specific human rights elements are not translated into national legislation which is binding upon Swiss corporations (including the places of their business activities), the adherence to human rights principles



lies within the discretion of corporate directors. However, these directors are bound to act in the best interests of the company, as described above. Although this topic is new and untested in Swiss courts, the obligation to act in the best interests of the company may imply the requirement to adhere fully to generally accepted human rights principles. To the extent that adherence to human rights principles enhances a company's reputation and therefore contributes to its overall success, compliance with human rights standards may be deemed to represent a component of the duty to act in the company's best interests. Conversely, should human rights be violated within the sphere of influence of a corporation due to the breach of the directors' duty, and result in a significant decrease of the company's share price, a claimant could attempt to hold directors liable. However, we are not aware of such claims being lodged to date. In practice, it appears that Swiss corporations pay an increasing level of attention to the benefits of human rights compliance and, likewise, seem to be aware of the significant potential costs of non-compliance. The duty of care (as in the case of ABB) appears to have lead corporate directors to the conclusion that compliance with human rights standards should be extended to the business practices of suppliers and other relevant business partners. This strikes us as a reasonable step, where business activities have been outsourced to third party suppliers in areas where the track record of compliance with human rights is notoriously poor.

Directors are subjected to a general duty of care that is based on Swiss corporate law and which requires a director to act diligently and to be competent in their position. Courts allow for a broad range of discretion with respect to the decision making of directors (ie, the business judgement rule) and will only assume a violation of the directors' duty of care in cases where this range of discretion is demonstratively exceeded. In situations where the board of directors has delegated certain of its responsibilities to executive management or a third party, the duty of care is limited to the proper selection, instruction and monitoring of such delegates of the board. As indicated above, the proper instruction and monitoring may need to include compliance with generally accepted human rights principles, if the business activities are particularly exposed to potential violations of human rights. It is important to note here that, despite the fact that directors are elected by the general meeting of shareholders, Swiss corporate law stipulates that all directors' duties are owed to the corporation as such. However, the right to claim damages in the event of a violation of such duties is not only granted to the corporation but also to shareholders and extends, in certain instances, to creditors.

There are no specific legal provisions which oblige directors to conduct HRIAs of corporate operations. Any requirement to conduct such an assessment as part of the general duty of care of directors and risk management obligations would depend on the particular characteristics of the business operations in question. One may assume that a duty exists to examine and regularly monitor human rights compliance of the corporation within an existing risk management system when, for instance, the corporation in question is active in the textile industry and maintains

production facilities in Asia, or for companies active in an extractive industry with operations on the African continent. There is no generally accepted standard regarding how HRIAs should be conducted by Swiss corporations. A limited number of corporations, including Novartis and Swiss Re, have posted their respective policies on their corporate websites, providing a nascent degree of guidance in this matter.

Corporations with strong human rights records do appear to possess an advantage in the labour market when recruiting best-in-class candidates. Likewise, direct or indirect human rights violations by corporations have become a significant reputational risk for Swiss companies, irrespective of the jurisdiction in which such violations occur. This may be substantially due to the increasing sensitivity to and awareness of human rights issues among the Swiss population. This evolution of awareness has led to an expanded probability that corporate violations of human rights will invite negative media coverage, advocacy campaigns by NGOs and consumer boycotts. Thus, in addition to potential legal consequences associated with human rights violations, the risks of reputational damage appear to have increased in recent years.

Swiss examples of developments in this area include Philip Morris International Inc, Metalor Technologies SA, and Nestlé SA.

In 2010, Philip Morris International, which has its headquarters in New York but maintains its operations centre in Lausanne, pledged to end human rights violations that related to migrant workers employed by its Kazakhstan tobacco suppliers.

