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## Oil, Gas & Energy Law Intelligence

### Human Rights in the Oil and Gas Trade in Switzerland - Risks and Mitigation Measures by S. Giroud and W. Martin and A. Vallélian

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# Human Rights in the Oil and Gas Trade in Switzerland - Risks and Mitigation Measures

by Sandrine Giroud,<sup>1</sup> Warren Martin<sup>2</sup> & Anton Vallélian<sup>3</sup>

## Abstract

*Business & human rights (“BHR”) is now more than a concept; it is a risk that companies must factor into their business and operation plans. This article aims to provide an overview of legal risks arising from human rights violations for companies operating in Switzerland in particular in the oil and gas sector and measures to be a step ahead and mitigate such risks. Adequate due diligence and compliance processes and contract drafting, in particular, go a long way in addressing these risks.*

## 1. Introduction

Switzerland is one of the world’s leading hubs for oil and petroleum products trading. It is also a market frontrunner in minerals, metals and agricultural products trading. Approximately 35,000 people are employed by the Swiss commodities sector which accounts for 3.8% of Switzerland’s GDP. Nearly 550 commodity trading companies are located in the country, including major market players such as Glencore, Vitol, Trafigura and Mercuria.<sup>4</sup>

Switzerland does not to have any specific BHR laws yet, but this may change in the future in view of the upcoming popular vote on 29 November 2020 on the Swiss Responsible Business Initiative (“RBI”). Meanwhile, the cornerstones of international policy on BHR remain the UN Guiding Principles on Business and Human Rights (“UN Guiding Principles”),<sup>5</sup> adopted by the UN Human Rights Council in 2011, and the 2011 OECD Guidelines for Multinational Enterprises (“OECD Guidelines”),<sup>6</sup> both of which are soft-law instruments. However, the need for a compliance system does not depend on the existence of specific Swiss regulation but on whether or not there is a risk for the company. Human rights violations have now become a risk that companies cannot ignore and in turn justifies the inclusion of BHR risks within compliance programme and contract negotiations. The risk is far from abstract, as illustrated

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<sup>4</sup> For more information on the commodities trading sector in Switzerland, see SWISS FEDERAL COUNCIL, Commodities trade, available here: <https://www.eda.admin.ch/aboutswitzerland/en/home/wirtschaft/taetigkeitsgebiete/rohstoffhandel.html>.

<sup>5</sup> UNITED NATIONS, UN Guiding Principles on Business and Human Rights, New York/Geneva, 2011, available here: [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf).

<sup>6</sup> OECD, OECD Guidelines for Multinational Enterprises, Paris, 2011, available here: <https://www.oecd.org/daf/inv/mne/48004323.pdf>.

by recent proceedings initiated in Switzerland involving Argor-Heraeus SA,<sup>7</sup> Lundin SA<sup>8</sup> and Kolmar Group AG,<sup>9</sup> or abroad involving Glencore.<sup>10</sup>

Even if the risk does not translate into the breach of a law, the mere existence of litigation, or even mere claims against the company, regardless of the final ruling, already generates substantial costs and damages for the company, including potential administrative sanctions, loss of funding, increase in operating costs, reputational damage and decline in stock performance, as notably shown by the 50% drop of BP's stock price following the Deepwater Horizon oil spill.<sup>11</sup> This should however not be surprising, as respect for human rights is increasingly becoming an expectation by the market.<sup>12</sup>

From a risk perspective, the question for Swiss trading companies is accordingly not whether or not to consider BHR in their compliance programme and contracts, but how and to what extent. The purpose of the present article is thus to provide Swiss trading companies with initial guidance to adapt their compliance programme and contracts in order to take into account BHR obligations. To do so, we first address the risks that trading companies face in terms of BHR from an international and Swiss perspective (2). We then consider mitigation measures

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<sup>7</sup> See BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, Argor-Heraeus investigation (re Dem. Rep. of Congo), 20.11.2013, available here: <https://www.business-humanrights.org/en/latest-news/argor-heraeus-investigation-re-dem-rep-of-congo/>.

<sup>8</sup> See Lundin Energy AB, Lundin Sudan Legal Case 1999-2003, available here: <https://www.lundinsudanlegalcase.com>.

<sup>9</sup> According to such complaint, Kolmar Group AG would have purchased gasoil which had been looted by a smuggling network, with the support of an armed group, at a time when Libya was torn apart by armed confrontation between rival factions. It is alleged that this would amount to pillage, a war crime under the Rome Statute of the International Criminal Court and Swiss criminal law. See TRIAL INTERNATIONAL, Smuggling of Libyan gasoil: criminal complaint filed against Swiss trader, 22.05.2020, available here: <https://trialinternational.org/latest-post/smuggling-of-libyan-gasoil-criminal-complaint-filed-against-swiss-trader/>.

<sup>10</sup> *Doe c. Apple Inc.*, U.S. District Court for the Central District of California, 2019, Docket number: 1:19-cv-03737; GLENCORE, Glencore statement on child labour allegations, 17.12.2019, available here: <https://www.glencore.com/media-and-insights/news/Glencore-statement-on-child-labour-allegations>.

<sup>11</sup> BAĞLAYAN/LANDAU/MCVEY/WODAJÓ, Good Business: the Economic Case for Protecting Human Rights, BHR Young Researchers Summit, Frank Bold, International Corporate Accountability Roundtable (ICAR), 2018, p. 41 ff., available here: [https://corporatejustice.org/2018\\_good-business-report.pdf](https://corporatejustice.org/2018_good-business-report.pdf); GLOBAL COMPACT NETWORK NETHERLANDS/OXFAM/SHIFT, Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights, 2016, p. 13, available here: [https://shiftproject.org/wp-content/uploads/2020/01/business\\_respect\\_human\\_rights\\_full-1.pdf](https://shiftproject.org/wp-content/uploads/2020/01/business_respect_human_rights_full-1.pdf); GROULX/DIGGS/REGAN/PARANÇE, Business and Human Rights as a Galaxy of Norms, Georgetown Journal of International Law, 2/2019, pp. 309 ff. and 321 ff.; BRABANT, Setting Human Rights Standards Through International Contracts, speech delivered at the UNCITRAL Regional Centre for Asia and the Pacific (RCAP) Trade Law Forum, 2016, available here: <https://www.herbertysmithfreehills.com/latest-thinking/setting-human-rights-standards-through-international-contracts>.

<sup>12</sup> SECO/FDFA IN COOPERATION WITH GLOBAL COMPACT NETWORK SWITZERLAND, Making success sustainable through Responsible Business Conduct – Human Rights Due Diligence of Swiss SMEs, Bern, 2019, p. 2, available here:

[https://www.seco.admin.ch/seco/en/home/Publikationen\\_Dienstleistungen/Publikationen\\_und\\_Formulare/Ausse-nwirtschafts/broschueren/Menschenrechtliche\\_Sorgfalt\\_Schweizer\\_KMUs.html](https://www.seco.admin.ch/seco/en/home/Publikationen_Dienstleistungen/Publikationen_und_Formulare/Ausse-nwirtschafts/broschueren/Menschenrechtliche_Sorgfalt_Schweizer_KMUs.html).

including adjustments to company's compliance management system (3) and the contracts it enters into (4).

