LALIVE

ESG litigation in Switzerland

Risks and possible defence strategies

March 2023

LALIVE

Executive summary

This paper examines the main litigation risks for companies and their boards of directors regarding ESG matters in Switzerland.

We address the three key questions:

The authors:

Matthias Gstoehl
Partner at LALIVE

Laura Knöpfel
Former Trainee at LALIVE. Now a Research Fellow at King's College London

Christian Exner
Counsel at LALIVE

01 / What is ESG litigation?

ESG litigation can be broadly understood as the efforts of any litigant, including governments and authorities, to align the business conduct of companies or states with the current ESG objectives defined in legal and quasi-legal frameworks.

Typical examples of ESG litigation include disputes about environmental matters, human and labour rights, and corruption, money laundering or, more generally, corporate governance.

ESG litigation arises in a range of non-binding standards, guidelines and principles and a fragmented regulatory landscape under private and public law. Lawmakers globally have started to introduce civil, administrative and criminal liability to police and sanction the violation of ESG obligations. These developments accentuate ESG litigation risks.

02 / What risks are companies facing in Switzerland?

The ESG litigation risks addressed in this paper can result in (reputational) damage and legal sanctions following corporate acts and omissions, which includes communication on ESG matters (reporting, labelling and greenwashing). The risks are significant and include criminal and civil liability, administrative and regulatory action, and quasi-judicial disputes.

Our findings also dispel three common misbeliefs:

1) with few exceptions, current ESG litigation risks do not originate from newly introduced ESG legislation. Rather, the new disclosure regimes and due diligence frameworks give new meaning to pre-existing legal instruments and resolution mechanisms.
2) breaching the new reporting and due diligence obligations may lead to more severe criminal sanctions than just the fine recently introduced as part of the legislative changes in connection with ESG due diligence and reporting, which follows the counterproposal to the Swiss Responsible Business Initiative ("RBI").
3) the rejection of the RBI and related legislative changes did not eliminate the risk of group liability (Konzernhaftung): quite the contrary. The knowledge that companies will acquire with increased due diligence obligations can carry even greater liability risks.

03 / How can companies best defend themselves against ESG litigation risks?

Companies must embrace ESG matters across the board, to effectively mitigate their exposure to ESG litigation risks and develop adequate defence strategies. ESG must become an inherent part of their strategy, culture, risk management and operational control mechanisms.

Swiss companies operating on a global scale must take all reasonable care to appoint, instruct and supervise any firm integrated into their global production network and make sure that those firms comply with domestic and international ESG standards.

The credibility of any defence to ESG litigation will, first and foremost, depend on the acts and omissions of the firms that operate in local societies – and only secondarily on the corporate governance system, ESG policies and codes of conduct in place at the Swiss lead company.

Ultimately, only the board will be able to impose required changes, making it the only credible guardian of ESG litigation risks. In other words, it is good governance, the "G" in ESG, that acts as the best risk mitigant.

Contents

1 Introduction

In this paper we look at the main litigation risks for companies and their boards of directors regarding environment, social and governance (ESG) matters in Switzerland ("ESG litigation risks").

We examine the legal situation under Swiss civil, criminal and administrative law, taking into account the current regulatory domestic and international environment, strategies adopted by litigants abroad, and international case law in ESG matters. We also propose possible defence strategies and measures of (litigation) risk prevention.

2 ESG litigation

2.1 What is ESG litigation?

In its broadest sense, ESG litigation can be understood as the efforts of a variety of litigants, including governments and authorities, to align the business conduct of companies or states with current ESG[1] objectives, as defined in the existing and emerging domestic and international legal and quasi-legal frameworks.[2]

A characteristic feature of ESG litigation is the heterogeneous nature of the litigants. They include a variety of stakeholders such as shareholders, employees, consumers, local communities, international organisations, activists and NGOs, as well as governments acting through their various agencies.

In terms of substantive scope, without being exhaustive, ESG litigation typically addresses the following problems and can broadly be grouped around the ESG categories:

i. Environment: claims relating to environmental pollution,[3] climate change[4] and reporting of companies on their CO_2 emissions[5];

ii. Social: claims in relation to infringements of human rights and labour rights in value chains[6] and the complicity of companies with state actions that violate human rights[7];

iii. Governance: claims relating to corruption, money laundering and, more generally, corporate governance.

