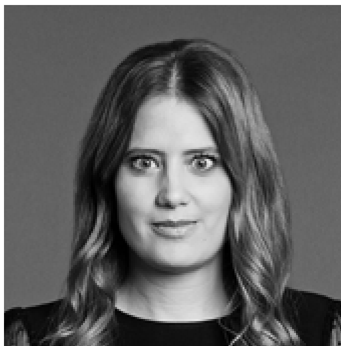
New ESG rules in Switzerland: how to mitigate the risk of criminal liability



Dr Vera Naegeli, LLM
Partner, Bär & Karrer
vera.naegeli@baerkarrer.ch

New ESG disclosure and due diligence rules

On 1 January 2022, the indirect counterproposal to the so-called Responsible Business Initiative has been introduced in the Swiss Code of Obligations (CO). The new rules in articles 964a ff. 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. Companies must account for environmental, social and employee issues, respect for human rights and the fight against corruption in their report. The new reporting requirement under Swiss law corresponds to the EU Directive 2014/95/EU on reporting on non-financial aspects. The report on ESG matters must be approved by the board of directors and the shareholders' meeting. Further, the report must be published electronically and remain available for at least ten years.

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 i) import or process tin, tantalum, tungsten or gold containing minerals or metals from conflict or high-risk areas (conflict minerals) or that ii) offer products or services for which there is reasonable suspicion that they were manufactured or provided using child labour (article 964j ff. CO). Thus, the new due diligence and reporting obligations in the area of conflict minerals and child labour apply, in principle, to every company domiciled in Switzerland. Companies in the scope of the rules must comply with due diligence requirements in their supply chain (which includes controlled entities within their own group of companies) and report thereon. While only the report on conflict minerals must be audited, both the report on conflict minerals and/or child labour must be approved by the board of directors. The report must be published electronically and remain available for at least ten years. Details on the due diligence and reporting obligations regarding conflict minerals and child labour are governed in an ordinance.

Companies will have to comply with the new disclosure and due diligence rules as of January 2023 and companies whose financial year corresponds to the calendar year will have to publish their first reports in 2024 (for the 2023 financial year.).

Special transparency rules for commodity companies

Further, independently from the ESG disclosure rules mentioned above, new ESG-related transparency rules for certain commodity companies have entered into force in 2021 (new articles 964d 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, ie meet applicable thresholds (listed companies, companies exceeding two of the following thresholds in two consecutive financial years: i) a total of CHF20m in assets, ii) CHF40m turnover, iii) 250 FTEs on annual average, as well as companies that are required to prepare consolidated accounts) have to publish a special report with respect to certain payments (in cash or in kind) of an aggregate amount of CHF100,000 or more to governmental authorities.

Such special reports will have to be published regarding financial years that have started on 1 January 2022 or later.

> **Companies must establish and document a sound control framework and reporting process. It is preferable to involve external experts for this process, especially if no proven specialists are employed by the company.**

Criminal law provisions

We believe that the new regulations can provide a valuable business opportunity and contribute to a more sustainable economy. However, a violation of the new ESG rules may not only result in civil liability and reputational damage for the company, but such violation is also subject to criminal penalties. As of January of this year, two new criminal offences have been entered into force in the Swiss Criminal Code (CC).

According to article 325bis CC a person who i) provides false information in the report on payments to governmental authorities or wholly or partly fails to make such report or who ii) fails to comply with the obligation to retain such reports for a ten-year period is liable to a fine of up to CHF10,000.

Article 325ter CC provides that a person shall be liable to a fine not exceeding CHF100,000 if he or she willfully commits any of the following acts: i) providing false information in the reports on non-financial matters, conflict minerals or child labour, failure to make such required reports or ii) failure to approve and retain such reports as required by law. If a person acted negligently, she/he shall be liable to a fine not exceeding CHF50,000.

Based on a referral rule in Swiss criminal law, which attributes criminal liability to the members of the board of directors and management if a special obligation that is incumbent on the legal entity is violated (article 29 CC), the persons who are responsible for compliance with the ESG due diligence and reporting rules are criminally liable for violations of articles 325bis and 325ter CC. While Swiss criminal law also knows the concept of corporate criminal liability (article 102 CC), a legal entity cannot be fined for violations of articles 325bis and 325ter CC, as the corporate criminal liability does not apply for contraventions punishable by fines.

In principle, anyone can file a criminal complaint for a violation of articles 325bis and 325ter CC. The cantonal criminal authorities are responsible for prosecuting the offences.

How to mitigate the risk of criminal liability

In addition to reputational damage, a conviction for a violation of article 325bis or 325ter CC may represent a possible basis for civil liability against a company and its management. Furthermore, a conviction for a violation of article 325bis or 325ter CC may lead to an entry in the criminal record of the natural person concerned and, for regulated companies, there may also be reporting obligations to supervisory authorities and potential concerns with fit and proper requirements for board members and executives in Switzerland and abroad.

Therefore, companies must first and foremost ensure that they comply with the new ESG rules and thus minimise the risk of criminal liability for their management.

Generally, companies must establish and document a sound control framework and reporting process. It is preferable to involve external experts for this process, especially if no proven specialists are employed by the company. 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 and on child labour (in contrast to the report on conflict minerals, article 16 of the corresponding ordinance), companies should consider providing for a voluntary audit. In particular, for a negligent act to be punishable, it is necessary that the offender, eg, a member of 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, some companies subject to the reporting obligations are considering having their report on non-financial matters voluntarily audited to some extent.

Finally, in our opinion, a certain materiality threshold should apply regarding false information in a report. A criminal conviction can only be justified if false information in the report can lead to the reader of the report being given a misleading impression. It is therefore particularly important that all responsible persons are aligned with the key statements of any report and confirm them. In addition, while it must be possible for companies to maintain business secrets in their reports, companies should ensure a transparent communication in that regard. ■