## 2. What Are the Risks for Trading Companies in Switzerland?

Active both in Switzerland and internationally, Swiss trading companies are not only subject to Swiss domestic law, but also to foreign BHR legislations which have increasingly far-reaching effects (2.3), as well as to industry standards, BHR contractual clauses and voluntary codes and principles (2.4). We consider the Swiss political and legislative context (2.1) before analysing the relevant rules and associated risks (2.3).

### *2.1 The Swiss Political and Legislative Context*

In December 2016, the Swiss Federal Council ("SFC") adopted a National Action Plan ("NAP") revealing how the implementation of the UN Guiding Principles was to be conducted over a four-year period.<sup>13</sup> 50 policies resulted from the NAP which contributed to the advancement of human rights due diligence within Swiss companies. One with particular relevance for the oil and gas trading sector is the Swiss Federal Department of Foreign Affairs ("FDFA") and State Secretariat for Economic Affairs ("SECO") Guidance on the implementation of the UN Guiding Principles within the commodity trading sector ("Swiss Government BHR Guidance for Commodity Traders").<sup>14</sup> Adopted in 2018, following close collaboration with companies involved in commodity trading, NGOs and the Canton of Geneva, as well as the public, through public consultation, its purpose is to assist commodity trading companies in their own endeavour to convert the necessity to respect human rights into effective systems and company-wide cultures.

In January 2020, the SFC approved a revised NAP ("Revised NAP") now covering the period of 2020 to 2023.<sup>15</sup> Following on the accomplishments of the previous NAP, the Revised NAP defines the priority action as regards communication, support for business enterprises and policy coherence for the next years to come.<sup>16</sup>

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<sup>13</sup> SWISS FEDERAL COUNCIL, Report on the Swiss strategy for the implementation of the UN Guiding Principles on Business and Human Rights, Bern, 09.12.2016, available here: <https://www.news.admin.ch/news/message/attachments/48579.pdf>.

<sup>14</sup> FDFA/SECO, Commodity Trading Sector Guidance on Implementing the UN Guiding Principles, Bern, 2018, available here: [https://www.seco.admin.ch/dam/seco/en/dokumente/Publikationen\\_Dienstleistungen/Publikationen\\_Formulare/Aussenwirtschaft/Broschueren/Guidance\\_on\\_Implementing\\_the\\_UN\\_Guiding\\_Principles\\_on\\_Business\\_and\\_Human\\_Rights.pdf.download.pdf/Guidance\\_on\\_Implementing\\_the\\_UN\\_Guiding\\_Principles\\_on\\_Business\\_and\\_Human\\_Rights.pdf](https://www.seco.admin.ch/dam/seco/en/dokumente/Publikationen_Dienstleistungen/Publikationen_Formulare/Aussenwirtschaft/Broschueren/Guidance_on_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights.pdf.download.pdf/Guidance_on_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights.pdf).

<sup>15</sup> SWISS FEDERAL COUNCIL, UN Guiding Principles on Business and Human Rights – Swiss National Action Plan 2020–23, Bern, 15.01.2020, available here: <https://www.nap-bhr.admin.ch/napbhr/en/home.html>.

<sup>16</sup> SWISS FEDERAL COUNCIL, UN Guiding Principles on Business and Human Rights – Swiss National Action Plan 2020–23, Bern, 15.01.2020, p. 7.

Also in January 2020, the SFC adopted a separate revised Action Plan on corporate social responsibility for the period of 2020 to 2023.<sup>17</sup> This plan will involve various stakeholders such as academic institutions, civil society organisations and business associations, and will aim at creating further human rights due diligence policies and mechanisms while placing greater emphasis on the transparency of Swiss companies regarding their implementation of corporate social responsibility measures.

As the Swiss Government BHR Guidance for Commodity Traders sums it up: “The [Swiss] Federal Council expects companies based and/or operating in Switzerland to act responsibly in accordance with international Corporate Social Responsibility (CSR) standards and to fulfil their responsibility to respect human rights in all of their business activities, wherever they operate.”<sup>18</sup>

Meanwhile, on the legislative front, the RBI collected 120,000 signatures in less than a year and was validated by the State administration in October 2016. The RBI is a popular initiative demanding the introduction of BHR provisions into the Swiss Federal Constitution in the form of a civil liability. This would generate a cause of action against Swiss companies for abuses related to human rights and perpetrated by entities under their control in Switzerland or abroad. In 2017, the Federal Council recommended to the Parliament to reject the initiative. Following parliamentary discussions, on 9 June 2020, the Swiss Parliament however agreed on a counterproposal. The counterproposal has been deemed insufficient by the RBI Committee which refused to withdraw the RBI. The RBI will thus be submitted to the popular vote on 29 November 2020. Accordingly, when the vote takes place, Swiss voters will be faced with three alternatives: (i) the RBI; (ii) the counterproposal or (iii) the status quo.

In brief, the **RBI** proposes the following:<sup>19</sup>

- A **compulsory due diligence** to the effect that Swiss companies must identify and review the environmental and human rights risks within their operations as well as their supply chain, and respond to the risks identified by eliminating their adverse impact;
- A **civil liability** of Swiss companies for environmental and human rights violations perpetrated by themselves and entities under their control in Switzerland or abroad.

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<sup>17</sup> SWISS FEDERAL COUNCIL, Position et plan d'action du Conseil fédéral concernant la responsabilité des entreprises à l'égard de la société et de l'environnement – État de la mise en œuvre 2017-2019 et plan d'action 2020-2023, Bern, 15.01.2020, available here: [https://www.seco.admin.ch/dam/seco/en/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/CSR/csr-aktionsplan\\_2020\\_2023\\_bundesrats.pdf.download.pdf/CSR\\_action\\_plan\\_2020-2023\\_of\\_Federal\\_Council\\_french.pdf](https://www.seco.admin.ch/dam/seco/en/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/CSR/csr-aktionsplan_2020_2023_bundesrats.pdf.download.pdf/CSR_action_plan_2020-2023_of_Federal_Council_french.pdf).

<sup>18</sup> FDFA/SECO, Commodity Trading Sector Guidance on Implementing the UN Guiding Principles, Bern, 2018, p. 3.

<sup>19</sup> The official text of the RBI is published in the Swiss Federal Gazette, FF 2020 5343, 30.06.2020, available here: <https://www.admin.ch/opc/fr/federal-gazette/2020/5343.pdf>; more information on the RBI available here: <https://corporatejustice.ch/about-the-initiative/>.

The notion of “control” would be construed as a factual control instead of a legally binding control. Hence, a Swiss company may be regarded as having a certain degree of control over its supply chain and, in turn, its third-party service providers;

- A **safe harbour** protecting Swiss companies from potential civil liability for environmental and human rights violations if such companies **have satisfactorily conducted due diligence**; and
- An **exception for small and medium-sized companies**<sup>20</sup> that are considered “low risk” from an environmental and human rights perspective.

By contrast, the counterproposal proposes the following:<sup>21</sup>

- **Reporting requirements** on environmental, social, human rights and corruption risks as well as a duty of care (also including reporting requirements) in the areas of conflict minerals and child labour for (i) Swiss major financial institutions<sup>22</sup> and (ii) Swiss public benefit corporations;
- **No specific provision for liability** of Swiss companies in case of environmental and human rights violations.