The current public debate focuses heavily on lawsuits that address the "E" factor of ESG.[8] This can create the false impression that ESG litigation is a new phenomenon, with disputes on the "S" yet to come. In fact, those lawsuits against companies that we have come to call "ESG litigation" began a while ago with actions on the health impact of exposure to asbestos – a typical "S" claim.[9] And, currently, leading cases on jurisdiction and related questions concern human rights – such as the right to bodily integrity and clean water, as well as labour rights.[10] Given that litigation on corporate governance (shareholder litigation) or government enforcement on topics like corruption or money laundering are already happening, it is clearly important not to reduce ESG litigation to climate change litigation.

A further distinctive element of ESG litigation is the wide range of resolution mechanisms, from judicial state-based enforcement to non-judicial, quasi-judicial[11] and company-specific grievance procedures. A salient example for the company-specific grievance mechanisms are the National Contact Points[12] for the OECD Guidelines for Multinational Enterprises.[13] In addition to these judicial, or judicial-like remedy mechanisms, companies will also be held to account for their ESG-related conduct in the court of public opinion.[14]

2.2 A fragmented regulatory landscape

ESG litigation arises in a fragmented landscape of established standards under private and public law, and a range of newly-emergent non-binding standards, guidelines and principles.[15] The separation between hard and soft law is blurred, and the soft law guidelines, standards and codes of conduct continue to define the social, political and legal expectations of companies' ESG conduct.[16] In fact, companies themselves continue to align their international policies and codes of conduct with soft law instruments such as the UN Guiding Principles on Business and Human Rights (2011) or the UN Global Compact.[17]

Lawmakers have been busy translating these non-binding principles into national and international legislation, investor protection and free trade agreements. Work on an internationally binding treaty on business and human rights is ongoing.[18]

Within the "hard currency" legislation, we observe a shift from simple reporting and transparency obligations, relying on the comply or explain concept, to binding human rights due diligence obligations (hereinafter "HRDD obligations"). Lawmakers have introduced civil, administrative and criminal liability to police and sanction the violation of the new HRDD obligations.[19]

In the past two years, Switzerland has adopted several ESG-related provisions in the Code of Obligations ("CO") and the Criminal Code, as well as in the Environmental Protection Act. From 2023 onwards, some large Swiss companies must now publish an annual report on ESG concerns, including environmental matters; in particular, CO_2 goals, social issues, employee-related issues, respect for human rights and combating corruption (art. 964*a* – *c* CO).[20] Large companies must also implement a due diligence process in the areas of conflict minerals and child labour (art. 964*j* - *l* CO).[21]

Swiss companies involved in the extraction of minerals, oil or natural gas, or in the harvesting of timber in primary forests, must publish an annual report on any payment of CHF 100,000 or more they have made to state bodies in any financial year (art. 964*d* – *i* CO).[22]

In addition, first-time distributors ("Erstinverkehrbringer") of timber or timber products on the Swiss market must now comply with ESG-related obligations (art. 35*e* – *h* Environmental Protection Act).[23]

2.3 Trends in ESG litigation against companies

2.3.1 Situation outside Switzerland

Companies in Europe, the US, Canada and Australia have been the target of ESG litigation brought by affected communities and people, activists and NGOs, as well as investors and public authorities. These companies are often the lead firms[24] of large multinational enterprises[25] with value chains[26] that span the globe.

ESG litigation against companies can broadly be classified into the following categories:

i. Claims for damages against lead firms for harm resulting from the operations of subsidiaries, controlled companies or suppliers.[27]

ii. Proceedings against companies in connection with climate change ("climate change litigation").[28]

iii. Claims by investors for damages arising from false and misleading statements and information.[29]

iv. Injunction actions against lead firms under domestic unfair competition law to remove misleading or wrongful commercial statements.[30]

v. Injunction actions and/or claims for damages for the violation of domestic human rights due diligence laws.[31]

vi. Disputes relating to governance issues and government enforcement action.

There are certain commonalities among these categories:

First, in the majority of cases, the contentious matter relates to the operations of either subsidiaries and/or controlled companies abroad and, more recently, also from those of suppliers along the global value chain.