In 2005, the Neuchâtel-based gold refining company Metalor Technologies decided to suspend purchases from its Ugandan supplier of gold ore until it was able to verify whether such ore originated from embargoed armed groups in the Democratic Republic of Congo. In both the Philip Morris and Metalor cases, reports by the NGO Human Rights Watch appear to have played a significant role in causing the offending firms to modify their practices.

In 2005, Vevey-based Nestlé was sued in the US courts, accused of using forced child labour in cocoa farms in Western Africa (Mali and Ivory Coast). This case led to public protests directed against Nestlé in the United States.

Directors of Swiss corporations are unlikely to be sued in Switzerland for a violation of fiduciary duties where the claim is based on an infringement of human rights outside Switzerland that is not directly applicable by law to a Swiss private entity.

## **CORPORATE REPORTING**

No legal obligation exists for Swiss private companies to regularly and comprehensively report on compliance with human rights, whether in their annual reports or elsewhere. However, an obligation to publish human rights related risks, or the risks associated with the conduct of operations as they relate to human rights, may apply to corporations listed on the SIX Swiss Exchange. This exchange's so called *ad hoc* publicity rules require a corporation to immediately disclose any facts with the potential to



significantly impact its share price. In certain circumstances, serious cases of human rights abuses may be deemed to be relevant facts under the *ad hoc* publicity rules.

Listed companies are required to publish an annual corporate governance report according to the SIX Swiss Exchange's Corporate Governance Guidelines. No similar requirement has been established by the SIX Swiss Exchange as it relates to the CSR or human rights records of listed companies. However, the number of corporations which voluntarily publish annual CSR reports has increased significantly in the past decade. Unfortunately, there is no generally accepted disclosure standard and, as a consequence, the information provided by these companies is usually difficult to compare, and benchmarking remains a challenge.

Despite the lack of reporting obligations and standards, private organisations do exist in Switzerland that are capable of exerting considerable influence in the area of human rights compliance. Of particular note in this regard is the foundation Ethos, which focuses on ethical, sustainable, ecological, social and sound corporate governance criteria in its asset management, proxy services and corporate dialogue activities. Among others, Ethos acts as an activist shareholder and uses its proxy service to encourage institutional shareholders to exert pressure on corporations that significantly deviate from Ethos' recommended standards. In addition to Ethos, other asset managers (eg, SAM Sustainable Asset Management AG) have raised the profile and awareness of sustainability issues in the Swiss investment community. In cooperation with Dow Jones Indexes and STOXX Limited, SAM publishes and licenses the Dow Jones Sustainability Indices product family. SAM has been active in assessing corporate sustainability performance since 1999.

No specific liabilities result from voluntary CSR or human rights reporting as a consequence of the lack of reporting obligations for Swiss companies on human rights issues. Erroneous reporting by a corporation on its human rights performance may, under certain circumstances, entail liability risks based on general unfair competition law. To our knowledge, liability risks of this type have not been tested in court.

In line with the lack of an obligation to publish reports on human rights, those companies that do so voluntarily are not subjected to a requirement for external verification. Sustainability reports of corporations that are components of the Dow Jones Sustainability Indices are routinely assessed by SAM. Several other organisations provide guidelines for CSR reporting and these are also known to assess the quality and standards of published corporate reports.

Although the practice of voluntary human rights reporting has increased in number and extent during the past decade, the overall status of such reporting is considered insufficient by a number of observers. This view appears to be based, at least in part, on the lack of generally accepted disclosure standards and the lack of external verification of CSR and human rights corporate reporting. However, there is reason to believe that the introduction of country specific reporting guidance by national exchanges could lead to

improved transparency, awareness and comparability with respect to Swiss corporations' human rights records. This view is based on the high level of corporate acceptance that occurred following publication of the SIX Swiss Exchange's Corporate Governance Guidelines. In building upon the success of the Corporate Governance Guideline, a similar approach could be applied to the development of a CSR and human rights reporting programme. The fundamental elements of this programme would likely be the application of a 'comply or explain' principle and the appointment of a competent body dedicated to monitoring the compliance of listed entities against these reporting requirements. Although non-listed companies would, of course, be excluded from reporting requirements that are set at the stock exchange level, the implementation of reporting requirements that capture the activities of many large and globally active enterprises would represent a significant step towards increased human rights transparency among Swiss businesses.

