Switzerland to adopt new ESG reporting obligations despite Swiss voters' rejection of the Responsible Business Initiative

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Key takeaways

- **The Swiss electorate rejected the Responsible Business Initiative (Konzernverantwortungsinitiative) in a public vote on 29 November 2020**
- **Swiss Parliament's counterproposal will now be implemented, provided no new referendum is called**
- **Companies of public interest will be subject to new ESG reporting duties, potentially starting from 2022**
- **New diligence requirements will affect all Swiss companies (not only companies of public interest) which import or process minerals or certain metals from conflict regions or which offer products or services where there are reasonable grounds to suspect child labor**
- **Non-compliance is subject to criminal liability resulting in a fine of up to CHF 100,000**

After a controversial debate, Swiss voters rejected the Responsible Business Initiative (Konzernverantwortungsinitiative) in a public vote on 29 November 2020. The initiative aimed to impose additional due diligence and indemnification obligations on Swiss companies for damage caused abroad by subsidiaries under their control when violating internationally recognised human rights and international environmental standards. As a consequence of the rejection, environmental, social and governance (ESG) reporting rules and some limited due diligence obligations will now come into force based on an earlier, government-backed counterproposal to the Responsible Business Initiative, which was approved by the Swiss parliament in June 2020.

New ESG reporting duties of companies of public interest

The new ESG reporting duties apply only to so-called companies of public interest, i.e. companies that are listed on an exchange or have bonds issued as well as banks, insurance companies and other supervised companies in the financial sector, which together with their subsidiaries in Switzerland and abroad have at least 500 full-time employees on average p.a., and (cumulatively) exceed either total assets of CHF 20 million or revenues of CHF 40 million.

It is expected that starting as early as from the financial year 2022, companies of public interest will be required to issue a report on the impact of their activity on environmental (including CO2 targets), social, employee, human rights and anti-corruption matters. Like the annual financial statements, such a report on "non-financial matters" will be issued annually and must be approved by the board of directors as well as by the general meeting of shareholders.

In substance, the report has to include a description of the group's business model and its ESG policies, measures taken and assessed as well as the main risks resulting from the group's operations (non-exhaustive). However, the new law follows the well-established regulatory approach of comply or explain and allows a reporting company to avoid reporting, provided the report includes a well-reasoned explanation for such lack of compliance.

New due diligence obligations in connection with child labour and the import or processing of minerals and metals from conflict regions

The new law also imposes special due diligence and related reporting obligations to all Swiss companies (not only to companies of public interest) which import or process minerals or metals containing tin, tantalum, tungsten or gold from conflict or high-risk regions, or which offer products or services where there are reasonable grounds to suspect child labour.

As part of the due diligence requirements the respective companies have to establish management systems which define the supply policy and allow to identify and assess any adverse impacts of the supplies. Also, there must be a risk management plan to prevent or mitigate respective risks. Companies importing or processing minerals or metals from conflict or high-risk regions must engage independent auditors to verify compliance with these obligations.

Finally, the company issues a report on the above to be approved by its board of directors as well as by the shareholders’ meeting. The Swiss government will enact further clarifications, in particular on minimum import requirements of minerals and metals affected by the above rules.

Criminal charges and entry into force

Non-compliance with the above-described reporting duties (failure to provide a report or false statement in the report) is subject to criminal liability resulting in a fine of up to CHF 100,000.

There is still a theoretical possibility of a second public vote on the topic (referendum). However, it is expected that no referendum will be held and the new law will come into force in 2021 (or 2022), with the reporting and due diligence duties to be complied with for the first time in the financial year commencing one year after the law's entry into effect, i.e. the financial year 2022 (or 2023).

Also, it is to be noted that independently of the rules outlined above, commodity companies will have to comply with an additional transparency rule regarding payments to public authorities for the first time in the financial year 2022 (Art. 964a et seq. Swiss Code of Obligations).

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.

Severin Roelli

Partner
Attorney at law, LL.M.

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 68
severin.roelli@pestalozzilaw.com

Beat Schwarz

Partner
Attorney at law

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 44
beat.schwarz@pestalozzilaw.com

Franz J. Kessler

Partner
Attorney at law, Dr. iur., LL.M.
Head Energy Law

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 93 42
franz.j.kessler@pestalozzilaw.com