Irrespective of the outcome of the vote, the existing legal framework already creates BHR obligations for Swiss companies.

## *2.2 BHR Liability in Switzerland*

As recent proceedings have shown, Swiss trading companies are already exposed to liability under Swiss law, whether corporate, tort or criminal.

### *2.2.1 Corporate Liability*

Larger Swiss companies are required to report non-financial information related to their risk profile on annual basis, which should cover human rights risks considering their potential impact on a company’s operations and value.<sup>23</sup> This is all the more so for listed companies

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<sup>20</sup> The RBI does not provide a definition of what constitutes a small and medium-sized company in Switzerland. The SECO however uses one criterion: any company, regardless of its legal status, is considered to be a small and medium-sized company if it employs less than 250 individuals. More information available here: <https://www.kmu.admin.ch/kmu/en/home/facts-and-trends/facts-and-figures.html>.

<sup>21</sup> The official text of the counterproposal is published in the Swiss Parliament’s Official Bulletin, *Objet du Conseil fédéral 17.060*, session of 30.06.2020, available here: [www.parlament.ch/fr/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=49091](http://www.parlament.ch/fr/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=49091).

<sup>22</sup> Meaning financial institutions having more than 500 employees and a balance sheet total of CHF 20,000,000 or a turnover of CHF 40,000,000 over two consecutive financial years, generated on their own or jointly with one or several Swiss or foreign companies under their control.

<sup>23</sup> Art. 961c(2)(2) SCO.

which must specifically report price-sensitive information, and thus also information as regards reputational and liability risks, to SIX Swiss Exchange (Switzerland's leading stock exchange).

Board members may also come under scrutiny. Pursuant to Art. 754(1) of the Swiss Code of Obligations ("SCO"), board members, as well as all persons involved in the management and liquidation of a limited liability company, are liable for the harm caused by the wilful or negligent violation of their duties. In this respect, Art. 717(1)1 SCO requires in particular that "board members and third parties who are entrusted with management duties must carry out their duties with due care and safeguard the interests of the company in good faith".<sup>24</sup> The duty of due care in turn commands board members to carry out their duties in accordance with the standard of quality which is contingent upon the circumstances of the case at hand and should be identified objectively against the background of what a reasonable board member would do under the same circumstances.<sup>25</sup> Accordingly, as international standards and best practice gradually include the assessment of human rights risks, directors may increasingly be exposed to potential claims in respect of incidents related to such risks.<sup>26</sup>

### *2.2.2 Liability in Tort*

Claims in tort against the company, although difficult to ascertain in the current legal framework, cannot be excluded. Human rights abuses suffered by third parties in the company's supply chain may be covered by Art. 41 SCO – the basis for tort liability – where they follow and are connected to the breach of duty by said company, which can be defined by reference to private or public standards.<sup>27</sup> In this respect, according to the Swiss government, the UN Guiding Principles are the internationally recognized reference framework on how to oblige companies to respect human rights in the State where they operate and to ensure that victims of violations are effectively compensated.<sup>28</sup> Hence, failure by a company to comply with the UN Guiding Principles could be considered, in certain circumstances, by Swiss courts as a ground for a claim in tort from individuals, entities or governments which suffered damages due to the company's violations.

Admittedly, when human rights abuses happen outside of Switzerland and/or are committed by third parties, a civil claim against a Swiss trading company is difficult to establish, in particular as regards first, jurisdiction and second, the conditions for liability. In the latter respect, for claims in tort to be asserted, factual and adequate causal link between the company's breach of the private or public standard and the damage will indeed in any case remain required – i.e. a

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<sup>24</sup> MÜLLER ET AL., *Guide pratique du conseil d'administration*, Zürich, 2019, pp. 30 ff.

<sup>25</sup> Decision of the Swiss Federal Tribunal 4A\_120/2013 of 27 August 2013, para. 3.

<sup>26</sup> BUENO, *Diligence en matière des droits de l'homme et responsabilité de l'entreprise – Le point en droit Suisse*, *Swiss Review of International and European Law*, 3/2019, pp. 346 ff. and 359.

<sup>27</sup> Decision of the Swiss Federal Supreme Court 126 III 113, para 2.

<sup>28</sup> SWISS NATIONAL COUNCIL, *Rapport de droit comparé. Mécanismes de diligence en matière de droits de l'homme et d'environnement en rapport avec les activités d'entreprises suisses à l'étranger*, Bern, 02.05.2014, p. 3, available here: <https://www.ejpd.admin.ch/ejpd/fr/home/aktuell/news/2014/2014-05-28.html>; BUENO, *Diligence en matière des droits de l'homme et responsabilité de l'entreprise – Le point en droit Suisse*, *Swiss Review of International and European Law*, 3/2019, pp. 346 ff. and 356 ff.

necessary and adequate causation link between the company's illicit action and the loss. Yet, the longer the supply chain concerned, the farther the violation, and the harder it will be for this requirement to be met in practice. However, such abuses may still amount to a breach of contract as BHR contractual clauses are becoming increasingly common<sup>29</sup> or even constitute criminal offences, which could in turn justify civil claims against the company.

### 2.2.3 Criminal Liability

A company may also be exposed to criminal liability as serious human rights violations often amount to criminal offences (theft, robbery, coercion, extortion, corruption, etc.). For trading companies in particular, trading goods or monies connected to human rights violations may constitute handling illegal goods<sup>30</sup> or money laundering,<sup>31</sup> both criminal offences under Swiss law. When extraction of oil and gas takes place in war-torn countries, the trading of such commodities may even expose trading companies to allegations of pillage under Art. 264g(1)(c) of the Swiss Criminal Code ("SCC").<sup>32</sup>

Corporate criminal liability is set out in Art. 102 SCC. It provides for a two-tier liability regime. As per Art. 102(1) SCC, a company shall be held criminally liable for any offence it has committed in the ordinary and regular course of its business if such offence cannot be attributed to any individual due to the lack of organisation of the company. Art. 102(1) SCC therefore sets forth a criminal liability of companies by default. Whereas, under Art. 102(2) SCC, a company may be held liable for organisational weaknesses (irrespective of the criminal conviction of any of its employees) and charged with a fine of up to CHF 5,000,000, if an act of bribery of a foreign official or money laundering has been committed. The offence must have been committed during the course of a usual commercial activity (concept which is subject to a broad interpretation) and, a causal link must be established between the company's lack of organisational measures and the offence in question.<sup>33</sup>

When finding a company liable, a court may further decide to order the forfeiture of the illicit assets resulting from such company's unlawful actions.<sup>34</sup> Where the assets resulting directly from the offence are not identifiable, and, in consequence, not available for forfeiture, the offending company shall pay a corresponding compensation.<sup>35</sup> As regards cases of corruption, forfeitable assets include assets which derive directly or indirectly from the offence of corruption such as (i) undue advantages received by the corrupted party or a third party and (ii) net profits generated by the contracts entered into as a result of the corruptive acts.

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<sup>29</sup> VALÉLIAN/ZULIAN, La protection des droits de l'homme dans les contrats internationaux, *Revue de l'avocat*, 10/2019, pp. 425 ff.