Second, in most cases, lead firms are held liable in their capacity as human rights, labour rights and environmental standards-setting entities along their value chains and subsidiaries. Group-wide policies are defined in codes of conduct, health and safety policies, and sustainability reports. These documents have, for example, served as the basis to establish jurisdiction[32] and responsibility (a duty of care)[33]. This role of lead firms as policy-setting entities is only set to increase in light of the consolidating regulatory environment. Domestic laws increasingly require lead firms to adopt and implement ESG policies along their value chain.[34]

Third, there is a recent trend in ESG legislation towards an administrative remedy mechanism by establishing/determining a public authority to supervise the compliance of companies with the new law.[35] This turn to the State is reflected in the many claims against public authorities to protect its residents from the effects of climate change.[36]

2.3.2 Situation in Switzerland

Compared with our European neighbours, the US, Australia and Canada, Switzerland has so far only seen a few lawsuits for “E” and “S“ brought against *Swiss companies* in *Swiss courts* (Swiss companies have been sued in other countries on such matters[37]). To our knowledge, there are currently only two such lawsuits pending in Switzerland: one against Syngenta for the sale of its pesticide Polo to small-scale farmers in India[38] and the other against Holcim for alleged climate change-related harms on the Indonesian island of Pari.[39] In our view, the reasons for this lie primarily in a relatively new legislative environment and a notoriously litigation-adverse business environment, in spite of a context of increasing juridification of social and political conflicts.[40] However, litigation relating to the “G”, e.g., prosecutions of companies in Switzerland for corruption or shareholder disputes, are not a recent phenomenon.

Recent developments may change this picture in the near future. For civil claims, we expect that the legal arguments and bases probed in foreign ESG litigation cases will inspire and influence prospective litigants in Switzerland. And, on the government enforcement side, authorities will likely come under increased scrutiny to enforce relevant provisions with the same tenacity as their counterparts abroad.

3 ESG litigation risks for companies under Swiss Law

In this section, we map out some of the main ESG litigation risks for companies under Swiss law.

We examine the legal situation under Swiss civil, criminal and administrative law, taking into account the above trends, the current domestic and international regulatory environment, strategies adopted by litigants abroad, and international case law in ESG matters. We also propose possible defence strategies and risk mitigation measures.

ESG risks generally arise from what a company “says”, what it “does or does not”, and what it “says about what it does”. Consequently, our analysis will cover exposure of companies in any communications (including spoken and written communications) related to ESG matters (“ESG communications”) as well as actions or omissions relevant to ESG objectives (“ESG actions”). ESG communications may qualify as so-called greenwashing if they provide untrue, confusing and misleading information to investors and consumers about sustainable aspects of the company and its business or its products.[41]

3.1 Exposure to criminal liability

Criminal liability mainly arises from wrongful and/or misleading ESG communications.

3.1.1 Art. 325bis and 325ter Swiss Criminal Code (SCC)

The Swiss legislator complemented the recently-adopted transparency and due diligence obligations (art. 964a CO et seq.; cf. Section 2.2) with new criminal provisions to ensure that the required reports are accurate. Under art. 325bis and 325ter SCC, the provision of false information in the reports, or failure to publish such reports, can incur a fine of up to CHF 100,000.

The fine targets members of the board of directors of the lead firm, as the new transparency and due diligence obligations stipulate consolidated reporting for group companies.

3.1.2 Art. 152 SCC

A more concerning consequence (and one often overlooked)[42], is that members of senior management or the governing body of the company may be liable for false or incomplete ESG statements under art. 152 SCC, which protects the general public – as well as potential investors and business partners – from false statements about a commercial business. The aim of the provision is to prevent anyone from making investment decisions based on misleading or incomplete information.[43]

Art. 152 SCC is designed to protect the public from false or incomplete[44] statements of substantial significance made via public announcement or notice, or in reports or presentations to all company members, partners or co-operative members, or to the participants in any other commercial enterprise. A public announcement or notice is aimed at a larger group of specific or undefined persons.[45] Notices or reports to company or co-operative members include annual and audit reports, as well as specific reports to the general assembly.

The report on non-financial information requires the approval of the governing body responsible for approving the annual accounts (art. 964c para. 1 CO; cf. Section 2.2), which means it must be presented to the company members. The report must also be made publicly accessible for at least 10 years (art. 964c para. 2 no. 2 CO). A Swiss court may well qualify the non-financial information report as a public announcement, as well as a notice or report directed at a more limited number of addressees, under art. 152 SCC.[46]

The report on compliance with due diligence obligations (based on art. 964l CO) does not have to be approved by the governing body of the company. This means the due diligence report may not qualify as an internal report under art. 152 SCC. However, senior management or the governing body must ensure that the report remains publicly accessible for at least 10 years (art. 964l para. 3 no. 2) and this could mean that the due diligence report represents a public announcement.

As a rule, requirements for a criminal conviction are high. The information in the non-financial or due diligence report must be false (“unwahr”). Statements are false if they do not adequately represent the actual factual and legal situation.[47] Incomplete statements are a particular example of false statements.[48] Art. 152 SCC is only directed at false statements of

particular importance, such as when the addressee could be enticed to make a damaging investment based upon the information provided in the report. For ESG reports, this could be the case where responsible investors are looking for green and socially responsible investment opportunities.[49]

This provides a standard of protection for investors that may also become relevant in civil liability litigation against the company under art. 722 CO (see Section 3.2.1.1), as well as against directors and any persons in charge of business management and liquidation under art. 754 CO (see Section 3.2.1.4).

