

Environmental responsibility of Swiss-based companies and related popular initiative

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Introduction

On 10 October 2016 the so-called 'Responsible Business Initiative' was submitted to the Swiss Federal Chancellery. A key element of the initiative is the introduction of a legal obligation on Swiss-based multinationals to respect international environmental standards in all of their business activities worldwide. The popular vote on the initiative is expected to take place in 2020.

The proposed amendments to the Constitution and their implementation by the legislature may have a considerable impact on Swiss-based companies with subsidiaries abroad and their environmental policies.

Swiss-based companies should therefore analyse whether they may be affected and, if so, determine appropriate implementation measures.

Current environmental liability applicable only to Swiss-based companies

Swiss environmental laws set out a number of core principles, including:

- the 'sustainability principle', under which the confederation and the cantons aim to achieve a balanced and sustainable relationship between nature and its capacity to renew itself and the demands placed on it by the population;
- the 'precautionary principle', under which preventive measures must be taken in order to limit effects which could become harmful or a nuisance and, irrespective of the existing environmental pollution, as a precautionary measure emissions are limited as much as technology and operating conditions allow, provided that this is economically acceptable; and
- the 'polluter pays principle', under which anyone that causes measures to be taken under environmental law must bear the respective costs.

The polluter pays principle applies to environmental damage such as the pollution of water, air and soil. The costs of investigating, monitoring and cleaning up polluted sites are allocated under the polluter pays principle. A limited liability applies with respect to each polluter's respective share where there are multiple polluters. The first to bear the costs is the legal person that, through its own conduct, caused the required measures (so-called 'disturber by conduct'). Simply being the owner of a contaminated site (so-called 'disturber by maintaining the harmful condition') bears no costs if, by exercising the required care, the owner could not have known about the pollution.

The liability for environmental damages is a so-called 'strict liability'. The operator of an establishment or installation that represents a special threat to the environment is liable for the damages caused by such establishment or installation. Polluters are responsible for any damage that they cause regardless of whether it was their fault, except *force majeure* and third-party or damaged-party liability.

Business responsibility *de lege lata*

Under the current Swiss regulations, a Swiss-based company is responsible in the first instance for the wrongdoings of its corporate bodies with respect to environmental matters.

AUTHORS

[Michael Lips](#)



[Larissa Rickenbacher](#)



Additionally, individuals of that company who are responsible for the business decision which lead to environmental damage can be held liable by the company or their shareholders based on director and officer's liability. In practice, the personal liability of directors and officers is often covered by liability insurance, if no limitation or exclusion applies, which is typically the case for damages resulting from wilful intent, gross negligence and criminal conduct.

Moreover, aggrieved parties can claim damages or losses directly from directors or officers based on tort liability. To establish tort liability they must prove damages, unlawfulness (ie, the violation of an *erga omnes* legal right such as life, physical and mental integrity and ownership), causality and fault.

Under Swiss law, a Swiss-based company could potentially be held liable for the wrongdoing of its foreign subsidiaries if it actually manages the foreign subsidiary. 'Actual management' is given if:

- one of the mother company's governing body is at the same time the governing body of the subsidiary; or
- the mother company is considered as a factual governing body of the subsidiary.

Thus, liability of Swiss-based companies for the wrongdoing of their foreign subsidiaries already exists. However, in such contexts, complex legal questions as to jurisdiction and applicable law arise.

Objectives of Responsible Business Initiative

The Responsible Business Initiative focuses primarily on companies' obligation to respect human rights in all of their business activities in Switzerland and abroad. Thereby, the initiative's promoters qualify the environmental law as the third generation of human rights (ie, the right to a safe, healthy and sustainable environment).

In particular, the initiative's promoters hold that certain foreign affiliates of such Swiss-based multinationals do not sufficiently comply with established principles of conduct and international environmental standards.

Against this background, the initiative aims to:

- introduce a general principle into the Constitution, according to which the confederation must take measures to strengthen the respect for human rights and the environment in the Swiss economy;
- introduce a duty of diligence of Swiss-based multinationals with respect to international environmental standards, combined with principles for its enforcement. Through this duty of diligence, Swiss-based multinationals will have to integrate environmental standards into their business activities and develop an environmental management system in order to monitor the environmental impact of their activities. Through such environmental system, such companies would be able to react at an early stage in the event of violations of environmental standards and continuously improve their environmental compatibility by means of appropriate measures;
- introduce an obligation to provide transparent information on the measures taken in case of the violation of environmental standards;
- cover all affiliates of a group of companies, as the duty of diligence will apply to any domestic and foreign controlled undertaking of a Swiss-based company. Victims of any violation will be entitled to claim damages from Swiss-based companies before the Swiss courts; and
- introduce enforcement measures consisting of damage compensation claims and further measures to stop existing and prevent future violations of the abovementioned standards.

Weak points of Responsible Business Initiative

While the initiative certainly pursues honourable goals and while there is a broad agreement that established principles of conduct and environmental standards must be met by any business activity worldwide, there is some disagreement on the appropriate measures to achieve this goal.

In particular, the approach of the initiative is criticised for the following points:

- A key point of the initiative are the so-called 'international environmental standards' that, under the initiative, Swiss-based companies and their affiliates worldwide must observe. There is, however, no clear definition of what is considered to be such a standard.
- Because Switzerland is not an EU member state and because most of the international agreements on environmental matters do not contain self-executing provisions, a direct applicability of such treaties on environmental matters is not possible. To generally declare international environmental standards as applicable in Switzerland would affect the legislature's right to decide autonomously which international regulations it wishes to

incorporate into Swiss law (so-called 'autonomous enforcement').

- With the suggested approach, Swiss law would be overly dominant. Recognised principles of international law as well as foreign local regulation and company bylaws of non-Swiss affiliates would not be taken into consideration sufficiently.
- The suggested due diligence obligations and liability rules would considerably affect the global competitiveness of Swiss companies.

The Federal Council opposes the initiative. The government argues that the initiative goes too far by governing any and all foreign affiliates. Such a broad duty of diligence would pose considerable difficulties and implementation problems. Further, the suggested liability rules are stricter than in most other legal systems and would put Switzerland at a disadvantage as a business location.

Parliament is currently discussing a counterproposal, which will contain more business-friendly rules and the possibility for companies to exempt themselves from liability for damages caused by affiliates abroad.

Comment

The honourable goals of the Responsible Business Initiative are undisputed. However, it seems that the initiative overshoots the target and more appropriate measures should be found to achieve this goal.

Additionally, actions against Swiss-based companies for the misconduct of their subsidiaries are already possible according current Swiss law if the subsidiary is actually managed by its mother company.

It would be counterproductive if, as a consequence of the initiative, companies decide to leave Switzerland; if so, the initiative would lose its desired effect with regard to these companies and their foreign affiliates.

For further information on this topic please contact [Michael Lips](#) or [Larissa Rickenbacher](#) at Pestalozzi Attorneys at Law by telephone (+41 44 217 91 11) or email (michael.lips@pestalozzilaw.com or larissa.rickenbacher@pestalozzilaw.com). The Pestalozzi Attorneys at Law website can be accessed at www.pestalozzilaw.com.

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