### **DERIVATIVE ACTIONS**

Each shareholder has the right to file a liability claim against members of the board and management should the company or the shareholder suffer any damages due to a violation of the directors' duties. Damages are paid to the company, except in exceptional circumstances where shareholders have suffered direct damage. The same right applies to the corporation itself. It will normally make use of such right only with respect to former board members. In the event of bankruptcy, the same claim may also be brought by any creditor of the corporation.

Available instruments with respect to performance of directors' duties are mainly of an *ex post* nature (eg, the liability claim and right to vote against the re-election or for the deselection of directors), with the exception of the shareholder's right to speak at annual meetings and in the election of new directors. In practice, major shareholders possess the factual power to exert significant influence over the performance of Swiss boards. As mentioned previously, however, the responsibility of directors of Swiss corporations remains exclusively towards the corporation and its interests.

### **INSTITUTIONAL INVESTORS**

Swiss law neither encourages nor discourages institutional investors from taking human rights into account when making investment decisions. Despite this, an increasing number of institutional investors have integrated CSR considerations into their investment guidelines. In addition, a large number of Swiss pension funds rely upon Ethos' voting recommendations with respect to general meetings.

Judging from market response, the attitude towards the UN Principles for Responsible Investing is favourable. Several large and influential Swiss banks, asset management firms and asset owners have signed the principles, including Swiss Re, Ethos, Caisse de Prevoyance du Canton de Geneve, UBS Global Asset Management, Pictet Private Bankers, Sarasin & Cie, Zürcher Kantonalbank, the Vontobel-Group and SAM's asset management arm. In addition, the Association of Swiss Pension Funds has recommended that its

members actively exercise their shareholders' rights in general, and make use of specialised proxy services, such as Ethos domestically, or ISS on an international level, in particular.

Given the socio-economic considerations applied by Swiss pension funds, we believe that the Association of Swiss Pension Funds could be encouraged to issue a blanket recommendation to its members to become signatories to the UN Principles for Responsible Investing. In addition, were more state-run pensions and social security schemes to become signatories to the UN Principles, this would increase the credibility of the Swiss government's commitment to the UN initiative.

## **SHAREHOLDER ENGAGEMENT**

The general level of votes represented at shareholders' meetings of Swiss listed companies varies between 30 and 60 per cent. This is partially due to the fact that shareholders of listed corporations are not required to disclose their identity to the company in order to become shareholders. Investors with shareholdings that are not recorded in the share register can exercise the pecuniary rights related to the shareholding, but cannot exercise the voting rights and other rights associated with the voting rights. The highly passive voting climate, which has historically prevailed in Switzerland, has changed steadily over the past decade, partially due to the growth of organisations such as Ethos and similar shareholder service groups, and the general impact of activist-oriented investment funds that have used shareholders' meetings to raise issues of concern or even endeavour to effect a factual change of control in the company.

According to Swiss corporate law, shareholders possess a number of rights that grant them the ability to engage in the affairs of the company. With respect to general shareholders' meetings, shareholders have the right to attend, vote, speak, ask questions (including the right to make statements for the record) and to make proposals with respect to any scheduled agenda item (including the right to propose individuals for election). Certain information-related rights are granted with a view to supporting, among others, claims for damages. Such rights include the right to request or inspect corporate information, the right to review the annual report in advance of the annual shareholders' meeting, and the right to propose a special audit at the shareholders' meeting.

Additional rights are granted to minority shareholders holding a substantial investment in the company. Shareholders that represent a 10 per cent interest in the company have the right to call for an extraordinary shareholders' meeting, and those investors with a stake of a nominal value of at least CHF one million may require the company to include additional items in the agenda.