The company itself may also face criminal liability under art. 102 para. 1 SCC, if false ESG statements cannot be attributed to a specific natural person due to deficiencies in the organisational structure.[50] Under art. 102 para. 1 SCC, the company may be fined up to CHF 5 million.

3.1.3 Art. 3 cum 23 Swiss Unfair Competition Act

Misleading or deceptive statements on ESG aspects may also lead to criminal liability under the Swiss Unfair Competition Act ("UCA").[51] These may qualify as unfair competition practices under art. 3 para. 1 lit. b and i UCA.[52] Art. 23 UCA criminalises the intentional conduct of unfair competition practices and imposes a custodial sentence not exceeding three years, or a monetary penalty (art. 23 UCA).

Consumer protection organisations and public authorities are entitled to file a criminal complaint against infringers under the UCA (art. 23 para. 2 in conjunction with art. 10 para. 2 lit. b and para. 3 UCA). An example of the latter can be seen in the criminal complaint by the Swiss State Secretariat for Economic Affairs (Seco) in connection with the Greensill matter.[53]

3.2 Exposure to civil liability

In recent international cases, courts have admitted civil liability based on a variety of grounds: the liability of directors and administrators,[54] direct duty of care[55] and vicarious liability.[56] We set out below an initial analysis under Swiss law, taking into account typical arguments brought forward by claimants in these cases.[57]

Civil liability may arise in connection with a variety of stakeholders. While ESG communications are primarily relevant for investors, ESG actions tend to affect a wider spectrum of actors. We will therefore distinguish between harm caused to investors and harm caused to other third parties.

3.2.1 Harm caused to investors – liability for false or misleading statements in public ESG communications

3.2.1.1 Art. 722 in conjunction with art. 41 CO

Investors who have suffered losses as a result of wrong or misleading information about the business may have a damage claim against the company based on art. 722 CO.

Art. 722 CO provides that a company (legal person) is liable for any damage resulting from an unlawful act by a person with authority to represent the company or manage its business in his or her company function (art. 722 CO). Unlawful acts are acts within the meaning of the general Swiss tort law provision (art. 41 CO)[58], which states that any person who unlawfully causes damage to another is obliged to provide compensation. Art. 41 CO is arguably the Swiss equivalent to the direct duty of care under foreign laws (tort in negligence).

Investors generally suffer purely monetary damage. Therefore, liability requires the violation of a legal provision that is designed to protect against such damage ("Schutznorm").[59] The following provisions may serve as "Schutznormen" in the present context.

According to one author, the new ESG-related duties of senior management or the governing body of a company stipulated in art. 964a et seq. CO may qualify as norms of protection ("Schutznormen") and therefore form a basis for liability.[60] Based on a systematic reasoning, a court could also conclude that art. 325bis and 325ter SSC (which sanction violations of the duties set forth in art. 964a et seq.) are "Schutznormen" as they follow art. 325 SSC, which puts the violation of the duties of proper bookkeeping under sanction and is mentioned by some authors as potential "Schutznorm".[61]

The unlawfulness of an action in relation to ESG communications may also arise under art. 152 SSC. This provision protects the property interests of investors from unlawful interferences (cf. Section 3.1.2).

As mentioned, misleading or deceptive ESG communications may qualify as unfair competition practices under art. 3 para. 1 lit. b and i UCA (cf. Section 3.1.3). Unfair competition practices are unlawful (art. 2 UCA)[62]. Accordingly, art. 3 UCA may form a basis for liability.

3.2.1.2 Art. 3 UCA

Where misleading or deceptive ESG communications qualify as unfair competition practices under art. 3 para. 1 lit. b and i UCA (cf. para. Section 3.1.3), a company may face claims based on the UCA. Under the UCA, customers are entitled to sue infringers (art. 10 para. 1 UCA). Remedies include injunctive relief [63], damages and disgorgement of profits.[64] A customer within the meaning of art. 10 para. 1 UCA is every person who purchases goods or services.[65] We believe that an investor may qualify as a "customer" in the sense of the UCA. So, in the case of misleading or deceptive ESG communications, an investor may have a claim against a company based on the UCA.