<sup>30</sup> Art. 160 SCC.

<sup>31</sup> Art. 305<sup>bis</sup> SCC.

<sup>32</sup> See for instance, TRIAL INTERNATIONAL, Smuggling of Libyan gasoil: criminal complaint filed against Swiss trader, 22.05.2020.

<sup>33</sup> MACALUSO, *Commentaire romand CP I*, 2009, Art. 102 CP par. 41.

<sup>34</sup> Art. 70 SCC.

<sup>35</sup> Art. 71 SCC.

Besides the risk for trading companies and their employees of being sentenced for having committed criminal offences, the investigations themselves, prior to their conviction, may result, *inter alia*, in searches at the premises of the company, freezing of the company's bank accounts and questioning of its employees by the prosecuting authorities. Hence, the reputational damage to a company may very well be already substantial at the investigation stage.

### 2.3 Liability Abroad

Given the international orientation of Swiss companies, they further cannot ignore foreign legislations which have increasingly far-reaching effects.<sup>36</sup> BHR in the following jurisdictions is of particular relevance:

- **France** and its *devoir de vigilance raisonnable* which requires companies to adopt and implement a vigilance plan including measures adequate to identify risks and prevent serious harm to human rights resulting from their activities and those of the companies they control directly or indirectly, as well as the activities of the subcontractors or suppliers with which they have an established commercial relationship. To this end, the vigilance plan, which has to be published and included in the company's mandatory reports, must contain (i) the mapping of the companies' risks, (ii) regular evaluation procedures of the companies' subsidiaries, subcontractors and suppliers, (iii) adequate actions to mitigate risks and prevent serious harm, (iv) an alert and complaint mechanism, and (v) monitoring of the implementation and effectiveness of the measures. In case of breach of these obligations, the company can be held liable for the damage that compliance could have prevented. The law applies to any company established in France which, either (i) at the end of two consecutive financial years employs 5,000 employees itself and its direct and indirect subsidiaries, the registered office of which is located on French territory, or (ii) employs at least 10,000 employees itself and its direct and indirect subsidiaries, the registered office of which is located on French territory or abroad;<sup>37</sup>
- In the **UK**, the Modern Slavery Act, that combines criminal liability with obligations to report on the measures taken throughout the company's entire supply chain. The Act's scope of application is also substantial. It applies to all companies

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<sup>36</sup> For a broad presentation of the BHR rules and regulations adopted across the globe, see GROULX/DIGGS/REGAN/PARANACE, Business and Human Rights as a Galaxy of Norms, *Georgetown Journal of International Law*, 2/2019, pp. 309 ff. and 354 ff. as well as the cases cited.

<sup>37</sup> Art. L225-102-4 and 5 of the French Code of Commerce.

that carry on business, or part of business, in the UK, supplying goods or services, and reach an annual global turnover of GBP 36,000,000.<sup>38</sup>

- In the **US**, the California Transparency in Supply Chain Act, which contains reporting obligations similar to those under the UK Modern Slavery Act and broadly applies to all retail sellers or manufacturers doing business in California, the annual worldwide gross receipts of which are in excess of USD 100,000,000.<sup>39</sup> Also from the US, one cannot ignore the US Office of Foreign Assets Control (“OFAC”), which has intensified sanctions against human rights abusers by making use of the US Global Magnitsky Human Rights Accountability Act. As an example, in July 2020, OFAC designated two individuals as well as one entity for their involvement in alleged human rights abuses in the Xinjiang Uyghur Autonomous Province.<sup>40</sup>
- At the **EU** level, the Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 includes obligations to report on the impact of the company’s activities on human rights and the main risks associated and measures adopted.<sup>41</sup> In addition, the Regulation (EU) 2017/821 lays down supply chain due diligence obligations for EU importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.<sup>42</sup> Finally, in April 2020, the EU Commissioner for Justice officially pledged for an EU initiative on compulsory Human Rights and Environmental Due Diligence and a first piece of legislation is to be expected in 2021.<sup>43</sup> Such EU legislation will undeniably introduce additional due diligence requirements on Swiss companies that may be exposed to environmental and human rights risks in Europe and elsewhere.

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<sup>38</sup> U.K. Modern Slavery Act, 2015, c. 30, see in particular Section 54. For a summary presentation of the scope of the related obligations, see UK Government, Guidance- Publish an annual modern slavery statement, 20.04.2020, available here: <https://www.gov.uk/guidance/publish-an-annual-modern-slavery-statement>.

<sup>39</sup> California Transparency in Supply Chains Act, 2010, (SB 657). See Art. 1714.43. For a summary presentation of the Act, see the State of California Department of Justice, The California Transparency in Supply Chains Act, available here: <https://oag.ca.gov/SB657>.

<sup>40</sup> U.S. DEPARTMENT OF THE TREASURY, official press releases, Washington, 31.07.2020, available here: <https://home.treasury.gov/news/press-releases/sm1073>.

<sup>41</sup> Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. See in particular Art. 1(1).

<sup>42</sup> Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. See in particular Art. 4(d). Many of the essential obligations of this instrument will only apply as from 1 January 2021.

<sup>43</sup> For more information on the EU Commissioner for Justice’s official commitment for an EU initiative on mandatory Human Rights and Environmental Due Diligence, see EUROPEAN COALITION FOR CORPORATE JUSTICE, Commissioner Reynders announces EU corporate due diligence legislation, Brussels, 30.04.2020, available here: <https://corporatejustice.org/news/16806-commissioner-reynders-announces-eu-corporate-due-diligence-legislation>.

In total, more than 80% of the economic partners of Switzerland are bound by some form of BHR obligations.<sup>44</sup> As these legislations often use unspecified terms and tend to have extraterritorial effects, Swiss companies are not immune and can very well end up in proceedings before foreign courts for human rights violations committed within their supply chain abroad. This is currently the case in *Doe v. Nestle S.A.* pending in California following allegations of human trafficking and slavery in cocoa plantations in Ivory Coast.<sup>45</sup> Other examples include:

- In 2014 and 2015, the criminal complaints filed by the Bruno Manser Fund, a Swiss NGO for the preservation of the rainforest, and the following proceedings by the Office of the Attorney General of Switzerland for corruption, embezzlement and money laundering in the 1MDB scandal, which notably involved PetroSaudi International SA in Geneva and Malaysian Prime Minister Najib Razak;<sup>46</sup>
- The proceedings against Lafarge SA in France, following the criminal complaint filed by Syrian employees and two NGOs for complicity in war crimes, crimes against humanity, financing of a terrorist enterprise, and forced labour;<sup>47</sup>
- The complaint filed by 1826 Zambian villagers against Vedanta Resources Limited before UK courts over water pollution caused by the copper mining operations of the company's subsidiary;<sup>48</sup>
- The criminal proceedings brought against Lundin Petroleum AB, already mentioned above, where the Swedish prosecution authorities charged the CEO of the company and the chairman of the board for aiding and abetting international atrocity crimes which occurred in South Sudan between 1997 and 2003;<sup>49</sup> or
- The proceedings filed in Canada against Hudbay Minerals Inc. and its subsidiary HMI Nickel Inc., following allegations that the companies were complicit in gang

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<sup>44</sup> VALLÉLIAN/ZULIAN, La protection des droits de l'homme dans les contrats internationaux, *Revue de l'avocat*, 10/2019, pp. 425 ff.

