

New ESG regulations enter into force as of January 1, 2022

After the "Responsible Business" Initiative failed in the referendum last November due to a majority of the cantons, the indirect counter-proposal will now enter into force on January 1, 2022. Following the conclusion of the consultation process, on December 3, 2021, the Federal Council published the corresponding ordinance on the specification of the new due diligence requirements in the areas of child labor as well as minerals and metals from conflict zones ("conflict minerals"), which are part of the legislative amendments. They will apply for the first time to the 2023 financial year.

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AUTHORS	Beat Kühni	Partner
	Matthias Wolf	Partner
	Tino Gaberthüel	Partner, Head of Corporate and M&A, Co-Head of Capital Markets
	Valérie Menoud	Partner, Head of Investigations
	Roman Graf	Partner, Head of Insolvency and Restructuring
EXPERTISE	ESG	

The amendments to the Code of Obligations (CO) adopted as an indirect counter-proposal to the Responsible Business Initiative are intended to require Swiss companies to better protect humans and the environment at home and abroad. However, this is without the strict liability provisions of the Responsible Business Initiative. The corresponding amendments to the law have already been known since last year and will enter into force on January 1, 2022. At the heart of the matter are:

- new **reporting requirements** on "non-financial matters", in particular in the areas of environment, social responsibility and human rights, which are based on the existing EU Directive 2014/95/EU (Non-Financial Reporting Directive); and
- new **due diligence and reporting obligations** with respect to **conflict minerals** and to prevent **child labor** throughout the supply chain.

On December 3, 2021, the Federal Council published the implementing Ordinance on Due Diligence Obligations and Transparency Regarding Minerals and Metals from Conflict Areas and Child Labor (the "**Ordinance**"), which specifies the aforementioned due diligence requirements and their scope of application.

Concerned Companies

In contrast to the reporting obligation on "non-financial matters", the new due diligence obligations in the area of conflict minerals and child labor do not only apply to major listed companies and regulated financial entities providers. In principle, they apply to every company domiciled in Switzerland whose business area may potentially come into contact with conflict minerals or child labor, by:

- importing **minerals** (ores and concentrates) or **metals** containing tin, tantalum, tungsten or gold **from conflict or high-risk areas** or processing them in Switzerland, or
- offering products or services for which there are **reasonable grounds to suspect that they** have been produced or provided by **children**.

Specific scope of application

The Ordinance now further specifies this scope of application.

The following applies to the area of **conflict minerals**:

- If a company falls below certain **import and processing quantities** of minerals and metals containing tin, tantalum, tungsten or gold, it is exempt from the due diligence and reporting obligations regarding conflict minerals. The relevant thresholds are listed in Annex 1 to the Ordinance with the corresponding customs tariff numbers.
- What is to be considered a **conflict and high-risk area** is now defined in Art. 2(1)(e) of the Ordinance (same wording as in Regulation (EU) 2017/821 on conflict minerals). However, despite the precise definition, it is not easy to determine which countries are currently classified as conflict and high-risk areas. The non-binding list of "Conflict-Affected and High Risk Areas" (available at www.cahraslist.net) should serve as a starting point for the classification.

Accordingly, companies that exceed the relevant import thresholds must regularly check whether the place of origin of the minerals and metals is currently classified as a conflict or high-risk area. If the place of origin is not located in a conflict or high-risk area, this fact must be appropriately documented. The company is then exempt from further due diligence and reporting obligations. Otherwise, the due diligence and reporting obligations as foreseen in the law apply in full.

In the area of **child labor**, the Ordinance specifies the requirements under which companies are exempt from the new due diligence obligations. Potentially affected companies have to go through three assessment steps:

1. **Thresholds**: If a company does not meet the **SME thresholds**, it is exempt from further clarification. The SME thresholds are not met if the company concerned falls below two of the following thresholds on a consolidated basis in two consecutive financial years: Total assets of CHF 20 million, sales of CHF 40 million and an annual average of 250 full-time employees.
2. **Risk assessment**: If the company meets two of the three SME thresholds, it must assess whether it qualifies as a "**low-risk company** with regard to the **area of child labor**". A company is considered to have a low risk if it produces in countries or provides services from countries whose "due diligence response" is classified as "basic" by UNICEF in its "Children's Rights in the Workplace Index", or if it procures products or services from these countries. If, according to this test, the company is considered to be a "company with low

risk with regard to the area of child labor", it is exempt from further evaluations.

