

# Legal Compass

## Liability and compliance

November 2021



## New Obligations for Companies to Better Protect Human Rights and the Environment

On 29 November 2020, the Swiss voters rejected the “The Responsible Business Initiative – Protecting human rights and the environment” popular initiative (so-called “corporate responsibility initiative”).

Following the vote, the Federal Assembly (the Swiss legislator) decided to implement its indirect counterproposal. The new provisions in the Swiss Code of Obligations (CO) provide for the following: on the one hand, large Swiss companies will be required to report on the risks of their business activities in the areas of environment, social and employee concerns, human rights and the fight against corruption, as well as on the measures taken against these risks. These provisions aim to create more transparency. On the other hand, companies with risks in sensitive areas such as child labour and so-called “*conflict minerals*” (i.e. tin, tantalum, tungsten and gold ore from conflict and high-risk areas) must comply with special and far-reaching due diligence requirements, which are regulated in an ordinance issued by the Federal Council.

Accordingly, in addition to the contemplated amendments to the Swiss Code of Obligations, the draft “*Ordinance on Due Diligence and Transparency Regarding Minerals and Metals from Conflict Areas and Child Labour*”<sup>1</sup> is now available. This piece of legislation specifies which companies must fulfil the new due diligence obligations. The ordinance defines the import and processing quantities for minerals and metals up to which a company is exempt from the due diligence and reporting obligations regarding conflict minerals. Furthermore, it sets out the exemptions from the due diligence and reporting obligations for small and medium-sized enterprises (SMEs) as well as for enterprises with low child labour risks. Finally, the ordinance specifies the individual due diligence obligations and lists the relevant internationally recognised regulations.

With the counterproposal to the aforementioned popular initiative, the Swiss legislator and the Federal Council have opted for an internationally coordinated regulation. Therefore, the counterproposal and the implementing provisions of the ordinance are based on the rules as they apply today in the EU. On the one hand, this is the EU Directive 2014/95 on non-financial reporting and, on the other hand, the EU Directive “*establishing supply chain due diligence obligations for Union importers of tin, tantalum, tungsten, their ores and gold from conflict and high-risk areas*”.

In the area of child labour, Switzerland goes one step further than the EU. Some EU member states adopted a stricter regulation. Germany and France, for example, have more general due diligence requirements than Switzerland, but also significantly higher thresholds.

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<sup>1</sup> Verordnung über Sorgfaltspflichten und Transparenz bezüglich Mineralien und Metallen aus Konfliktgebieten und Kinderarbeit (VSoTr)

## 1. Status and Outlook

The referendum period against the contemplated amendment to the CO and the consultation period for the new Federal Council Ordinance expired on 5 August 2021.

According to current planning, the Federal Council is most likely to adopt its ordinance with the implementing provisions this year. The companies will then have one year to adapt to the new framework, which would apply for the first time for the business year 2023.

## 2. Core Contents of the New Regulation

The draft *“Ordinance on Due Diligence and Transparency Regarding Minerals and Metals from Conflict Areas and Child Labour”* specifies which companies must fulfil these new due diligence obligations. In the area of so-called conflict minerals, the ordinance defines the annual import and processing quantities for minerals and metals up to which a company is exempt from the due diligence and reporting obligations. The corresponding implementing provisions in the ordinance are based on the thresholds applicable in the EU (EU 2017/821). In the area of child labour, the ordinance contains the exemptions from the due diligence and reporting obligations for small and medium-sized enterprises (SMEs) as well as for enterprises with low risks in this area. Finally, the ordinance specifies the individual due diligence obligations and refers the relevant internationally recognised regulations. The exceptions for SMEs are based on the threshold values that apply today for the ordinary audit of annual financial statements.

### 2. 1. Reporting Obligation on Non-Financial Matters

#### A. General

The reporting obligation on non-financial issues includes an annual report on environmental (in particular CO<sub>2</sub> targets), social and employee issues as well as respect for human rights and the fight against corruption. The corresponding report should contain on the one hand the business model in practice and on the other hand the impact of the company's activities on the aforementioned concerns. In addition, the corporate concepts in relation to the aforementioned concerns, including the measures taken to implement them, must be presented. Finally, the report must also contain a risk assessment of the company's own business activities in connection with the non-financial issues.

The report must be published and be publicly accessible for at least 10 years. A violation of the reporting obligation may result in a fine of up to CHF 100,000.

