

AFTER THE PUBLIC VOTE: NEW RULES ON RESPONSIBLE BUSINESS CONDUCT IN SWITZERLAND

I. THE OUTCOME OF THE NOVEMBER 29 VOTE

With the November 29 public vote on the “*Responsible Business Initiative*” one of the longest, most fiercely debated and most expensive political campaigns in Switzerland’s history came to its conclusion.

With the rejection of the *Responsible Business Initiative*, the indirect Counterproposal, which was introduced by Federal Councillor Karin Keller-Sutter in August 2019 was automatically adopted. It will soon be published in the Swiss Federal bulletin.

The Federal Council will set it into force after (1) the lapse of a 100-day period if no public vote (referendum) is requested, or (2) in the event a public vote is requested by at least 50’000 voters, if the Counterproposal is confirmed.

Since no referendum has been announced, it appears highly likely that the Counterproposal will enter into force in the course of Q2/2021. Its obligations will become enforceable in the first regular business year, which begins after the lapse of a transitional period of one year after the Counterproposal’s entry into force, i.e. for most companies in 2023.

II. THE COUNTERPROPOSAL: THE NEW REALITY

The Counterproposal is not a statute on its own but consists of amendments of the Swiss Code of Obligations and the Swiss Criminal Code.

In substance, the Counterproposal will align Swiss law with EU law, by adopting key elements of the EU directive on non-financial reporting (EU 2014/95) and the EU regulation on conflict minerals (EU 2017/821), and supplementing this by introducing a diligence obligation regarding child labour, similar to a recent Dutch statute («*Wet Zorgplicht Kinderarbeid*») which is foreseen to enter into force in the course of 2022.

In terms of scope, the Counterproposal differentiates: While the non-financial (i.e. ESG) **transparency obligations** only apply to large companies (companies of «public interest»¹ with (1) more than 500 FTEs and (2) a balance sheet of more than CHF 20m or revenues in excess of CHF 40m), the more far reaching **due diligence and reporting obligations** attach to all companies which import,

¹ Pursuant to Art. 2 lit. c Federal Audit Supervisory Act these are (a) listed companies and (b) financial institutions subject to FINMA supervision.

process or market goods and services involving a higher underlying risk of human rights violations. The latter applies to (1) the import or processing of **certain conflict ores and metals** (tin, tantalum, tungsten, gold) above a certain import quantity, and (2) the offering of goods or services which may reasonably be suspected to originate from, respectively involve, any **child labour**.

Companies subject to the above due diligence and reporting obligations will have to design and implement a **supply chain management system** which at least consists of (1) a supply chain policy addressing the respective 'salient issues' of conflict ores/metals respectively child labour, and (2) a system which allows the tracking of products along the entire supply chain.

Quite similar to the French statute *Loi de Vigilance* of 2017, the companies in scope must establish a **risk management plan**, in which the supply chain related 'salient issues' as well as appropriate mitigation measures are identified.

In order to ensure **transparency**, the supreme executive body (for corporations: the board of directors) of the companies in scope must publish an **annual report** regarding their compliance with these due diligence obligations and keep publicly accessible for at least 10 years.

One of the major differences between the now rejected *Responsible Business Initiative* and the Counterproposal is the element of civil liability of Swiss parent companies for their affiliates and economically controlled third party enterprises, which is absent in the Counterproposal. Notwithstanding, the Counterproposal should not be mistaken as a mere «paper tiger», because a violation of its reporting obligation will be subject to **criminal sanctions** (fine of up to CHF 100'000).

III. NEXT STEPS FOR SWISS COMPANIES

With the Counterproposal's introduction of extensive non-financial reporting obligations and a risk based ESG due diligence requirement, Switzerland is now about to establish a "level playing field" with all EU member states.

While many large Swiss companies already today publish regular sustainability reports, the new law will not only require a careful analysis regarding such reports' **completeness**, respectively a possible need for supplementing, but it will also require an assessment and, as the case may be, modification of such companies' **governance and processes** since the new reports on non-financial matters must be signed-off by such companies' boards and approved by their shareholders. For such companies, it may be advisable to revisit the **composition of the board** to ensure appropriate proficiency with sustainability respectively responsible

business conduct matters. Robust sustainability governance and processes will be key to avoid criminal sanctions for lacking or false reporting.

Subject to some exceptions for small and medium size enterprises (SMEs) which will be defined by the Swiss Federal Council in a new Ordinance, all Swiss based companies which either import or process certain **conflict ores or metals** in Switzerland, or which offer products or services potentially originating from **child labour** will be required to establish a due diligence and risk management concept as outlined above.

Starting point for such a framework will be a **human rights impact assessment (HRIA)** which will have to analyse a company's entire value chain regarding potential human rights impacts. For a company in the food and beverage industry, such assessment maps its entire value chain, i.e. (1) from the sourcing of raw materials to (2) the production, (3) distribution and (4) marketing of products and, ultimately, their (5) recycling. All stakeholders potentially affected along this chain, i.e. employees, contract workers, workers in the supply chain, local communities and vulnerable groups are in scope. The result of this assessment will necessarily define a company's '*salient issues*' and inform its responsible business conduct framework.

International frameworks, such as the "*Child Labour Guidance Tool for Business*" issued by the International Labour Organization (ILO) and the International Organisation of Employers (IOE) in 2015 or the "*OECD Due Diligence Guidance for Responsible Business Conduct*" of 2018 may need to be consulted.

For its new Ordinance on Responsible Business Conduct² the Swiss Federal Council is likely to draw on such international frameworks, but also national instruments (such as the expected General Administrative Order regarding the Dutch Child Labour Due Diligence Law).

You are looking forward to supporting you on all aspects of responsible business conduct.

Basel - December 1, 2020

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² Official title of this Ordinance is not yet known.