<sup>45</sup> *Doe c. Nestle S.A.*, U.S. District Court for the Central District of California, 2010, Docket number: 2:05-cv-05133. For a presentation of the case, see BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, Nestlé, Cargill, Archer Daniels Midland lawsuit (re Côte d'Ivoire), 03.07.2020, available here: <https://www.business-humanrights.org/en/nestl%C3%A9-cargill-archer-daniels-midland-lawsuit-re-c%C3%B4te-divoire>.

<sup>46</sup> NIKOLIC, La Suisse ouvre une enquête sur le scandale de corruption en Malaisie, *Le Temps*, Geneva, 21.08.2015.

<sup>47</sup> For a case summary, see BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, Lafarge lawsuit (re complicity in crimes against humanity in Syria), 29.01.2019, available here: <https://www.business-humanrights.org/en/latest-news/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria/>.

<sup>48</sup> For a case summary, see BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, Vedanta Resources lawsuit (re water contamination, Zambia), 07.10.2015, available here: <https://www.business-humanrights.org/en/latest-news/vedanta-resources-lawsuit-re-water-contamination-zambia/>.

<sup>49</sup> For a case summary, see BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, Lundin Petroleum lawsuit (re complicity in war crimes, Sudan), 13.12.2019, available here: <https://www.business-humanrights.org/en/latest-news/lundin-petroleum-lawsuit-re-complicity-in-war-crimes-sudan/>.

rapes committed by their private security forces on a mining project in Guatemala. Two other lawsuits were brought against Hudbay Minerals Inc. in relation to the mining project, one after the death of a community leader killed during protests against the project and another by a survivor of a shooting at the mine.<sup>50</sup>

These examples are only a few and show that civil society activism is on the rise as well as sensitivity to BHR compliance. Irrespective of the result of legal proceedings, the damage resulting from the mere initiation of proceedings is a risk which needs to be adequately anticipated.

#### *2.4 Industry Regulations and Standards*

Industry regulations and standards is another important self-regulatory framework which needs to be considered when assessing BHR obligations. Many Swiss companies have indeed recently adhered to voluntary standards, such as the Equator Principles,<sup>51</sup> the International Finance Corporation's Performance Standards on Environmental and Social Sustainability,<sup>52</sup> Shift and Mazars's UN Guiding Principles Reporting Framework Assurance Guidance,<sup>53</sup> or the Voluntary Principles on Security and Human Rights from the extractive industry.<sup>54</sup> In practice, company codes of conduct, charters and internal policies which include provisions on BHR are also increasingly common.<sup>55</sup>

In terms of international best practice, the International Standardisation Organisation ("ISO") established management system standards, and in particular the following standards. ISO 19600 – Compliance management systems ("ISO 19600") provide guidance as to how a company should establish, develop, implement, evaluate, maintain and improve an effective compliance management system.<sup>56</sup> ISO 19600 is based on the principles of transparency, sustainability, proportionality and good governance, and it may be applied by all companies regardless of their size or structure. In turn, ISO 26000 – Guidance on social responsibility

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<sup>50</sup> For a case summary, see BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, Hudbay Minerals lawsuits (re Guatemala), 30.03.2011, available here: <https://www.business-humanrights.org/en/latest-news/hudbay-minerals-lawsuits-re-guatemala/>.

<sup>51</sup> Equator Principles best practice and documents, available here: <https://equator-principles.com/best-practice-resources/>.

<sup>52</sup> INTERNATIONAL FINANCE CORPORATION (IFC), International Finance Corporation's Performance Standards on Environmental and Social Sustainability, Washington, 01.01.2012, available here: [https://www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC\\_Performance\\_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk](https://www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk).

<sup>53</sup> See SHIFT/MAZARS, UN Guiding Principles Assurance Guidance, available here: <https://www.ungpreporting.org/assurance/>.

<sup>54</sup> VOLUNTARY PRINCIPLES INITIATIVE, Voluntary Principles on Security and Human Rights, 2000, available here: <http://www.voluntaryprinciples.org/wp-content/uploads/2019/12/TheVoluntaryPrinciples.pdf>.

<sup>55</sup> GLOBAL COMPACT NETWORK NETHERLANDS/OXFAM/SHIFT, Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights, 2016, p. 13; BRABANT, Setting Human Rights Standards Through International Contracts, speech delivered at the UNCITRAL Regional Centre for Asia and the Pacific (RCAP) Trade Law Forum, 2016.

<sup>56</sup> ISO, Compliance management systems – Guidelines, ISO 19600:2014, Geneva, 2014.

(“ISO 26000”) provides assistance to companies for contributing to sustainable development and taking into consideration environmental, social, political and cultural diversity.<sup>57</sup>

All in all, and in view of these public and private law regimes, introducing the BHR within a company allows not only to mitigate human rights risks, but also to increase mitigation of more common risks.<sup>58</sup>

### **3. How to Adapt the Company’s Compliance System to Mitigate Human Rights Risks?**

The BHR obligations regime is built on three pillars: (i) States’ obligations to respect, protect and fulfil human rights; (ii) the corporate responsibility to respect human rights; and (iii) access to remedy.<sup>59</sup> BHR’s obligations which thus concern trading companies are the second, and in part, the third pillar.

While in practice BHR obligations may appear undetermined, the UN Guiding Principles and the OECD help businesses understand their obligations and accordingly conduct their operations in a manner which is consistent with human rights while limiting the potentially negative impact on the human rights of all stakeholders involved. In other words, under the BHR obligations regime, the companies’ operations must not negatively impact or interfere with the human rights of others, including consumers, community members or employees of such companies. As human rights abuses may result from the actions of any individual or entity that acts on behalf of a company, joint venture partners, consultants, advisers and agents may, by way of example, indirectly also implicate a company into human rights abuses. To ensure continuous compliance with these requirements, trading companies must thus implement comprehensive policies and compliance management systems capable of identifying, preventing and mitigating human rights abuses as well as their contribution to negative human rights effects.<sup>60</sup>

The first step is to conduct a due diligence assessment of BHR risks in a given company. Once all findings have been identified and categorized, such findings should be integrated into the company’s compliance management system, which will have to comprise a zero-tolerance policy by senior management and a group-wide company culture as to human rights, and include: a Business Ethics Committee (“BEC”); comprehensive policies and guidelines; a

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<sup>57</sup> ISO, Guidance on social responsibility, ISO 26000:2010, Geneva, 2010.

<sup>58</sup> FDFA/SECO/GLOBAL COMPACT NETWORK SWITZERLAND, Une gestion d’entreprise responsable pour une réussite durable – La diligence raisonnable en matière de droits de l’homme dans les PME suisses, Bern, 21.06.2019, p. 2, available here: [https://www.seco.admin.ch/seco/fr/home/Publikationen\\_Dienstleistungen/Publikationen\\_und\\_Formulare/Aussenwirtschafts/broschueren/Menschenrechtliche\\_Sorgfalt\\_Schweizer\\_KMUs.html](https://www.seco.admin.ch/seco/fr/home/Publikationen_Dienstleistungen/Publikationen_und_Formulare/Aussenwirtschafts/broschueren/Menschenrechtliche_Sorgfalt_Schweizer_KMUs.html).

