COUNTER-PROPOSAL TO THE CRI

New Non-Financial Reporting and Due Diligence Requirements

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As part of the indirect counter-proposal to the Corporate Responsibility Initiative (CRI), Switzerland will introduce new non-financial reporting and due diligence requirements for certain Swiss companies. Ensuring compliance with these regulations requires preparatory work that should not be underestimated. Affected companies are therefore well advised to obtain an overview by means of a gap analysis, as the new regulations are expected to come into force on 1 January 2022.

Initial Situation

On 29 November 2020, the corporate responsibility initiative failed to win a majority of the cantons. Its aim was to ensure that Swiss companies comply with human rights and international environmental standards worldwide. Prior to the vote, parliamentary discussions on the Corporate Responsibility Initiative had led to an indirect counter-proposal at the legislative level. This counter-proposal provides for reporting obligations on non-financial matters as well as due diligence and transparency obligations with regard to conflict minerals and child labour (Art. 964bis et seq. revised Code of Obligations [CO]).

In the summer of 2021, the referendum deadline for the new legal provisions expired and the consultation on the new Ordinance on Due Diligence and Transparency in the Areas of Minerals and Metals from Conflict Zones and Child Labour (VSoTr) was concluded.

Reporting Obligations on Non-Financial Matters

The counter-proposal provides for an annual reporting obligation on non-financial matters in various areas. It was modelled on the EU directive on the disclosure of non-financial and diversity-related information from 2014.

The new reporting obligations pursuant to Art. 964bis et seq. CO relate to "public interest entities". In addition to banks, insurance companies and other financial services providers supervised by swiss regulator FINMA, public companies fall within the scope of the new provisions if, together with domestic and foreign companies controlled by them, they have an annual average of at least 500 full-time employees in two consecutive financial years and exceed a balance sheet total of CHF 20 million or a turnover of CHF 40 million. A public company is a company that a) has equity securities listed on a stock exchange or b) has bonds outstanding or c) contributes at least 20% of its assets or turnover to the consolidated financial statements of one of the aforementioned companies. This does not apply to companies that are controlled by another company to which the reporting requirements already apply or which have to prepare an equivalent report under foreign law.

The companies affected have to report on non-financial issues relating to the environment, social and labour issues, respect for human rights and the fight against corruption. If the company controls domestic or foreign companies, the report must also include these companies.

«THE COUNTER-PROPOSAL PROVIDES FOR AN ANNUAL REPORTING OBLIGATION ON NON-FINANCIAL MATTERS IN VARIOUS AREAS.»

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The report has to contain the information necessary for an understanding of the company's business performance, results, position and the impact of its activities on non-financial matters. This includes, for example, the following topics:

- Description of the business model;
- Description of the approach taken to non-financial matters, including the due diligence applied;
- Presentation of the measures taken to implement these concepts and evaluation of their effectiveness;
- Description of the main risks related to non-financial matters and how these risks are managed;
- Key performance indicators relating to non-financial matters.

The Board of Directors and the General Assembly have to approve the report, which must be published electronically in a national language or in English. If the report is based on national, European or international regulations or standards, the regulations used must be specified in the report and, if necessary, a supplementary report has to be drawn up.

In order to effectively meet its reporting obligations, a company must therefore actively address its non-financial concerns, define corresponding performance indicators, identify resulting risks and adequately address them. This means that the reporting obligations also indirectly trigger specific obligations to act.

Due Diligence and Transparency Obligations Regarding Conflict Minerals and Child Labour

The counter-proposal provides for due diligence and reporting obligations in dealing with metal and mineral transactions from conflict areas and for the avoidance of child labour. This involves companies with their registered office, head office or principal place of business in Switzerland that import tin, tantalum, tungsten and gold or metals from conflict and high-risk areas, process them in Switzerland or whose products/services are suspected of being manufactured/provided using child labour. In the VSoTr, the Federal Council has laid down definitions, exceptions and restrictions, such as those relating to SMEs or minimum import quantities.

The draft ordinance of 14 April 2021 is strongly oriented towards the size of the company that triggers the reporting obligation on non-financial matters in the case of exemptions for SMEs. Affected companies have to introduce a management system in which they define the supply chain policy for risk products and ensure traceability. Furthermore, they must identify and assess the risks and take measures to limit them as part of a risk management plan. With regard to minerals and metals, compliance with the due diligence obligations have to be verified by an independent expert, whereby this person should be a supervised auditing company according to the draft VSoTr. The company must then report annually on compliance with the due diligence obligations.

Consequences of Non-Compliance With the New Requirements

A violation of the provisions regarding non-financial reporting is set out in Art. 352ter of the revised Swiss Criminal Code (official offence). Anyone who fails to report, makes false statements in the reports or fails to comply with the legal obligation to retain and document the information is liable to a fine of up to CHF 100,000 in the case of intent, or up to CHF 50,000 in the case of negligence. On the other hand, criminal sanctions were waived in the case of violations of due diligence obligations regarding conflict minerals and child labour.

Gap Analysis

The new regulations are expected to come into force on 1 January 2022. The transitional provisions stipulate that the new regulations will apply for the first time to the financial year that begins one year after the regulations come into force. Thus, 2023 will be the first year for which reporting is required. Accordingly, the first reporting will occur in the first half of 2024 in the run-up to the 2024 General Assembly. The new due diligence requirements on conflict minerals and child labour are also expected to apply for the first time in 2023. This leaves only a modest timeframe for preparing for compliance, particularly if a company does not already have seasoned non-financial reporting and risk management in place.

Compliance with the reporting and due diligence obligations requires preparatory work and lead time that should not be underestimated. For the concrete implementation of the new obligations, it is therefore recommended to obtain an overview as soon as possible within the scope of a gap analysis. The board of directors has to clarify whether its company falls within the scope of the new rules. This should be followed by an analysis of the current status of reporting on non-financial matters and of risk and compliance management. Establishing clear responsibilities and a timetable will ensure that a company implements the rules effectively, efficiently and on time.

Key Facts

01 As part of the indirect counter-proposal to the CRI, Switzerland will introduce new non-financial reporting and due diligence requirements for certain Swiss companies.

02 Compliance with these new require-ments requires sufficient preparatory time. To implement the new regulations, companies should perform a gap analysis to obtain an overview as soon as possible.

03 Criminal law consequences for violations of the new regulations: If the reporting requirements are not complied with, companies and individuals face fines of up to CHF 100,000.

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