

Human Rights Due Diligence Legislation in Switzerland: The state-of-play after the Swiss Responsible Business Initiative

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On 29 November 2020, Swiss citizens voted on the Swiss Responsible Business Initiative. This initiative aimed to include a new provision on responsible business conduct in the Swiss federal Constitution. This provision required companies based in Switzerland to carry out appropriate human rights and environmental due diligence. In addition, companies would have been liable for human rights and environmental-related harm caused by companies under their control unless they could prove that they took all due care to avoid the harm.

Despite a short majority 50.7% of the popular votes in favour of the initiative, the constitutional initiative did not reach the majority of votes in the majority of the twenty-six cantons (the double majority of the population and of the cantons was required in order to amend the constitution). As a result, the initiative was rejected and the constitution will therefore not be modified as proposed. The rejection of the constitutional initiative nevertheless triggered the automatic adoption of a counterproposal accepted by the Parliament in June 2020.

The counterproposal takes the form of several provisions modifying the Swiss Code of Obligations and of the Swiss Criminal Code. The French version of these provisions is available [here](#). Once in force, probably at the beginning of 2022, these provisions will reflect the new corporate human rights due diligence legislation for the years to come in Switzerland. This legislation contains three main elements: reporting obligations, due diligence obligations, and criminal sanctions.

Firstly, large companies will have the obligation to annually report on non-financial information, including environmental and human rights issues. The report will need to describe the due diligence processes in place, measures taken, and the main risks resulting from the own activity of the company and, where relevant, those arising out of its business partners, products and services. Where companies do not have processes in place, they will need to explain why that is the case.

Secondly, the new legislation will introduce supply chain due diligence obligations, but only in two areas: conflict minerals and child labour. The legislation will apply to companies importing or processing in Switzerland certain types of minerals originating from conflict zones above a certain threshold. It will also apply to companies selling goods or services in Switzerland for which there exists a founded suspicion of child labour having been used in

their production. An implementation ordinance will be adopted this year to establish whether small and medium size companies and other larger companies presenting a low risk will be exempted for the child labour due diligence obligation.

Concretely, the content of the supply chain due diligence obligation is defined in a separate provision. Companies will be required to have a management system in place that defines internal policies regarding conflict minerals or child labour and to contain a tracing system in the supply chain. Companies will also have to identify and evaluate risks and take appropriate action to mitigate them. An independent expert will have to verify whether companies have fulfilled their due diligence obligation. Finally, companies subject to due diligence obligations will be required to report annually on the implementation of their due diligence obligation. That report will have to be made publicly available.

Thirdly, the Criminal Code will be modified to include a fine up to 100'000 CHF to anybody who intentionally omits to report or provides false information in those reports.

The new Swiss legislation on corporate human rights due diligence leaves many questions open. What is a 'founded suspicion of child labour'? What is a tracing system? Who will be that independent expert controlling the compliance with the due diligence obligation? It also raises uncertainties as to which companies will the due diligence obligations apply to. To which extent can a breach of their due diligence obligation play a role in civil liability claims?

Altogether, the due diligence legislation largely departs from the original project of the Responsible Business Initiative. Beyond selecting only two specific areas for corporate due diligence, the major departure is for sure the absence of any mechanism of access to remedy for individuals affected by the conduct of companies based in Switzerland. The absence of consideration of affected individuals that should be at the centre of any corporate human rights due diligence legislation is conceptually questionable and does not reflect the essence of the United Guiding Principles on Business and Human Rights. Despite the noteworthy popular majority for mandatory due diligence obligations, Switzerland maybe just got too much international spotlight with its Responsible Business Initiative for a single small country. It is now time for bigger actors to take the lead.

References (for background information)

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