<sup>59</sup> UNITED NATIONS, UN Guiding Principles on Business and Human Rights, New York/Geneva, 2011, p. 1.

<sup>60</sup> UNITED NATIONS, Frequently asked questions about the Guiding Principles on Business and Human Rights, New York/Geneva 2014, Question 24, available here: [https://www.ohchr.org/Documents/Publications/FAQ\\_PrinciplesBusinessHR.pdf](https://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf).

whistleblowing management system; adequate training; internal policies as regards breaches of company policies; and an effective grievance management system.

### *3.1 BHR Due Diligence Process*

The requisite preliminary step before implementing a BHR compliance management system is to conduct a group-wide human rights due diligence process to identify, prevent, mitigate and account for how the company addresses its adverse human rights impacts. Such process is based on the company's size, nature of its business, and the regions/countries where its activities are conducted.<sup>61</sup> Including the company's entire supply chain – along with all stakeholders – is key to successfully carry out this process. Indeed, when companies engage subcontractors, one cannot exclude the possibility that such third-party service providers, even if declared admissible from a compliance standpoint, may push illegal activities down the contractual chain to further underlying subcontractors.

One of the key questions in doing so is to delimit the scope of BHR obligations and of human rights in general. It is actually one of the criticisms raised against the counterproposal and the RBI which respectively broadly refer to respect for “human rights” and compliance with “internationally recognised human rights and environmental norms”.<sup>62</sup> To this end, the UN Guiding Principles Commentary provides some guidance, referring to the 1948 Universal Declaration of Human Rights, the 1996 International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of the same year, as well as the principles concerning fundamental rights in the eight International Labour Organisation's core conventions as set out in the 1998 Declaration on Fundamental Principles and Rights at Work. For the UN, these are the benchmarks against which to assess the human rights impacts of a company.<sup>63</sup> The scope nevertheless remains broad and in practice, the focus

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<sup>61</sup> On BHR due diligence in general, see UNITED NATIONS, UN Guiding Principles on Business and Human Rights, New York/Geneva, 2011, Principles 17 to 21; see also ISO, Compliance management systems – Guidelines, ISO 19600:2014, Geneva, 2014, Section 4.6 and BUENO, Corporate Liability for Violations of the Human Right to Just Conditions of Work in Extraterritorial Operations, *International Journal of Human Rights*, 5/2017, pp. 565 ff. and 571 ff.; BUENO, Diligence en matière des droits de l'homme et responsabilité de l'entreprise – Le point en droit Suisse, *Swiss Review of International and European Law*, 3/2019, pp. 346 ff.

<sup>62</sup> The official text of the RBI is published in the Swiss Federal Gazette, FF 2020 5343, 30.06.2020; the official text of the counterproposal is published in the Swiss Parliament's Official Bulletin, *Objet du Conseil fédéral* 17.060, session of 30.06.2020. The counterproposal however also notably refers to “national, European or international regulations, such as the OECD Guidelines”.

<sup>63</sup> Depending on circumstances and the impact of their activities, companies may need to consider additional standards. UN instruments have elaborated further on the rights of indigenous peoples, women, national or ethnic, religious and linguistic minorities, children, persons with disabilities as well as migrant workers and their families. In situations of armed conflict companies should further comply with the standards of international humanitarian law (UNITED NATIONS, Commentary to the UN Guiding Principles on Business and Human Rights, New York/Geneva, 2011, Principle 12, p. 14).

of the due diligence process will have to be adapted depending on the effects of the company's activities.<sup>64</sup>

This due diligence process should further be adjusted to the company's complexity and the jurisdictions in which it operates.<sup>65</sup> By way of example, should a company's supply chain integrate various actors (e.g. production and refining sites, a network of warehouses, distribution centres) or involve operations in countries and territories with high levels of perceived public sector corruption as per Transparency International Corruption Perceptions Index, the due diligence process will require a comprehensive mapping and categorisation (i.e. listing, prioritisation and definition) of the potential risks related to these actors/operations.

It is only once all risks have been identified and categorised that, on the basis of such due diligence findings, a company may begin implementing its compliance management system. Thereafter, such due diligence process should be conducted on an ongoing basis as the risks already identified may evolve with time or additional risks may develop.<sup>66</sup>

The OECD Due Diligence Guidance for Responsible Business Conduct ("OECD Due Diligence Guidance")<sup>67</sup> provides helpful support to companies on the implementation of the OECD Guidelines and outlines a six-step due diligence process that may be adapted to the needs of trading companies as follows:

- **phase one:** trading companies should implement a robust company-wide compliance programme – by way of example, a policy on the extraction of oil and gas resources in conflict-affected regions should be adopted and clearly communicated to the company's suppliers. It should further be incorporated into its supply chain agreements;
- **phase two:** they must identify and review the risks within their supply chain;
- **phase three:** they should implement procedures to respond to the risks identified by eliminating adverse impacts within a reasonable period of time;
- **phase four:** they should perform third-party audits on their supply chain – by way of example, refineries and terminals should be regarded as high-risk assets and should be subject to external audits;

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<sup>64</sup> UNITED NATIONS, Commentary to the UN Guiding Principles on Business and Human Rights, New York/Geneva, 2011, Principle 12, p. 14.

<sup>65</sup> UNITED NATIONS, UN Guiding Principles on Business and Human Rights, New York/Geneva, 2011, Principle 17(b); GLOBAL COMPACT NETWORK NETHERLANDS/OXFAM/SHIFT, Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights, 2016, p. 85.

<sup>66</sup> UNITED NATIONS, UN Guiding Principles on Business and Human Rights, New York/Geneva, 2011, Section 17(c).

<sup>67</sup> OECD, OECD Due Diligence Guidance for Responsible Business Conduct, Paris, 2018, available here: <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

- **phase five:** they should report externally on the due diligence policies, processes, and activities which have been conducted in their supply chain; and
- **phase six:** should a trading company identify that it has caused or has contributed to adverse human rights impacts, it must address the impacts caused by providing for their remediation.

Such due diligence process is difficult to conduct in practice given the broad scope of BHR obligations. For this purpose, specialized attorneys and experts with extensive expertise in the field of BHR may assist trading companies in conducting their human rights due diligence process. Being alert to regional compliance risks is also essential when performing this exercise. Trading companies should therefore engage with local communities and identify the concerns of local stakeholders, in particular those who may be the most affected by their operations. This includes the use of a grievance management system as described in Section 3.8.

### *3.2 Senior Management Commitment and Group-Wide Company Culture*

All company employees should have a thorough knowledge of and comply with the company's internal policies and guidelines related to human rights.<sup>68</sup>

For this objective to be achieved, senior management must abide by the highest ethical standards. It is indeed only through a top-of-the-pyramid commitment that a group-wide culture may be subscribed to and appreciated by all employees.

Senior management commitment is indispensable for encouraging and advancing ethical actions as well as building a group-wide compliance culture. The essential requirements of the company's values which apply across its operations should therefore be repeated by senior management in the introduction of each internal guidelines and policies. A foreword from the company's CEO is also an efficient and powerful means for promoting the company's commitment to its values and responsible business practices.

