

BRIEFING MAY 2024

SWISS ESG REPORTING OBLIGATIONS: KEY TAKEAWAYS AFTER 2024 AGM SEASON

With most large Swiss public companies having completed their 2024 annual general meetings and the first cycle of non-financial reporting for shareholder approval, it is an opportune time to evaluate their approach to the new Swiss ESG reporting requirements. In this briefing, we explore how these companies have implemented the Swiss ESG reporting obligations, assess shareholder reception of the non-financial reports, and identify emerging trends in this evolving landscape.

For an overview on the Swiss ESG due diligence and reporting obligations that entered into force on 1 January 2023, please see our previous briefings ([overview](#) and [selected questions](#)).

DIVERSE FORMATS AND CONTENT OF REPORTS ON NON-FINANCIAL MATTERS

After the Swiss non-financial reporting obligations as per art. 964a ff. of the Swiss Code of Obligations ('CO') entered into force in January 2023, questions arose around what the non-financial reports would look like: Should they be separate reports, as suggested by the Swiss government in its accompanying materials for the new rules? Alternatively, should they be integrated into the management report, as required under equivalent EU rules? Or could they be integrated into a more comprehensive sustainability report or annual report? Should the report on non-financial matters and (potentially required) report on due diligence regarding child labor or conflict minerals as per art. 964j ff. CO be combined or published separately? How long and detailed should the report on non-financial matters be?

While there is still no further guidance on a legal level, a review of the reports on non-financial matters that have been published with respect to the business year 2023 provides some answers: All of the above options have been applied by at least some companies. Some reports on non-financial reports were integrated into the annual report, some were part of a separate sustainability report (either as a distinct section or embedded into an existing structure), and some companies published a stand-alone report on non-financial matters – without a clear trend emerging, neither among Swiss Market Index (SMI) companies nor taking into account a larger population of companies.

In terms of content and structure, some companies followed the requirements of art. 964b CO verbatim (with sections of the report on general or business information, environmental matters, employee-related matters, social matters, respect for human rights and anti-corruption), whereas others weaved the required content into chapters and categories tailored to the company. 13 of the SMI companies provided an index to the requirements of art. 964b CO, guiding the reader to the (legally) relevant sections of the report. In our view, it is worthwhile and advisable to include such an index, since it provides shareholders with guidance on where to find the information that must be disclosed from a legal perspective.

Generally, the more closely companies followed the letter of the law (whether in a specific section of the annual or sustainability report or whether in a separate report), the shorter the respective section or report turned out. The length of the reports also varied widely, ranging from roughly 25 to over 150 pages, with many companies ending up with 80-100 pages.

To summarize, the first wave of reports on non-financial matters shows that – as long as the legal and formal requirements provided in the CO are met – almost anything is possible, and the chosen structure largely depends on the company's reporting style and culture.

VOLUNTARY LIMITED ASSURANCE REPORTS

Even though it is not required to have the report on non-financial matters audited or reviewed by an independent expert, some companies contemplated whether it would be appropriate or advisable to obtain an audit opinion or reasonable assurance from an independent audit firm. Consequently, many companies did indeed obtain an independent limited assurance report (usually from one of the big four audit firms), including 16 of the 20 SMI companies (two of which were limited to the "greenhouse gas balance" and the "CO₂ footprint", respectively).

These limited assurance reports generally concluded that based on the performed procedures and the evidence obtained, nothing has come to the attention of the auditors that causes them to believe that certain selected KPIs or sustainability criteria were not, in all material respects, prepared in accordance with the applicable criteria. The selected KPIs as well as the applicable criteria varied; only six of the SMI companies that obtained a limited assurance had included the requirements of art. 964b CO in these "applicable criteria" which were covered by the limited assurance review. Most commonly used criteria were the GRI standards and (regarding climate matters) the TCFD recommendations.

We expect that this trend will continue and that it will become "best practice" to have the report on non-financial matters reviewed by an independent expert. Some proxy advisors (including Glass Lewis and Ethos) recommend that external audits on the non-financial report be obtained. It is also likely that a requirement for external review will be introduced to Swiss law, given that the Swiss Federal Council has indicated a respective intention to align the Swiss rules with the European Corporate Sustainability Reporting Directive (CSRD).

BINDING OR CONSULTATIVE SHAREHOLDER VOTE

A controversial topic of debate (in legal literature and among companies) has further been the question of whether the shareholder vote regarding the report on non-financial matters should be positioned as a consultative vote, in analogy with the vote on the remuneration report, or whether it should be binding, as the law suggests.

Of the 18 SMI companies that already held their annual general meetings or published the respective invitation at the date of this briefing, 12 conducted (or will conduct) a consultative vote and 6 viewed the shareholder votes as binding. For other (non-SMI) companies, the split is roughly 50:50.

The Swiss proxy advisor Ethos took the position that, based on the letter of the law, the vote on the non-financial report should be binding (even though it did not recommend opposition to all proposals for consultative votes on non-financial reports). To our knowledge to date, no reports on non-financial matters have been rejected by shareholders, regardless of whether the votes were conducted as binding or consultative, and we could not identify a significant difference in approval rates. Therefore, and unless any changes in law occur or clarifications by the authorities are published, we expect that most companies will continue with the approach that they have chosen for the business year 2023. However, in view of the experience gathered during this annual general meeting season, there is in our view no reason why the shareholder vote should not be binding, as suggested by the CO.

CONSEQUENCES OF REJECTION BY SHAREHOLDERS OF THE REPORT ON NON-FINANCIAL MATTERS

The question what a company and its board of directors are required to do if shareholders do not approve the report on non-financial matters remains theoretical after this first round of shareholder votes. There has (to our knowledge) been no such rejection, and most non-financial reports were approved with

overwhelming majorities of 98% or more – even in cases where Ethos had published a recommendation to oppose the respective board proposal (which was the case for nine SMI companies and several others). However, this does not necessarily mean that reports on non-financial matters cannot be rejected by shareholders in the future.

In our view – and in line with what has been argued in legal literature – the board of directors does not have an obligation to change a rejected report on non-financial matters. This is, on the one hand, due to the lack of a legal obligation in the CO, and on the other, since it may not be evident why the report was rejected. However, such report must still remain electronically accessible for ten years as per art. 964c CO and should indicate that it has not been approved by the shareholders. We believe it is likely that a rejection would lead to significant (media) attention, given that it would mark a notable exception among the otherwise high approval rates, which would likely impact the reputation of the company.

OUTLOOK

It is anticipated that the Swiss rules on non-financial reporting will be revised soon. In September 2023, the Swiss Federal

Council announced that Swiss legislation should be further aligned with international regulations, particularly those of the EU.

The anticipated changes concern the scope of application of art. 964a ff. CO, which should be extended to companies with more than 250 employees (as opposed to the current threshold of 500 employees) and could potentially also include non-listed companies and the introduction of a mandatory independent external review for the report on non-financial matters. A respective proposal is expected in July 2024.

Many Swiss companies conducting business in EU member states will, in the coming years, also directly be impacted by EU regulations, including the Corporate Sustainability Reporting Directive (CSRD) and the Corporate Sustainability Due Diligence Directive (for further information see our [briefing on the CS3D](#)). In addition, Swiss companies may (already now) be indirectly affected by EU rules due to requests from their business partners along the supply chain to confirm compliance with those rules. Such requests are likely to increase, particularly with the staggered approach where certain groups of companies are granted longer transition periods before they become subject to the ESG-related due diligence and reporting rules of the EU and its member states.



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