

BRIEFING JANUARY 2022

NEW ESG DUE DILIGENCE AND REPORTING OBLIGATIONS

As of January 1, 2022, the indirect counterproposal to the Responsible Business Initiative has been introduced in the Swiss Code of Obligations and a new criminal provision has been introduced in the Criminal Code. The board of directors and management of companies in Switzerland should analyse which new reporting and due diligence obligations are relevant for them, which reports they have to publish, and how they can mitigate the criminal liability risk of a breach of the reporting obligations.

INTRODUCTION

After several years of debate and an intensive voting campaign, Switzerland narrowly rejected the adoption of the so-called „Responsible Business Initiative“ in November 2020.

While the initiative was rejected, the rules in an indirect counterproposal have been introduced in the Swiss Code of Obligations (CO) on January 1, 2022. The new provisions set out new reporting and due diligence requirements in relation to ESG (environmental, social, governance) matters for many Swiss companies.

TRANSPARENCY ON NON-FINANCIAL MATTERS?

The new rules in article 964a to 964I CO require that companies of public interest domiciled in Switzerland, such as listed companies and large companies supervised by the Swiss Financial Market Supervisory Authority (FINMA), publish annual reports on ESG issues. The new reporting requirements for non-financial matters are in line with the corresponding EU Directive 2014/95/EU on reporting on non-financial aspects. Companies must account for environmental, social and employee issues, respect for human rights and the fight against corruption in their report.

The report on ESG matters can be drafted in either a Swiss national language or in English. It must be approved by the board of directors and the shareholders' meeting like the annual financial statements. However, in principle the

report does not have to be audited by an external body, such as an auditing company. The report must be published electronically and remain available for at least ten years. Companies whose financial year corresponds to the calendar year will have to publish their first non-financial matters report in 2024 for the 2023 financial year. Therefore, the year 2022 should be used to prepare: Companies that fall within the scope of the new regulations on non-financial reporting 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 within the scope of the new reporting obligations on non-financial 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.

SPECIAL REPORTING AND DUE DILIGENCE OBLIGATIONS REGARDING CONFLICT MINERALS AND CHILD LABOUR

In addition to the reporting obligations on non-financial matters, new due diligence and reporting obligations have been introduced for all companies with their registered office, head office or principal place of business in Switzerland that import or process tin, tantalum, tungsten or gold containing minerals or metals from conflict or high-risk areas (Conflict Minerals). New due diligence and reporting obligations also apply to companies that offer products or services for which there is reasonable suspicion that they were manufactured or provided using child labour.

Details are regulated in an implementing ordinance (the Ordinance on Due Diligence and Transparency in the Areas of Minerals and Metals from Conflict Areas and Child Labour, hereinafter the Ordinance). The Ordinance has been amended by the Federal Council based on the results of the consultation procedure in summer 2021. The Ordinance provides for certain exceptions to the due diligence and reporting requirements on Conflict Minerals and child labour.

Exemptions regarding Conflict Minerals	Exemptions for small import and processing quantities as well as certain exemptions for recycled metals (art. 3 and art. 12 para. 3 of the Ordinance, Annex of the Ordinance)
---	---

Exemptions regarding Child Labour	<p>With regard to child labour, companies must carry out the following assessment:</p> <ol style="list-style-type: none"> 1. Thresholds test - exemption for small and medium-sized enterprises (SMEs), art. 6 of the Ordinance: Companies that, together with the domestic and foreign companies they control, fall below two relevant thresholds (balance sheet total of CHF 20 million, sales revenue of CHF 40 million, 250 FTE on an annual average) in two consecutive business years. It should be noted that the exemption for SMEs does not apply if a company offers products and services that were obviously manufactured or provided using child labour (art. 8 of the Ordinance); 2. Risk assessment, art. 7 of the Ordinance: Assessment of the child labour risks of the countries from which products or services are sourced based on the UNICEF Children's Rights in the Workplace Index; 3. Suspicion test: If the risk assessment shows that medium or high risks exist (risk classification „enhanced“ or „heightened“ according to the UNICEF Index), a company must assess whether there is a reasonable suspicion of child labour for a specific product or service. If such review does not reveal any concrete, substantiated suspicion of child labour, the company is exempt from the due diligence and reporting obligation.
--	--

Exemptions due to compliance with internationally recognised equivalent standards	If a company publishes a report in accordance with Annex 2 of the Ordinance, it is exempt from the Swiss due diligence and reporting obligations.
--	---

Based on the criteria set out above, all companies in Switzerland must assess whether they are subject to special due diligence and reporting obligations in the area of child labour. If a company does not fall under one of the exemption provisions, it must observe special due diligence obligations and publish a corresponding report. Regarding Conflict Minerals, compliance with the due diligence obligations must be verified further by an independent expert. Based on the results of the consultation process, the Ordinance also stipulates that companies must provide for a notification procedure that allows all interested persons to express substantiated concerns regarding Conflict Minerals or child labour (art. 14 of the Ordinance).

CRIMINAL LIABILITY

With the amendment of the CO, a new art. 325^{ter} has been included in the Swiss Criminal Code. Anyone who intentionally makes false statements in the reports on non-financial matters or in the report on due diligence regarding Conflict Minerals and child labour, or fails to comply with the reporting obligation, will be punished with a fine of up to CHF 100,000. Negligent acts are punishable by a fine of up to CHF 50,000.

In our opinion, a certain materiality threshold should apply regarding false information in a report. A criminal conviction can only be justified if the false information in the report can lead to the reader of the report being given a misleading impression. In addition, it must be possible for companies to maintain business secrets in their reports. For the sake of completeness, it should be mentioned that the same penalty threat also applies to violations of the duty to maintain the reports. The cantonal criminal authorities are responsible for prosecuting the offence.

MITIGATING THE RISK OF CRIMINAL LIABILITY

Companies that are required to prepare a report on non-financial matters or a report on due diligence regarding Conflict Minerals and child labour may provide for various measures to fulfil their obligations while mitigating their risk of criminal liability. In particular, for regulated companies, a criminal conviction for violating reporting obligations would have far-reaching consequences.

Companies must establish and document a sound control framework and reporting process. All newly established procedures and requirements must be sufficiently documented and discussed by the governing bodies of the company, including the board of directors.

Even if no external audit is required for the report on non-financial matters, companies should consider providing for a voluntary audit. In particular, for a negligent act to be punishable, it is necessary that the offender, e.g., the board of directors, did not realise that he or she may have published a false report, but that he or she could have realised this if he or she had exercised due diligence. Through a voluntary audit, the governing bodies of a company can demonstrate that they acted diligently. According to current available information, various companies subject to the reporting obligations are considering having their report on non-financial matters voluntarily audited.

AUTHOR



Dr. Vera Naegeli

Partner

T: +41 58 261 55 89

vera.naegeli@baerkarrer.ch

Vera Naegeli regularly advises clients on compliance, environmental, social and governance (ESG) topics, and regarding corporate governance matters. She is experienced in international and domestic M&A transactions and in general corporate and regulatory matters. In addition, she specialises in representing companies across various industries and individuals in white collar crime, administrative criminal and regulatory enforcement proceedings.