Following the financial crisis of 2008-2009, and the resulting publicly expressed dissatisfaction regarding the lack of accountability of directors of certain Swiss financial institutions, proposals have been formulated to strengthen the practical application of liability claims against directors. These proposals include suggestions to introduce class action lawsuits,

reduce the financial risks of claimants and establish the right of a shareholder claimant to be compensated prior to the attribution to the corporation of the litigated damage amount.

NGOs have no particular legal privilege to engage in the affairs of Swiss corporations. Certain NGOs do choose to become shareholders in order to gain the right to speak at shareholders' meetings and will, in such cases, use this platform to criticise the business behaviour in question. NGOs have also engaged in media campaigns in the run-up to shareholders' meetings and intermittently published recommendations for shareholders regarding the exercise of their voting rights.

### **STOCK EXCHANGE INDICES**

The SIX Swiss Exchange does not publish an index that focuses on human rights or CSR in its indices family, although the exchange is involved with the global and regional Dow Jones Sustainability Indices family through its participation in STOXX. These indices do include certain Swiss corporations.

### **REGULATORY ENFORCEMENT**

The Federal Department of Foreign Affairs recently reiterated that the Swiss government's policies for protecting human rights in the context of global business activities and globalisation will continue to be conducted primarily through engagement in diplomatic dialogue, the financing of human rights related research projects and the development of instruments that will facilitate the integration of human rights matters into business activities. Apart from its willingness to use international economic sanctions in certain limited circumstances, the Swiss government clearly expressed that it has no intention of introducing legally binding rules with the objective of enforcing human rights compliant business conduct. Rather, the government emphasised that human rights principles are intended to be applied to nations and not to private entities. Despite the government's unambiguous stance regarding the limited applicability of human rights principles to private organisations, both the Federal Department of Foreign Affairs and the State Secretariat for Economic Affairs provide active support to companies that endeavour to implement human rights compliant business practices.

The Swiss National Contact Point (NCP) is lodged within the responsibility of the State Secretariat for Economic Affairs. Recently, parliamentary proposals have been heard that request improved efficiency and intensity in the monitoring activities carried out by the NCP. The Special Representative has also communicated views regarding weaknesses and areas for improvement of the Swiss NCP. The Swiss government is currently examining these alleged weaknesses.

### **LIABILITY OF SWISS INCORPORATED MULTINATIONAL PARENT COMPANIES FOR FOREIGN SUBSIDIARIES**

Under Swiss corporate law, except for very specific exemptions, parent companies may not be held liable for activities conducted at the subsidiary level, whether these are domestic or foreign. Parent companies and

subsidiaries, as opposed to branches, are independent legal entities and therefore protected by the 'corporate veil'. Swiss law, thus, generally protects Swiss parent companies from liabilities arising at the subsidiary level and includes limitations on the application of Swiss domestic law in foreign jurisdictions with laxer human rights standards. There are certain very specific circumstances under which Swiss courts have ruled that the corporate veil be lifted and a parent company be held liable for its subsidiary's activities. Such situations include cases where a parent company acts through a fully-controlled subsidiary with the express intent to avoid the applicability of certain laws, or where the parent company has created the impression of being a *de facto* director of the subsidiary.

According to principles of Swiss international private law, the courts in the parent company's domicile, and possibly other jurisdictions depending upon the nature of the claim, are generally competent to decide on legal actions brought against the parent company where these legal actions address the specific activities of the parent company.

Swiss law does not, in principle, recognise the concept of *forum non conveniens*. However, the court has the discretion to refuse to admit a case in the event that a legal action is brought before an ordinary Swiss court based on the parties' choice of jurisdiction, and in the event that there is no sufficient connection of the claim with the place of jurisdiction. Under Swiss international private law, insufficient connection is deemed to exist when none of the parties is domiciled in the respective Canton and Swiss substantive law is not applicable.

