

## Briefing December 2020

# After the Vote against the Swiss Responsible Business Initiative: How to Prepare for the Implementation of the Indirect Counterproposal?

On 29 November 2020, Swiss voters rejected the Responsible Business Initiative. As a result, the indirect counterproposal to the initiative will enter into force. It introduces reporting obligations on environmental, social and governance (ESG) matters for Swiss companies of public interest, mandatory human rights due diligence and reporting obligations regarding conflict minerals and child labour. As the new regulations are expected to enter into force in 2021, companies should assess their obligations and prepare to implement and enhance their ESG reporting and compliance programmes.

## Scope of the Indirect Counterproposal

After four years of debate and an intense voting campaign, Switzerland has voted against the adoption of the Responsible Business Initiative (Initiative) on 29 November 2020. For an initiative requiring a constitutional amendment to pass, it must receive both a majority of the total votes cast and support from the majority of the Swiss Cantons. While the majority of the Swiss people voted for the Initiative (50.73%), the Cantons rejected it (14.5 of 23 Cantons).

Consequently, the indirect counterproposal (Counterproposal) to the Initiative will enter into force in 2021 (or 2022 at the latest). The Counterproposal is largely based on existing EU regulation. Since a successful referendum against the Counterproposal is highly unlikely, those Swiss companies within

scope should start to prepare to comply with the additional obligations to be ready for when they take effect.

Although the Counterproposal does not introduce a new liability regime, it does set out new due diligence and reporting obligations. Furthermore, it introduces a criminal liability for violations of the reporting and record-keeping obligations.

### Non-Financial Reporting Obligations

- **Personal Scope of Application:** The non-financial reporting obligation applies to companies of public interest domiciled in Switzerland such as listed companies and prudentially supervised large companies in the financial sector that with their subsidiaries in Switzerland and abroad: (i) have an annual average at least 500 full-time employees and (ii) exceed either the threshold of CHF 20

million in assets or CHF 40 million turnover. A company will not be subject to the reporting obligation if: (i) it is controlled by another company within the scope of the new regulation or (ii) it is required to produce an equivalent report under foreign law. Compared to the Initiative, the personal scope of application is therefore considerably more limited.

- **Objective Scope of Application:** The non-financial reporting obligations are analogous to the Non-Financial Reporting Directive of the European Union (Directive 2014/95/EU). Companies that fall under the scope of the new Swiss regulation will be required to report on environmental, social, employee, human rights and anti-corruption matters (ESG Matters). The report on environmental matters must include information on emissions reduction goals and, among other things, will be required to describe the business model (if not done elsewhere, incorporation by reference seems possible to us), the overall approach applied to ESG Matters, any due diligence measures taken and their effectiveness, the main risks in connection with ESG Matters both resulting from the company's and its subsidiaries own operations and, where relevant and proportionate, also from its business relationships, products or services as well as the key performance indicators applied regarding compliance with ESG Matters. If a company does not operate in a structured way regarding one or more ESG Matters, a clear and justifiable explanation needs to be included. The report may be based on national, European or international reporting standards, in particular on the OECD guidelines for Multinational Enterprises, but companies must also ensure that their ESG report covers all requirements of the new Swiss regulation.
- **Formal Requirements:** The report on ESG Matters can be drafted in either a Swiss national language (German, French, Italian, Romansh) or in English. It must be approved by the board of directors and the shareholders' meeting like the annual financial statements, but the report must

not be audited. It must be published electronically and remain available for at least ten years.

### Human Rights Due Diligence Obligations

- **Personal Scope of Application:** In contrast to the reporting obligation on ESG Matters, the mandatory human rights due diligence obligations apply to all companies with their registered office, central administration or principal place of business in Switzerland regardless of their size that (i) import or process tin, tantalum, tungsten, or gold containing minerals or metals from conflict or high-risk areas (Conflict Minerals) or (ii) offer products or services giving rise to a justified suspicion that they were manufactured or provided using child labour. In its implementing ordinance, the Federal Council may define certain exceptions relating to low annual import volumes.
- **Objective Scope of Application:** The due diligence obligation is also largely based on EU regulation, mainly the Regulation Laying Down Supply Chain Due Diligence Obligations for EU Importers (Regulation (EU) 2017/821) and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. Swiss companies which import or process Conflict Minerals or offer products or services that generate a justified suspicion of an involvement of child labour are required to conduct due diligence regarding Conflict Minerals and child labour. Companies subject to the due diligence obligation will be required to have an adequate control system to address risks associated with Conflict Minerals and child labour that includes a supply chain policy and a system for tracking the supply chain. They will also be required to determine and evaluate the risks of adverse impacts in the supply chain, to create a risk management plan and take appropriate measures to mitigate such risks. Companies importing or processing Conflict Minerals will have to engage independent experts to verify compliance with these obligations. Note that while Conflict Minerals are defined in the Counterproposal, it does not contain a definition of child labour. Additionally, many details of the due

diligence requirement will have to be determined in the implementing ordinance by the Federal Council that is likely to follow international recognised standards, particularly the OECD Guidelines.

