New Swiss Conflict Minerals and Child Labor Due Diligence and Transparency Obligations apply as of Business Year 2023

18.01.2023

Key takeaways

- **Starting with business year 2023, companies importing or processing conflict minerals or offering products or services for which there is a reasonable child labor suspicion have to comply with new due diligence and transparency obligations.**
- **Companies in scope that are fully complying with certain internationally recognized standards are exempt from implementing the Swiss due diligence and reporting procedures.**
- **At the same time, new non-financial reporting obligations have come into force (cf. separate Legal Update).**

Introduction

Following the rejection of the so-called "Responsible Business Initiative" and inspired by both the European Union's Regulation EU 2017/821 and the Child Labor Due Diligence Act of the Netherlands, Switzerland enacted new provisions on conflict minerals and child labor due diligence and transparency.

The new Swiss regulations, set forth in articles 964j et seqq. Swiss Code of Obligations (CO) and the Due Diligence and Transparency Ordinance (DDTrO), must be followed starting with the business year 2023. The provisions on conflict minerals and on child labor apply independently of each other.

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Scope of Application: Conflict Minerals

Companies are in scope of the new conflict minerals regulations if they import to, or process in, Switzerland conflict minerals. Conflict minerals are defined as minerals and metals containing tin, tantalum, tungsten or gold (so-called 3TG) originating from conflict-affected or high-risk areas such as war zones or areas with widespread systematic violations of international law (see the CAHRAs list providing an indicative assessment in connection with Regulation EU 2017/821).

Scope of Application: Child Labor

Companies are in scope of the new child labor regulations if they offer products or services for which there is a reasonable suspicion that they have been produced or provided using child labor (irrespective of whether these products or services are offered in Switzerland or abroad).

Child labor in this regard is defined as the work of persons under the age of 18 that qualifies as one of the worst forms of child labor, according to ILO Convention no. 182 (among others, child slavery and work involving children in illegal or potentially harmful activities). In addition, in countries that have ratified and implemented ILO Convention no. 138, any form of child labor prohibited under local law qualifies as child labor. In countries that have not ratified ILO Convention no. 138, any work performed by children under the age of 15 or who are in compulsory education, and any work performed by persons under the age of 18 that is likely to be dangerous to the life, health, or morals of juveniles, is also considered to be child labor.

A reasonable suspicion of child labor exists if there is at least one substantiated indication for inadmissible child labor in connection with a specific product or service, e.g., from the results of inspections, or information from external sources such as NGOs. The UNICEF's Children's Rights in the Workplace Index can provide an additional indication for inadmissible child labor, however, it is not sufficient on its own to establish a reasonable suspicion. Simply stated, if a company sources from countries that are rated as "Enhanced" pursuant to this UNICEF index, this does not automatically lead to a reasonable suspicion for the involvement of child labor.

Exemptions for SME and Low Child Labor Risks

Companies are not required to scan their supply chain for indications of child labor, and thus are out of scope of the due diligence and transparency obligations regarding child labor, in the following cases:

- Companies qualifying as SME, i.e., if they (including companies controlled by them) have an annual average of less than 250 full-time positions (FTE) and do not meet a balance sheet total of CHF 20 million or revenues of CHF 40 million, each threshold to be met in two consecutive business years.
- Companies considered to have only low child labor risks, which is presumed if they only source products or services that were predominantly manufactured ("made in") in countries that are classified as "Basic" in the UNICEF's Children's Rights in the Workplace Index.

These two exemptions, however, do not apply if a company offers products or services that evidently have been produced respectively provided using child labor. The term "evidently" refers to blatant cases of child labor, ones that "jump to the eye". A mere reasonable suspicion is not sufficient. Such knowledge may be derived from reliable, objective, and independent sources such as final court decisions or ILO reports.

Exemptions for Compliance with International Standards

Companies in scope of the new conflict minerals and/or child labor regulations are not required to implement the due diligence and reporting procedures as set forth below if they adhere to the following internationally recognized sets of rules:

Conflict minerals:

- OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, including all annexes and supplements; or
- Regulation EU 2017/821.

Child labor:

- ILO Conventions no. 138 and no. 182;
- ILO-IOE Child Labor Guidance Tool for Business of 15 December 2015; and
- OECD Due Diligence Guidance for Responsible Business Conduct, or the UN Guiding Principles on Business and Human Rights.

Compliance with international sets of rules can take place at company level, or, due to the integration in a group, at group level. The equivalent provisions must be complied with entirely, i.e., including any reporting obligations.

Supply Chain Due Diligence

Companies in scope of the new conflict minerals and/or child labor obligations must comply with an ongoing and recurring due diligence process. To this end, companies have to implement a so-called management system that essentially consists of the following core elements:

Supply Chain Policy: Companies must define (and comply with) a supply chain policy that sets standards and defines processes concerning the procurement of conflict minerals and/or products or services for which there is a reasonable suspicion of child labor. In the interest of transparency, these standards are to be communicated both to suppliers and to the broader public.

Supply Chain Traceability System: Companies are required to implement a traceability system for imported or processed conflict minerals and/or for sourced products and services for which there is a reasonable suspicion of child labor.

Grievance System: Companies need to set up a grievance system so that stakeholders can express reasonable concerns about the existence of potential or actual adverse effects related to conflict minerals and/or child labor.

Risk Management: Companies must analyze, assess, and rate risks caused by conflict minerals (among others, conflict financing and subsequent human rights violations) and/or child labor, and must eliminate, prevent, or minimize such risks following a risk management plan.

Reporting

Companies subject to the conflict minerals and/or child labor due diligence obligations must prepare an annual report on the fulfillment of the due diligence obligations. The responsibility for the report rests with the highest management or administrative body, namely, in Swiss stock corporations, with the board of directors.

This report needs to be published within six months following the end of the business year. In other words, companies in scope of the new conflict minerals and/or child labor regulations, whose business year corresponds to the calendar year, have to report for the first time by the end of June 2024. The report must be published electronically and remain publicly accessible for at least ten years.

Criminal Charges

Individuals may be criminally sanctioned with a fine of up to CHF 100,000 for a deliberate (respectively with CHF 50,000 for a negligent) breach of the duty to prepare reports containing true information and the duties to make and retain the reports regarding conflict minerals and/or child labor.

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No legal or tax advice

This legal update provides a high-level overview and does not claim to be comprehensive. It does not represent legal or tax advice. If you have any questions relating to this legal update or would like to have advice concerning your particular circumstances, please get in touch with your contact at Pestalozzi Attorneys at Law Ltd. or one of the contact persons mentioned in this Legal Update.

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