### *3.3 Business Ethics Committee*

A BEC should be implemented at a group level and local BEC officers nominated at a local level. The BEC's role should be to provide guidance to employees as to transactions/actions that may or may not infringe the law or the company's internal guidelines and policies.<sup>69</sup>

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<sup>68</sup> UNITED NATIONS, UN Guiding Principles on Business and Human Rights, New York/Geneva, 2011, Section 16(a); ISO, Compliance management systems – Guidelines, ISO 19600:2014, Geneva, 2014, Section 5.1.

<sup>69</sup> ISO, Compliance management systems – Guidelines, ISO 19600:2014, Geneva, 2014, Section 5.3.2.

Additionally, the BEC should review on an ongoing basis all company policies and internal guidelines and suggest, where necessary, adaptation/improvement of such documents.

### *3.4 Policies and Guidelines*

The company's entire compliance management programme (i.e. not only related to human rights but also to all other compliance matters) must be readily available to all employees on the company's intranet. Should certain employees be located in areas with difficult access to the internet or be in a role that does not implicate the use of computers, such documents should be made available in physical format.<sup>70</sup>

The policies and guidelines should apply to all employees, whether temporary or permanent. However, the company's managers should also discuss its human rights policies and guidelines with their counterparties and explicitly put forward the company's requirements in terms of human rights and, where necessary, integrate such requirements in formal agreements (e.g. supplier codes of conduct, joint venture agreements, side letters to be signed by investors),<sup>71</sup> as further discussed in Section 4 regarding the mitigation of BHR risks through contracts.

### *3.5 Whistleblowing Management System*

The treatment of whistleblowers varies considerably across different jurisdictions. Certain national laws put emphasis on their protection while others impose more restrictive conditions and reporting channels. Discrepancies within the EU jurisdictions as to how whistleblowing ought to be regulated led the EU to adopt the Directive on the protection of persons reporting on breaches of EU law,<sup>72</sup> which must be implemented at a national level in order to become binding.

It is against this background that the Swiss Council of States discussed in 2019 a new piece of legislation in relation to whistleblower protection in the private sector. However, this project never materialised as, on 5 March 2020, the Swiss National Council rejected the draft legislation. Therefore, currently, Swiss law does not provide specific legal provisions on the protection of whistleblowers in the private sector and it is the courts that must carefully weigh up all the relevant public and private interests when handling cases relating to such matters.

In parallel, ISO has published a new draft standard regarding whistleblowing management systems: ISO standard 37002, which is expected to be finalised by the end of 2021.<sup>73</sup> This standard will guide companies as to how an effective compliance management system should

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<sup>70</sup> ISO, Compliance management systems – Guidelines, ISO 19600:2014, Geneva, 2014, Section 5.2.

<sup>71</sup> FDFA/SECO, Commodity Trading Sector Guidance on Implementing the UN Guiding Principles, Bern, 2018, p. 23.

<sup>72</sup> Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of EU law.

<sup>73</sup> More information on the draft ISO 37002 Whistleblowing management systems – Guidelines available here: <https://committee.iso.org/sites/tc309/home/projects/ongoing/ongoing-2.html>.

be structured. In particular, under ISO standard 37002, an effective system must (i) allow for proper receiving and assessing of reports of breaches of the law or other wrongdoings; (ii) guarantee processes for addressing such reports; and (iii) incorporate a method for resolving incidents.

Hence, a whistleblowing management system in line with international standards ought to:

- ensure that the **anonymity** of the reporting employee, as well as the third parties cited in the report, is safeguarded (non-authorized company members should not have access to such report);
- provide a **confirmation of receipt** of the report to the reporting employee within a short period of time – i.e. from one to seven days;
- appoint an **independent and adequately trained internal officer** in charge of assessing and following up on the reports;
- guarantee a **thorough follow-up assessment** of the reports;
- provide for **comprehensive responses** to the reports within an acceptable timeframe – i.e. from one week to three months from the confirmation of receipt.

Different channels should be put in place – i.e. an online smartphone compatible platform, a phone-based hotline, a face-to-face option with an independent and adequately trained internal officer as well as a dedicated email address and inbox.<sup>74</sup> The details for contacting the appropriate compliance officers should be available in the company’s intranet and policies.

One of the key principles of any such programme is that employees who report a potential breach of the company’s internal guidelines or policies should not suffer any form of retaliation (e.g. negative evaluations, demotions or dismissals).

### *3.6 Internal Training*

All employees should receive training sessions focusing on the risks of human rights abuses related to the company’s business activities upon commencement of employment. Thereafter, all employees should repeatedly – ideally on a yearly basis – and effectively undertake such training sessions. A record of each accomplished training session should be kept by the company’s compliance department/officer.<sup>75</sup>

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<sup>74</sup> ISO, Compliance management systems – Guidelines, ISO 19600:2014, Geneva, 2014, Section 5.3.4.

<sup>75</sup> ISO, Compliance management systems – Guidelines, ISO 19600:2014, Geneva, 2014, Section 7.2.2.

### *3.7 Breaches of Company Policies*

Internal controls and enforcement of disciplinary sanctions in case of violations of the law and/or the company's policies and guidelines should be put into effect.<sup>76</sup> Should there be just cause evidencing an employee's gross negligence or intentional non-compliant behaviour/actions, then dismissal may be considered. Any breach should nonetheless be subject to a comprehensive internal investigation prior to the decision as to which disciplinary sanction is warranted.

### *3.8 Grievance Management System*

Finally, third parties should be able to submit concerns with regards to human rights abuses or to report potential instances of breaches of the law and/or the company's policies and guidelines to a department capable of independently managing grievance procedures.<sup>77</sup>

Systems for the management of grievances also allow for an analysis of the issues faced by third parties across all company sites. It is particularly important that grievances are managed consistently across the group. Therefore, such systems should be integrated consistently within all departments/sites.

Grievances should be accounted for formally and documented through a transparent and clear process.

## **4. Mitigating BHR Risks Through Contracts**

The foreign legal regimes, industry standards and other private rules referred to above already influence contracts with obligations to respect human rights passed on up and down the supply chain. As more than 80% of the economic partners of Switzerland are bound by BHR obligations, Swiss companies are increasingly exposed to such obligations and may use contractual clauses to mitigate their legal, reputational and operational risks.<sup>78</sup> This is even stated as a duty under the UN Guiding Principles,<sup>79</sup> and it is detailed in the particular context

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<sup>76</sup> ISO, Compliance management systems – Guidelines, ISO 19600:2014, Geneva, 2014, Section 7.3.2.3.

<sup>77</sup> UNITED NATIONS, UN Guiding Principles on Business and Human Rights, New York/Geneva, 2011, Principle 29; ISO, Compliance management systems – Guidelines, ISO 19600:2014, Geneva, 2014, Section 9.1.3.

<sup>78</sup> VALLÉLIAN/ZULIAN, La protection des droits de l'homme dans les contrats internationaux, *Revue de l'avocat*, 10/2019, pp. 425 ss.