3. *Verification of suspicions*: If none of the aforementioned exceptions apply, the company must verify whether there is a **reasonable suspicion of child labor** in relation to a specific product or service. If there is no reasonable suspicion of child labor, the company is exempt from the due diligence and reporting obligations. This finding and the reasons for it must be clearly documented.

Finally, the Ordinance contains a **counter-exception** to the aforementioned exceptions: If the company offers products or services that were **evidently** produced or provided using **child labor**, the company is subject to the due diligence and reporting obligations regardless of the result of the above-mentioned three assessment steps. According to the explanatory report to the Ordinance, "evidently produced or provided using child labor" refers to "blatant cases" that "stand out" and of which the company has "certain knowledge".

Equivalent international standards

Annex 2 of the Ordinance contains a list of international regulations that are considered to be equivalent standards, both with regard to conflict minerals and child labor. If a company fully complies with such an international standard, it is exempt from the new due diligence and reporting obligations under the CO.

Outlook

Even companies that do not meet the application requirements for the new due diligence obligations as of January 1, 2022, or benefit from an exemption must keep the new due diligence obligations in mind. The decisive parameters for the applicability of the new due diligence and reporting obligations are dynamic and adapt continuously, such as the classification of a region as a conflict or high-risk area or its risk classification according to UNICEF's "Children's Rights in the Workplace Index". Consequently, even Swiss companies that are not currently affected will have to **reassess in regular intervals** whether they are still exempt and they will have to document the relevant findings and the justification thereof. Likewise, when entering into new business relationships or other expansions of business activities, it must be reassessed in each case whether the self-classification still corresponds to the facts.

Clarification of due diligence requirements

The Ordinance also contains a number of details on the specific content of the due diligence and reporting obligations in the area of conflict minerals and child labor. The focus is in particular on the **management system** to be introduced **along the supply chain** by the companies concerned in accordance with Art. 964^{sexies} para. 1 CO. The management system must, in particular, contain the following two elements, the specific content of which is now detailed in the Ordinance:

- a **supply chain policy**; and
- a supply chain **traceability** system.

The management system must be supplemented by a **risk management plan** that describes the methods used by the company to identify, analyze and weigh the risks of harmful effects of its

business activities in the supply chain. The Ordinance also contains specifications in this regard.

Entry into force

The new due diligence and reporting obligations under the indirect counter-proposal and the new Ordinance will enter into force on **January 1, 2022**. However, the affected companies will be granted a transitional period of one year to adjust to the new obligations, i.e. they will apply for the first time to the **2023 financial year** (or the financial year beginning in 2023). Concerned companies should nevertheless start preparing and implementing the necessary measures and policies now in order to comply with the new legal requirements by that time.

Please do not hesitate to contact us in case of any questions.

Legal Note: The information contained in this Smart Insight newsletter is of general nature and does not constitute legal advice.

CONTACTS	Beat Kühni	Partner, Zurich beat.kuehni@lenzstaehelin.com Tel: +41 58 450 80 00
	Matthias Wolf	Partner, Zurich matthias.wolf@lenzstaehelin.com Tel: +41 58 450 80 00
	Tino Gaberthüel	Partner, Head of Corporate and M&A, Co-Head of Capital Markets, Zurich tino.gaberthuel@lenzstaehelin.com Tel: +41 58 450 80 00
	Valérie Menoud	Partner, Head of Investigations, Geneva valerie.menoud@lenzstaehelin.com Tel: +41 58 450 70 00
	Roman Graf	Partner, Head of Insolvency and Restructuring, Geneva roman.graf@lenzstaehelin.com Tel: +41 58 450 70 00