- **Reporting Obligation:** Companies within the scope of the mandatory due diligence requirements will have to report annually on their due diligence within six months after the end of the business year. The report must be approved by the board of directors, but unlike the report on ESG matters does not have to be submitted to the shareholders' meeting for approval. It must remain available for at least ten years. Companies offering products and services of other companies which are also subject to the reporting obligation are exempted from the reporting obligation.

#### Liability for Violations of the Reporting Obligations

- **Criminal Sanctions:** Although, the Counterproposal does not introduce a new civil liability for violations of human rights as the Initiative sought to do, which faced harsh criticism in the voting campaign, it addresses the concern of being a "law without teeth" by introducing a new criminal law provision for the violation of reporting obligations in the Swiss Criminal Code. Anyone who makes false statements in the report on ESG matters or on the mandatory human rights due diligence or fails to publish a report or who does not comply with the documentation obligations can be fined up to CHF 100'000. The fine for negligent behaviour is up to CHF 50'000. The criminal prosecuting authorities will be responsible for prosecuting violations of the new criminal provision *ex officio*.
- **Liability of the Board of Directors and the Executive Management:** The Counterproposal does not change the existing civil liabilities for companies, board members and management. Existing liability provisions, namely the liability of board members and management according to article 754 of the Swiss Code of Obligations (CO), will therefore apply if the requirements are fulfilled.

Consequently, there is theoretically speaking potential for a derivative claim if a board of directors does not instruct management to put in place all required measures and, if due to the non-existence of such measures or a poor control system, the company is for example harmed by reputational issues which lead to customers' losses. However, experience has shown that the hurdles for successful liability claims are very high.

#### The Implementation of the Counterproposal

The Counterproposal will be implemented by six new articles in the Swiss Code of Obligations (new articles 964<sup>bis</sup> to 964<sup>septies</sup> CO) and a criminal provision in the Swiss Criminal Code (new article 325<sup>ter</sup> SCC). In contrast to the Initiative, for which implementing legislation would have had to be drafted by Parliament and which could have taken several years, the legislation implementing the Counterproposal has already been adopted by Parliament in June 2020. In addition, the Federal Council will adopt an ordinance for the further implementation of the Counterproposal, in particular regarding the additional due diligence requirements regarding Conflict Minerals and child labour. According to the available information, it has not yet been determined whether the ordinance will also contain further rules regarding the reporting on ESG Matters. Given its political significance, we expect that the draft ordinance will presumably go through a formal consultation proceeding ("*Vernehmlassungsverfahren*").

We expect the entry into force of the Counterproposal in 2021 (and at the latest on 1 January 2022); it is possible that the reporting requirements on ESG Matters will come into effect as early as in Q1 of 2021. Pursuant to the applicable transitional provision, however, the new reporting obligations will only have to be observed for the first time with respect to the financial year commencing one year after entry into force of the respective provisions of the Counterproposal. Companies whose financial

year corresponds to the calendar year will presumably have to publish their first report on ESG Matters in 2023 (covering the financial year 2022).

### **How to Prepare for the Implementation**

The impact of the Counterproposal on Swiss companies is not immediate. However, they should prepare for the implementation of and compliance with the additional reporting and due diligence obligations in due course.

First, Swiss companies should clarify whether they will have to publish a report on ESG Matters. Second, those falling within the scope of the new regulations should set up or assess their current business relationship control framework. They will have to establish, to the extent not already existing, and maintain, a sound reporting process on ESG Matters. Some companies in scope of the new reporting obligations on ESG Matters do already publish corporate and social responsibility reports that are based on the corresponding EU directive. In such cases, an analysis should be performed to identify potential gaps regarding the requirements under Swiss law. All newly established procedures and requirements should be sufficiently documented and discussed by the governing bodies, including the board of directors.

Furthermore, all Swiss companies must analyse whether they trade with or process Conflict Minerals or offer products or services that prompt a justified suspicion of an involvement of child labour. Unless an exemption applies, which will be determined in the implementing ordinance, such companies must adhere to the additional human rights' due diligence and reporting requirements, which involves a check of their compliance by an independent expert.

Finally, it is to be noted that there is a new, related reporting obligation for some commodity companies as part of the additional transparency rules under the Swiss corporate law reform that will enter into force already on 1 January 2021 (new article 964a to 964f CO). Companies that, directly or indirectly through a controlled entity, extract minerals, oils, natural gas or primary forest wood and which are subject to an ordinary audit (article 727 (1) CO) will have to publish a special report, approved by the board of directors, with respect to certain payments of an aggregate amount of more CHF 100,000 or more to governmental authorities. Such special reports will have to be published in the financial year commencing one year after the entry into effect of the new rule, i.e. in financial years starting from 1 January 2022 onwards.

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