3.2.1.3 Swiss Federal Act on Financial Services

An additional liability risk for ESG communications could exist based on prospectus liability under the Federal Act on Financial Services (FinSA). In light of recent legislative developments, ESG-related matters must be considered as essential information about the business and/or relevant risks. In Switzerland, any person who makes a public offer for the acquisition of securities or who seeks the admission of securities to trading on a trading venue in accordance with Article 26 lit. a of the FinMIA, must first publish a prospectus (art. 35 para. 1 FinSA). This must contain essential information on the business situation (art. 40 para. 1 lit. a no. 3 FinSA) and the main prospects, risks and litigation (art. 40 para. 1 lit. a no. 4 FinSA). The FinSA imposes civil liability on persons providing misleading information in the prospectus or similar communications[66] (art. 69 FinSA).

3.2.1.4 Directors' liability based on art. 754 or art. 41 CO

Investors may bring claims not only against a company, but also against its directors and all persons engaged in the business management or liquidation of the company. If art. 964a et seq. CO qualify as "Schutznormen" for investors, art. 754 CO[67] or art. 41 CO[68] may form a basis for claims against directors. The other potential "Schutznormen" mentioned above (cf. Section 3.2.1.1) may provide a legal basis for claims against directors based on art. 41 CO.

3.2.2 Harm caused to non-investors

3.2.2.1 Art. 722 in conjunction with art. 41 CO

Under Art. 722 CO, a company may also face civil liability for unlawful acts (within the meaning of art. 41 CO (cf. Section 3.2.1.1)) committed towards non-investors.[69] Liability under art. 41 CO requires the violation of an absolutely protected right of the injured party[70], or the violation of a "Schutznorm".[71] Where an absolutely protected right is violated because of inaction, liability requires the breach of a duty to act.[72]

The recently-introduced due diligence obligations in conflict minerals and child labour stipulate a new duty to act (art. 964*j-l* CO): they entail a legal duty to ensure the personal safety of third parties that might be affected by the working conditions in value chains. A breach thereof may therefore lead to tortious liability.[73]

A further basis for direct liability for tort in the realm of ESG litigation is found in the Product Liability Act. Manufacturers are liable for damages caused by defective products even if they are not at fault.[74] The pending action against Syngenta (brought by Indian claimants for the sale of its pesticide Polo) is based on product liability.[75]

3.2.2.2 Vicarious liability based on art. 55 CO

In the ESG context, the concept of vicarious liability as stipulated in art. 55 CO, could also become relevant. This question arises in connection with the possible liability of a lead firm for a controlled entity.

Art. 55 CO provides for the liability of principals for the damage caused by their employees or auxiliaries. Liability based on this provision generally requires that (i) a damage was proximately and unlawfully caused by an employee or auxiliary, (ii) while carrying out business on behalf of the principal, and (iii) a relationship of subordination exists between employee or auxiliary and the principal.[76]

The Federal Supreme Court has not yet clarified whether legal persons may also be considered employers and auxiliaries in the meaning of art. 55 CO. According to some authors, the Federal Supreme Court commented on this issue only tentatively in an *obiter dictum*.[77] In that decision, the court held that the integration of a company into a multinational enterprise does not in itself result in ("*(…) n'entraîne pas à elle seule une responsabilité (…)*"[78]), a potential liability under art. 55 CO. The reason being that, despite its integration into a multinational enterprise, a controlled company remains a separate and independent entity. Based on further remarks in this *obiter dictum*, some authors conclude that, to establish civil liability based on art. 55 CO, the Federal Supreme Court requires that the controlled company must be subordinated, receive instructions and act on behalf of the principal.[79]

While case law has not yet answered the question, legal scholars generally admit that vicarious liability of one company for another is *per se* possible. Some suggest that lead firms could be held responsible for the wrongful acts and omissions of controlled companies based on art. 55 CO, if they cannot show that they took all reasonable care to prevent the damage from occurring.[80]

When the basic requirements for liability based on art. 55 CO are applied to the relationship between two companies, a lead firm is liable for the damage caused by another company if (i) the damage was proximately and unlawfully caused by the other company, (ii) while the other company was carrying out business on behalf of the lead firm, and (iii) the lead firm sufficiently controls the other company.

However, art. 55 CO allows for the possibility of exoneration if the principal shows that it has taken all reasonable care in selecting (*cura in eligendo*), in supervising (*cura in custodiendo*) and in instructing *(cura in instruendo*) the subordinate person.