<sup>79</sup> UNITED NATIONS, Commentary to the UN Guiding Principles on Business and Human Rights, New York/Geneva, 2011, Principle 17, p. 18; see also BRABANT, Setting Human Rights Standards Through International Contracts, speech delivered at the UNCITRAL Regional Centre for Asia and the Pacific (RCAP) Trade Law Forum, 2016.

of State-investor contracts by the UN Principles for responsible contracts: integrating the management of human rights risks into State-investor negotiations.<sup>80</sup>

In this respect and in support of the company's compliance system, negotiating BHR contract clauses represents a cost-efficient opportunity for trading companies to address and mitigate human rights risks.<sup>81</sup> The purpose for doing so is not to alter the economic balance of contracts, but to identify the clauses and mechanisms available that are the most suitable to the size of the company, its operations and locations, its counterparts as well as its capacity to influence them.<sup>82</sup> While all contracts and tailored BHR provisions will accordingly be different, a few essential elements should be common to most contractual relationships.<sup>83</sup> Trading companies should consider in particular the following:

- The **general due diligence** mentioned in Section 3.1 should be implemented before entering into the contract and during the life of the contract. The companies should already at the negotiation stage make sure that they are prepared and have the capacity to address the human rights implications of their activities – responsibility for the prevention and mitigation of human rights risks should thus be clarified and agreed upon before the contract is finalised. The entire contractual chain and its stakeholders should be considered. To this end, the agreement should not merely set out that the contractor must “ensure that its sub-contractors/suppliers” respect the agreed upon BHR provisions. It should directly require the contractor to inform its own sub-contractors and suppliers of the rules applicable and to include back-to-

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<sup>80</sup> UNITED NATIONS, Principles for responsible contracts: integrating the management of human rights risks into State-investor negotiations – Guidance for negotiators, New York/Geneva 2015, available here: <https://shiftproject.org/resource/principles-for-responsible-contracts-integrating-the-management-of-human-rights-risks-into-state-investor-contract-negotiations-guidance-for-negotiators/>. While these principles are tailored for the specific negotiations between States and investors, most of them can be applied to all companies and their contractual relationships.

<sup>81</sup> SCHELTEMA, The Mismatch Between Human Rights Policies and Contract Law: Improving Contractual Mechanisms to Advance Human Rights Compliance in Supply Chains, forthcoming, in ENNEKING et al. (eds.), *Accountability and International Business Operations: Providing Justice for Corporate Violations of Human Rights and Environmental Standards*, London, 2018, Chapter 13; BRABANT, pp. 1 ff.; CROCKETT, *Human Rights Clauses in Commercial Contracts*, LSE Investment & Human Rights Project, London, 2014, available here: <https://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/6667/>. See also UNITED NATIONS, Principles for responsible contracts: integrating the management of human rights risks into State-investor negotiations – Guidance for negotiators, New York/Geneva 2015.

<sup>82</sup> UNITED NATIONS, UN Guiding Principles on Business and Human Rights, New York/Geneva, 2011, Principle 17 and FDFA/SECO/GLOBAL COMPACT NETWORK SWITZERLAND, *Une gestion d'entreprise responsable pour une réussite durable – La diligence raisonnable en matière de droits de l'homme dans les PME suisses*, Bern, 2019, p. 4; see also VALLÉLIAN/ZULIAN, *La protection des droits de l'homme dans les contrats internationaux*, *Revue de l'avocat*, 10/2019, pp. 425 ss.

<sup>83</sup> As to the BHR regime within contracts, see notably SCHELTEMA, *The Mismatch Between Human Rights Policies and Contract Law: Improving Contractual Mechanisms to Advance Human Rights Compliance in Supply Chains*, forthcoming in ENNEKING et al. (eds.), *Accountability and International Business Operations: Providing Justice for Corporate Violations of Human Rights and Environmental Standards*, London, 2018, Chapter 13, BRABANT, *Setting Human Rights Standards Through International Contracts*, speech delivered at the UNCITRAL Regional Centre for Asia and the Pacific (RCAP) Trade Law Forum, 2016; VALLÉLIAN/ZULIAN, *La protection des droits de l'homme dans les contrats internationaux*, *Revue de l'avocat*, 10/2019, pp. 425 ss.

back clauses in its own contracts (so-called “perpetuity clauses”). Contractual limitation on the number of sub-contractors, or on pre-approved or industry-certified sub-contractors, may also be contemplated;

- Boilerplate clauses providing that “the parties will respect human rights” should be avoided, for lack of precision and enforceability. **Specifying what is clearly expected** from the contracting party in plain but precise clauses should be the preferred option. The more specific the clause is, the easier it will be to rely upon and to seek redress in case of breach. Clauses should however remain relatively open in order to take into account unpredictable risks. References to industry standards and certifications may be considered but may need to be further detailed to be enforceable as they tend to be generic;
- A **contractual right to information** throughout the supply chain should be included. Indeed, as supply chains become increasingly complex, only access to information will allow for a trader to efficiently manage the risks within its supply chain. Information may also be obtained through contractual reports and audit obligations, as well as complaint and whistleblowing mechanisms. Outsourcing and resorting to local NGOs may also be considered to address the related obligations;
- Contracting parties should be given **incentives to prevent human rights violations**, not to pay compensation once damages have occurred, as the latter will be difficult to quantify and repair; and
- **Dispute resolution mechanisms** favouring negotiations and alternatives to domestic courts should be included. In this respect, the OECD National Contact Points for the OECD Guidelines already propose mediation in case of allegations of human rights violations. Arbitration should also not be excluded, namely for its efficiency, flexibility and confidentiality. This has notably been illustrated by the USD 2,300,000 settlement reached on 17 January 2018 between Switzerland-based labour organizations UNI Global Union, IndustriALL Global Union and a multinational fashion brand. The settlement was entered into within arbitration proceedings brought under the 2013 Accord on Fire and Building Safety in Bangladesh, a binding agreement negotiated in the aftermath of the 2013 collapse of the Rana Plaza factory in Dhaka and signed by more than 200 clothing brands and retailers worldwide.<sup>84</sup>

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<sup>84</sup> The Unions had settled with a different global brand in December 2017. Although the exact terms and brand names remain confidential, the Unions reported that these historic settlements would ensure remediation of over 200 supplier factories and provide USD 300,000 to the Unions’ joint Supply Chain Worker Support Fund. For more information, see LALIVE, The Accord on fire and building safety in Bangladesh: arbitration meets human rights, 22.02.2018, available here: <https://www.lalive.law/news/the-accord-on-fire-and-building-safety-in-bangladesh-arbitration-meets-human-rights/>.

## **5. Conclusion**

While governments acknowledge the challenges that companies face in certain industries – such as the oil and gas industry – to operate at an international level, the elimination of human rights abuses related to business activities is now a recognised long-term objective triggering legislative, economic and social consideration. Like risks of corruption, money laundering and tax compliance, BHR is a risk that has become a reality for all companies and the legislative trend will likely continue to crystallise companies' obligations in Switzerland and abroad in the shorter or longer term. Lack of anticipation by companies and their executives may not only be inconsistent with best practices but may now give rise to legal liability. Adequate BHR compliance management system and proper consideration of such issues when drafting contracts can go a long way in avoiding a breach of BHR obligations and in mitigating litigation and reputation risks and companies are encouraged to gear up accordingly.