SWITZERLAND SET TO ADOPT HUMAN RIGHTS REPORTING AND LIMITED DUE DILIGENCE LAW AFTER REFERENDUM ON STRICTER PROPOSAL FAILS

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Legal Briefings

On 29 November 2020, a far-reaching proposal to introduce new human rights and environmental due diligence and corporate liability obligations into Swiss law failed to get the required 'double majority' in a referendum in Switzerland.

While 50.7% of voters supported the ground-breaking proposal, Swiss federalism also required majorities in at least half of the country's cantons for the initiative to pass. As a result, a less ambitious counter-proposal, prepared by the Swiss legislature and based on ESG reporting with limited due diligence, will likely become law in 2021.

Whilst the proposed extension to parent company liability will not now come into force, large Swiss companies and financial institutions should nonetheless prepare for ESG-style reporting and all Swiss companies should consider, and start to implement, appropriate due diligence mechanisms in relation to conflict minerals and child labour.

The rejected proposal, which we discuss in detail here, would have required all Swiss companies to conduct human rights and environmental due diligence. It would also have introduced direct liability on Swiss companies for violations of human rights and environmental standards by companies under their control. This would have included a partial reversal of the burden of proof, requiring companies to establish that they took the requisite care to prevent violations, or that damage would have occurred even if the requisite care had been taken.

Instead, the Swiss legislature's counter-proposal, which is now set to become law in 2021 (unless opponents call for, and win, a further referendum on the issue within 100 days) has narrower scope:

- The mandatory due diligence requirements are limited to the issues of conflict minerals (being minerals or metals containing tin, tantalum, tungsten and gold ("3TG") from conflict or high-risk areas) and child labour. These due diligence requirements will apply to all companies with their registered office, headquarters or principal place of business in Switzerland.

- In relation to broader environmental and human rights issues, these will be the subject of non-financial reporting in a similar manner to Directive 2014/95/EU. As a result, large publically-traded Swiss companies and large financial institutions will need to undertake annual reporting on environmental matters, social and employment-related matters, respect for human rights, and anticorruption.

- The counter-proposal also does not include provisions for the extension of parent company liability or a reversal of the burden of proof.

- However, it does include criminal sanctions in relation to non-compliance with (or false statements as part of) the reporting regime.

At a press conference following the referendum, the responsible Federal Councillor stressed that the vote had not been a vote for or against the protection of the environment and human rights but a vote about the best way to achieve an undisputed goal. The Federal Councillor stressed that the counter-proposal would put Switzerland in line with corporate social responsibility standards currently applicable in other countries, including the EU, and would impose even stricter requirements in relation to child labour (comparable to the Dutch law adopted in 2019 and presently due to come into force in 2022).

According to the Federal Councillor, Switzerland would also continue to monitor developments in other countries. However, whilst the Responsible Business Initiative's proposed extension to parent company liability would have been truly ground-breaking, had it passed the referendum, it is arguable that the new Swiss law that is now set to come into force will not go as far as the existing French Duty of Vigilance Law, as it is also does not include provisions for due diligence applicable to all human rights and environmental matters, and it does not go as far as is currently being considered by the EU. Whether Switzerland would consider adapting its legislation to match any potentially stricter EU-wide approach remains to be seen.

In the meantime, it is not expected that a further Switzerland-wide referendum would seek to stop the counter-proposal's mandatory due diligence regime from becoming the law. The Swiss legislature is therefore expected to pass secondary legislation in the coming months setting out additional details regarding the scope of the due diligence and reporting requirements.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

JEROME TEMME
ASSOCIATE, LONDON

+44 20 7466 2607
jerome.temme@hsf.com

OLIVER ELGIE
SENIOR ASSOCIATE, LONDON
+44 20 7466 6446
Oliver.Elgie@hsf.com

ANTONY CROCKETT
PARTNER, HONG KONG
+852 21014111
Antony.Crockett@hsf.com

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