These defences must be adapted to the factual realities of the multinational enterprise. The lead firm would need to show that it took all reasonable steps to ensure that a controlled company is equal to its task. In addition, the lead firm would need to show that it monitored the controlled company in such a way as to ensure the company's compliance with ESG norms.[81] In the "Schachtrahmen" case, the Federal Supreme Court set a high bar for the proof of exoneration.[82] The principal firm must show that it organised its business ("Betrieb") impeccably ("einwandfrei").[83] In our opinion, applied to the multinational enterprise, this would mean that a transnational production network should be organised in a way that ensures compliance with relevant ESG norms at every point in the value chain. This is far reaching, as it requires an active involvement, and possibly an intervention of the lead firm, in the operations of its controlled companies.

This in turn would, arguably, increase the level of control between the lead firm and the involved companies, as well as the knowledge of local ESG matters. Such increased control amplifies the risk of a firm's direct liability in the sense of art. 41 CO, as the lead firm may be regarded as factual director of the controlled company. In these circumstances, unlawful actions of the lead firm's directors, acting as factual directors of the controlled company, could give rise to the lead firm's liability based on art. 722 and 754 CO.[84]

3.2.2.3 Art. 3 UCA

To the extent ESG communications qualify as unfair competition practices, a company may face lawsuits from competitors, as well as consumer protection organisations and public authorities (cf. art. 9 and art. 10 para. 2 lit. b and para. 3 UCA). Consumer protection organisations and public authorities can seek injunctive relief [85] only, while competitors may also seek damages or disgorgement of profits (art. 9 and art. 10 para 2 lit. b in conjunction with art. 9 para. 1 and 2 UCA).[86]

3.2.2.4 Art. 28/28a Swiss Civil Code (CC)

Damages for harm caused by climate change are increasingly pleaded with reference to personality rights. We observe a turn towards future-oriented remedies such as applications to refrain from manufacturing certain products or to reduce the emission of greenhouse gases (as opposed to backward-looking claims for damages).[87]

In Switzerland, the first climate change lawsuit was recently initiated by Indonesian claimants from Pari Island against the Swiss cement company Holcim.[88] Their claim seems to be based on the infringement of personality rights under art. 28/28a of the CC. Accordingly, the claimants asked the court to order Holcim to cut CO_2 emissions by 43 per cent by 2030, compared with 2019 figures, to contribute towards adaptation measures on Pari Island and to provide proportional compensation for the climate-related damage they have suffered there.[89]

It remains to be seen how Swiss courts will rule in such cases.

3.2.2.5 Directors' liability based on art. 754 or art. 41 CO

A company's directors may be held personally liable for violations of the duty to act, set forth in art. 964j-l CO, based on art. 754 CO. They may also be personally liable for harm caused in violation of the UCA or art. 28 CC based on art. 41 CO.

3.2.3 International private law as a challenge (and defence)

3.2.3.1 Jurisdiction

As the vast majority of ESG litigation entails an international element, the first hurdle to clear is that of determining jurisdiction.

The PILA[90] and Lugano Convention[91] establish jurisdiction for liability claims against companies that have their statutory seat in Switzerland (PILA and Lugano Convention) and central administration or principal place of business in Switzerland (only Lugano Convention) (art. 129 PILA and art. 2 para. 1 in connection with art. 60 para. 1 Lugano Convention). Accordingly, if the action is brought *directly against the Swiss lead firm or parent company*, a Swiss court could well assume jurisdiction for ESG liability claims brought by foreign defendants for extraterritorial harm.

3.2.3.2 Applicable law

In a second step, the court determines the applicable law under art. 132 et seq. PILA.[92] The PILA sets forth rules for liability claims in general and special rules for certain types of liability claims.

a) General rules

The PILA sets out a cascade order according to which the applicable law is, in the absence of a choice of law (made after the damaging event; art. 132 PILA) or pre-existing legal relationship (art. 133 para. 3 PILA), determined by the law of the place in which both parties have their habitual residence (art. 133 para. 1 PILA). In the absence of a common habitual residence, the claims are governed by the law of the state in which the tort manifested (i.e. where the protected right was violated), if such manifestation in this place was foreseeable (art. 133 para. 2 PILA).[93] The law of the state in which the tort was committed is only

applicable if the place where the tort would manifest had not been foreseeable (art. 133 para. 2 PILA).