#### B. Scope

A company is subject to such a reporting obligation if the following conditions are cumulatively fulfilled:

- The company qualifies as a *“public interest entity”*. This includes publicly listed companies as well as other legal entities and natural persons that require a licence, recognition, authorisation or registration by the financial market supervisory authority in accordance with the financial market laws (such as banks or insurance companies);
- The company has at least 500 full-time positions on an annual average. The positions within domestic or foreign companies controlled by the company are also to be counted in [A *“control”* or a group is given if the requirements of Article 963 paragraph 2 CO are fulfilled: accordingly, an enterprise controls another enterprise if it (i) directly or indirectly holds the majority of the votes in the supreme body, (ii) directly or indirectly holds the right to appoint or dismiss the majority of the members of the supreme management or administrative body, or (iii) can exercise a controlling influence on the basis of the articles of association, the deed of foundation, a contract or comparable instruments];
- The company has a balance sheet total of CHF 20 million or a turnover of CHF 40 million in two consecutive business years. Again, the domestic and foreign companies controlled by the company are to be included.

## **2. 2. Due Diligence and Reporting in the Areas of "Conflict Minerals" and "Child Labour"**

Additional due diligence and reporting obligations apply in the areas of conflict minerals and child labour.

### **A. Due Diligence Obligations**

The due diligence obligations in the areas of conflict minerals and child labour include, among other things, the maintenance of a management system and the preparation of a risk management plan. The management system should outline the supply chain policy for minerals and metals that may originate from conflict and high risk areas, as well as for products and services where there is reasonable suspicion of child labour. The system is ultimately intended to ensure supply chain traceability. Due diligence obligations are obligations of effort and not obligations of success. The company must endeavour not to source conflict minerals or products with reasonable suspicion of child labour.

### **B. Reporting Obligation in the Area of "Conflict Minerals"**

In the area of conflict minerals, the company is subject to a reporting obligation if two conditions are fulfilled: (i) the company must import minerals (ores and concentrates) or metals containing tin, tantalum, tungsten or gold into Switzerland or process them in Switzerland and (ii) these materials must originate from conflict or high-risk areas (see Recommendation (EU) 2018/1149). These are areas in which armed conflicts are being waged, which are in a fragile situation following conflicts, where governance and security are weak or non-existent and where there are widespread systematic violations of international law, including human rights violations.

In the draft Ordinance on Due Diligence and Transparency in the Areas of Minerals and Metals from Conflict Areas and Child Labour (VSoTr), the Federal Council defines the annual import and processing quantities up to which a company is exempt from the due diligence and reporting obligation. The import and processing quantities of the individual domestic and foreign subsidiaries are added together. These quantities are currently under consultation.

### **C. Reporting Obligation in the Area of "Child Labour"**

In the area of child labour, companies have a duty to report if they offer products or services that they reasonably suspect have been produced using child labour. This obligation does not apply to all companies.

## **2. 3. Exemption from Due Diligence and Reporting Obligations on "Conflict Minerals" and "Child Labour"**

The company can exempt itself from the due diligence and reporting obligations on conflict minerals and child labour if it demonstrates that it complies with internationally recognised regulations. These regulations are OECD guidelines, ILO conventions and an EU regulation, which are described in detail in Article 6 VSoTr.

## **2. 4. Audit-Check**

To check whether a company is subject to such a duty, the following three-step verification scheme can be applied:

- Does the company (including domestic and foreign companies controlled by the company) reach two of the following three thresholds in two consecutive financial years:
  - a) Balance sheet total of CHF 20 million;
  - b) Sales revenue of CHF 40 million;
  - c) 250 full-time positions on an annual average?
- Does the company purchase products or services from countries with medium or high child labour risks (according to the UNICEF Children's Rights in the Workplace Index)?
- Is there a concrete suspicion of child labour (through internal or external indications)?

If the answer to all these three questions is “yes” and if there are no exceptions to the due diligence and reporting obligations to be complied with on the basis of internationally recognised equivalent regulations pursuant to Article 6 VSoTr, the company is obliged to comply with the due diligence and reporting obligations described.

The new due diligence obligations in the supply chain are to be integrated into the usual accountability and reporting obligations as well as into the internal control system. The new due diligence and transparency obligations affect in particular board members, board secretaries, legal counsels and compliance managers.

The Eversheds Sutherland team supports companies in implementing the new provisions. We offer workshops, provide legal opinions (in particular negative assurance reports if exemptions apply) and assist with the necessary compliance documentation (such as code of conduct and risk-specific guidelines).

When advising on specific cross-border matters, we consult with colleagues from our global Eversheds Sutherland network who are all experienced in this area in their own jurisdictions.

## Your contacts for liability and compliance



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