

## **BUSINESS AND HUMAN RIGHTS: SWISS COMPANIES FACE NEW DUE DILIGENCE OBLIGATIONS**

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*On the 10th anniversary of the United Nations Guiding Principles on Business and Human Rights' ("UNGPs") adoption, some of its most important provisions are finally being voted into law around the globe. Cases against multinationals for human rights violations within supply chains are rising globally, as are criminal proceedings for corruption relating to human rights violations. Swiss courts have traditionally taken a cautious approach but – with new legislation looming – affected businesses should take stock.*

On 29 November 2020, the Swiss people accepted the Responsible Business Initiative ("RBI") by 50.7%, but it was rejected by a majority of cantons, thus failing the double majority threshold required for an initiative to become law. The RBI called for compulsory human rights due diligence and civil liability where Swiss companies – or the entities they control – breached environmental and human rights at home or abroad. The Swiss government and parliament considered it too onerous on companies and instead worked on a counterproposal (the "Counterproposal") as an alternative, which imposes **new reporting and due diligence obligations** for companies. As no referendum was held against it, the Counterproposal will now become law.

### **When will it happen?**

The Counterproposal could enter into force by the end of the year. Companies will most likely be required to comply with its provisions as from January 2023.

### **What will it mean?**

The Counterproposal introduces an obligation to **report** on the company's impact on the environment – including CO2 emissions, social and labour issues, human rights and corruption, and what policies, due diligence and measures it has taken to address the same.

The obligation applies to Swiss companies which:

- **are of “public interest”**, i.e. publicly-traded companies and those regulated by the Swiss Financial Market Supervisory Authority;
- **employ 500 persons full-time over two consecutive financial years** – either on their own or with other companies under their control; and
- **have a balance sheet of CHF 20 million+ or a turnover of more than CHF 40 million over two consecutive financial years**, on their own or jointly with other companies under their control (companies which are required to produce an equivalent report under the laws of another jurisdiction are exempt).

The Counterproposal also imposes compulsory **due diligence for supply chains**. Indeed, companies with their registered office, headquarters or principal place of business in Switzerland and which either import/process minerals/metals comprising tin, tantalum, tungsten or gold (referred to as “**3TG**” companies) from conflict or high-risk regions or provide services/products with suspected links to child labour will have to:

- **define a policy** for their 3TG supply chains from conflict and high-risk regions and for their supply chains for products or services that may involve child labour;
- **identify and assess the risks** of adverse impacts or negative effects within their supply chain, prepare a risk management plan for such risks and take measures to mitigate them;
- **define and implement a related due diligence system** to ensure traceability within the supply chain; and
- **report annually** on the implementation of these obligations (companies importing or processing 3TG from conflict or high-risk regions must hire independent auditors to verify compliance with these obligations).

Companies are exempt from such enhanced due diligence requirements if they offer products and services of other companies which have already satisfied these reporting obligations.

## Liability

The Counterproposal has no provisions to found a claim for tort against Swiss companies in case of environment and human rights violations. However, a company can be fined up to CHF 100,000 if it provides false information or fails to submit, keep or document the required reports.

To implement and detail the Counterproposal's obligations, the Swiss government intends to adopt the [Ordinance on Due Diligence and Transparency regarding Minerals and Metals from Conflict Areas and Child Labor](#) that defines the annual import volumes under which due diligence and reporting obligations do not apply, as well as conditions exempting small and medium companies which have limited risk of child labour from child labour scrutiny.

The introduction of the Counterproposal is bound to impact Swiss courts' approach to companies' human rights obligations. Until now, Swiss courts have remained cautious. Recent research on the impact of the UNGPs on courts and judicial mechanisms across the globe, commissioned by the United Nations and presented before the United Nations Human Rights Council,<sup>1</sup> showed that no Swiss court had so far based its decision on the UNGPs and the Swiss Federal Supreme Court recently refused to consider that global warming could constitute a state of necessity.<sup>2</sup> Swiss courts have accordingly not yet followed the path set by, for example, the Hague District Court, which ordered Royal Dutch Shell to cut its worldwide carbon emission by 45% by 2030.<sup>3</sup> The Hague District Court is however not alone and cases against multinationals for human rights violations committed within the supply chains are on the rise globally, as are criminal proceedings for corruption in connection with human rights violations. With the upcoming implementation of the Counterproposal, case law will undoubtedly emerge in Switzerland as well.

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<sup>1</sup> Research conducted by LALIVE for Debevoise & Plimpton's report "UN Guiding Principles on Business and Human Rights at 10, The impact of the UNGPs on courts and judicial mechanisms across the globe" dated 6 July 2021 and available here: <https://www.ohchr.org/Documents/Issues/Business/UNGPsBHRnext10/debevoise.pdf>.

<sup>2</sup> Swiss Federal Supreme Court, decision 6B\_1295/2020, 26 May 2021.

<sup>3</sup> Hague District Court, judgment *Milieudéfensie et al. v Royal Dutch Shell plc*, NL:RBDHA:2021:5339, 26 May 2021.

## Preparing for the new landscape

Swiss companies are well advised to start factoring human rights risks into their business and operational plans. The entry into force of the Counterproposal is not the only reason to do so:

- Larger Swiss companies are already required to report non-financial information related to their risk profile. This should cover human rights risks and their potential impact on a company's operations and value;
- Board members themselves may come under scrutiny;
- Corporate criminal liability cannot be excluded, as illustrated by recent proceedings initiated in Switzerland;<sup>4</sup>
- Swiss companies must also consider legislation adopted by foreign countries, which can have far-reaching effects.

Legal and reputational risks accordingly already exist for Swiss companies when human rights violations are committed within their supply chains. A robust compliance management system and considering these issues when drafting contracts can go a long way towards mitigating those risks.

For more information on this issue, see:

- GIROUD/MARTIN/VALLÉLIAN, The Swiss Responsible Business Initiative: what business & human rights obligations for Swiss companies?, LALIVE Blog, 6 November 2020, available here: <https://www.lalive.law/the-swiss-responsible-business-initiative-what-business-human-rights-obligations-for-swiss-companies/>;
- GIROUD/MARTIN/VALLÉLIAN, Human Rights in the Oil and Gas Trade in Switzerland – Risks and Mitigation Measures, Oil, Gas & Energy Law, 5/2020, pp. 6 ff., available here: <https://www.ogel.org/article.asp?key=3930>.

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<sup>4</sup> See e.g. 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/>. See also the proceedings involving Argor-Heraeus SA (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/>).

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