Based on the above-stated cascade, Swiss law is only the applicable law if it *had not been foreseeable*[94] that the tort would manifest in the state in which the damage occurred.[95]

The situations under which Swiss lead firms might incur civil liability include either an own and direct act and omission on the part of the Swiss company (in the meaning of art. 41 CO) or a failure to ensure that a controlled company acts according to national and international ESG standards (in the meaning of art. 55 CO). In these situations, the territorial location of the impact of the acts and omissions of a lead firm and/or a controlled entity is not random, but would arguably be foreseeable.[96] Hence, the applicable law to the claims would be the foreign law.[97] However, a court would need to examine on a case-by-case basis whether, in a given instance, it was objectively foreseeable that the tort would manifest in that particular country.[98] In any case, the active involvement and control by a lead firm of the operations of companies under its control influences the determination of the applicable law under the cascade order of art. 133 PILA. The more involvement and control, the more likely it is that the location of the place in which a tort manifests was foreseeable. This foreseeability of the territoriality of a tort leads to the applicability of the law of the place where the tort manifested (art. 133 para. 2 PILA). With increasing due diligence requirements imposed on companies, this result may become inevitable.

A separate connecting factor to apply Swiss law is found in art. 15 and art. 17 PILA. Art. 15 PILA ensures that the law with the closest connection to the dispute applies. Art. 17 PILA contains an *ordre public* provision to safeguard Swiss public policy.

b) Product liability claims

In the case of product liability actions (further discussed in Section 3.2.2.1), the claimants may choose as the applicable law either the law of the state in which the defendant is established or the law of the state in which the product was acquired, unless the defendant proves that the product was introduced in the market of that state without its consent (art. 135 PILA).[99] Accordingly, for claims against a Swiss company, the injured party can choose Swiss law.

c) Unfair competition practices

Claims based on unfair competition are governed by the law of the state in whose market the unfair practice has its effect (art. 136 para. 1 PILA). Market within the meaning of art. 136 para. 1 PILA is the place where a competitor addresses the potential purchasers, which may lead to the application of more than one law.[100] ESG communications by a company with its statutory seat in Switzerland must therefore, in our opinion, comply with the UCA to the extent they address the Swiss market.

3.3 Exposure to administrative and regulatory action

3.3.1 In the financial sector

Regulatory action in Switzerland has recently focused on greenwashing in the area of financial products.[101] One of FINMA's strategic goals for 2021 to 2024 is the sustainable

development of the Swiss financial market.[102] For investment funds, FINMA pays particular attention to the sustainability information provided when approving and supervising a Swiss collective investment scheme (in the meaning of Art. 1 et seq. and art. 102 Collective Investment Schemes Act (CISA); art. 35a Collective Investment Schemes Ordinance (CISO); Financial Services Ordinance (FinSo) Annex 6).[103] It also checks the adequacy of the organisational structure of institutions that manage sustainability-related collective investment regimes (in the meaning of art. 7 Financial Institutions Act (FinIA)).[104]

In 2021 FINMA has also revised the circulars to banks and insurance companies regarding disclosure of certain (financial) information.[105] Banks in supervisory categories 1 and 2, and insurance companies in supervisory category 2 (as well as insurance group of companies which include insurance companies in supervisory category 2) must annually disclose information regarding the management of climate-related financial risks.[106]

In the case of violation of supervisory provisions, FINMA will require that the proper situation be restored and may, in case of a serious violation, revoke the licence or withdraw its recognition (cf. art. 30, 31, and 37 Financial Market Supervision Act (FINMASA). FINMA's circulars are part of the supervisory provisions to the extent they are within the scope of the applicable statutory provisions.[107]

Furthermore, the Swiss Bankers Association has recently adopted guidelines (in force since 1 January 2023) whose purpose is to define a uniform minimum standard within the industry for the consideration of ESG-preferences and -risks in investment advice (portfolio-based and transaction-based) and portfolio management.[108] Similarly, the Asset Management Association Switzerland has adopted rules which are intended to ensure quality in the management and positioning of sustainability-related collective assets, as well as transparency within the Swiss asset management industry (coming into force on 30 September 2023).[109] While both sets of rules are not (yet) part of the self-regulation recognised or approved by FINMA pursuant to Art. 7 para. 3 FINMASA[110], it seems likely that FINMA will consider them when assessing compliance with applicable supervisory provisions, including in particular the Financial Services Act (FinSA).