## **CLASS ACTIONS**

Swiss civil procedure does not allow for class actions. However, under certain restrictive conditions, a voluntary joinder of parties is possible. For this to occur, the actions of several claimants must be filed at the same place of jurisdiction, in the same type of procedure and with claims linked by merit or fact. While a single legal procedure exists where claimants have formed a joinder of parties, each party is considered to act on its own and in its own interests.

In administrative proceedings, civil rights organisations and other NGOs may, under certain conditions, appeal against administrative decisions in defence of collective interests they have committed to pursue. Such actions may affect private entities to the extent that the private entity was a beneficiary of the administrative decision in question.

## **SECURITIES LAW ISSUES**

Switzerland's securities law regime differentiates itself by varying prospectus requirements depending upon the transaction type. A central distinction is made between the prospectus requirements for a public offering of securities (including private companies) on the one hand, and the prospectus requirements involving a public listing of securities on the other. The prospectus requirements for a listing on the SIX Swiss Exchange are equivalent to the EU standards, whereas the disclosure obligations of the



general public offer rules are less comprehensive than in the EU. Although none of the disclosure requirements for any type of prospectus specifically require that human rights issues be addressed, all prospectuses published in Switzerland must, as a general rule, contain sufficient disclosures of material facts in order to allow for an informed investment decision. To the extent that human rights issues may be deemed a material risk to the company's business activities, it is advisable that such risks be adequately reflected in the prospectus. In the event that economic sanctions have been directed against a country in which the issuer has operations, the prospectus will usually include a list of such sanctions.

A claim for prospectus liability can be brought by a claimant against anyone who participates in the preparation of the prospectus, including the issuer, the directors and senior management of the issuer, the lead manager of the offering and other syndicate banks, as well as auditors, lawyers and other external specialists. As a general rule, a contributor to a prospectus may only be held liable for those portions of the prospectus to which they are assigned (the so-called 'expertised portions'). A court may differentiate among several defendants according to their degree of culpability and other circumstances, including their specific role in the preparation of the prospectus. This concept, including the reliance upon 'expertised portions', was upheld, in principle, by the Swiss Federal Supreme Court in a 2002 decision.

Due diligence processes that have been conducted in accordance with recognised market practices will support a defendant when attempting to demonstrate that they acted with the required standard of care.

## **PRODUCT LIABILITY ISSUES**

The prevalence of consumer product labelling has increased significantly in the past 15 years. Leaders in the use of social labels that specifically identify compliance with human rights issues are Max Havelaar Switzerland and STEP. Max Havelaar issues labels mainly for imported food and flowers, and STEP mainly for carpets and rugs. The activities of both label organisations are subsidised by the State Secretariat for Economic Affairs. Social labels often do not certify the compliance with all human rights and instead tend to focus on the prevention of child labour and labour compensation that adheres to minimum wage standards. Following on Max Havelaar's success, Switzerland's largest retailers, Coop and Migros, created their own fair trade labels (Naturaline, EngageMent).

The Swiss Association for Standardisation was involved in the development of ISO 26000; a standard that will provide guidance at an international level to corporations regarding how to integrate social responsibility into various elements of business operations, including certain aspects of corporate communications. ISO 26000 is not intended to be used for certification.

Improper or incorrect labelling is generally associated with the loss of consumer trust and the risk of expulsion from international self-regulatory organisations such as the Fairtrade Labelling Organisation. It may also lead to a liability based on general and sector specific unfair competition



provisions. The use of misleading labels may also lead to sanctions, including fines, under the Federal Act Against Unfair Competition. The right to bring a claim against a corporation for using a label in a misleading fashion may be brought by consumers who suffered damage, as well as by consumer protection organisations and certain business associations.

The Swiss Product Liability Act is limited to protect consumers against physical injury or damage to property. Both are unlikely to occur in the event of non-compliance with social labels.