3.3.2 Listed companies

Listed companies ("Issuers") are under an obligation to comply with the regulations of the relevant exchange, in the case of the SIX Exchange the SIX Listing Rules dated 15 July 2022 ("LR") and directives issued by the regulatory board of SIX Exchange Regulation AG ("SER"). As a condition for maintaining listing the LR require periodic[111] and ad-hoc reporting of certain information. Under the latter obligation, Issuers must disclose price-sensitive facts which have arisen in their sphere of activity (so-called ad hoc publicity; Art. 53 LR). Price-sensitive facts are facts whose disclosure can trigger a significant change in market prices (Art. 53 para. 1 LR). A price change is significant if it is considerably greater than the usual price fluctuations (Art. 53 para. 1 LR).[112] The Issuers must provide notification as soon as they become aware of the main points of the price-sensitive fact (Art. 53 para. 2 LR). Facts related to ESG matters may well be price-sensitive facts and trigger respective reporting obligations.[113]

Intentional or negligent non-compliance with the reporting requirements, including the publication of false or misleading information[114], constitutes a breach of the LR or their implementing provisions and may be sanctioned by SER (Art. 60 LR). Potential sanctions

include fines of up to CHF 1 million in cases of negligence and up to CHF 10 million in cases of wrongful intent (Art. 61 para. 1 LR).

3.3.3 Swiss Commission for Fair Practices

ESG communications may also come under scrutiny by the Swiss Commission for Fair Market Practices ("Schweizerische Lauterkeitskommission"), which provides for a quasi-judicial complaints procedure to investigate claims regarding misleading and untrue commercial statements and advertisements.[115] Recently, for example, the coalition for business responsibilities submitted a complaint against Glencore's climate change campaign.[116]

3.4 Exposure to quasi-judicial procedures – the example of the OECD National Contact Point

According to our broad definition of ESG litigation (see Section 2.1), there is an additional risk from the resolution mechanism foreseen by the OECD Guidelines for Multinational Enterprises (the "Guidelines").[117]

Governments (like Switzerland) that adhere to the Guidelines must set up a National Contact Point (NCP) to further their implementation.[118] Part of their mandate consists in providing a grievance mechanism to resolve disputes (called "specific instances") that have arisen from a lack of compliance with the Guidelines.[119] As of 2020, the OECD reports that NCPs had received more than 575 specific instances.[120]

The Swiss NCP sits with the State Secretariat for Economic Affairs (SECO) at the International Investment and Multinational Enterprises unit (Ordinance on the Organisation of the National Contact Point for the OECD Guidelines for Multinational Enterprises and on its Advisory Board, NCPO-OECD).[121]

Any individual person or groups can raise specific instances regarding the possible violation of the OECD Guidelines (art. 3 para. I NCPO-OECD). As regards the procedure for dealing with submissions that raise specific instances, the Ordinance refers to the Procedural Guidance of the OECD Guidelines and instructions issued by the Swiss NCP[122] based thereon (art. 4 para. I NCPO-OECD). In addition, Art. 4 para. II NCPO-OECD specifies that, where a specific instance is submitted, the NCP will set up an ad hoc working group within the Federal Administration to deal with it. The respective working groups include representatives from the offices of the Federal Administration that are affected by the specific instance.

Specific instances procedures before the Swiss NCP follow a five-step process described in the Swiss NCP's Information on the Specific Instances Procedure ("NCP Information")[123]:

Step 1, Confirmation and Information: This includes the receipt of the submission, notification of the responding party and convening the ad hoc working group.[124]

Step 2, Initial Assessment: the Swiss NCP makes an initial assessment of the matter in accordance with the OECD Guidelines. Once the initial assessment phase has been completed, the NCP provides a written report, which is published on the NCP's website, stating whether or not the specific instance will be pursued.[125]

Step 3, Providing a platform for dialogue to the parties: When the NCP decides to pursue a specific instance, it offers its help in finding a solution to the parties involved. If the parties accept this offer, the NCP initiates an informal conciliation procedure that may be led by the NCP itself, or an external mediator.[126]

Step 4, Conclusion of the procedure: If the parties reach an agreement and find a solution to the dispute, or a further means of resolving the dispute, or if no agreement is reached, or one of the parties is not willing to participate in the proceedings, the NCP publishes a final statement.[127]

Step 5, Feedback to the NCP: On conclusion of the proceedings, the NCP provides the parties with a questionnaire, to provide the NCP with feedback on the proceedings.[128]

In a recent instance, the Swiss company contested the jurisdiction of the Swiss NCP to hear the claim, as the contentious issues arose with regard to a project in the US (which was governed by US law). The company argued that the instance raised should be handled by the US NCP. However, in its initial assessment, the Swiss NCP accepted the specific instance, because the main issues submitted concerned the coherence between the internal policies of the Swiss company and international standards. For the discussion of such policies, the Swiss NCP considered itself competent.[129] This demonstrates that a Swiss company may have to face a procedure before the Swiss NCP, with the corresponding possible reputational damage, even if an activity in a foreign country is concerned and foreign law applies.

Currently, the Swiss NCP is handling one case.[130] It was brought by the NGO Global Legal Action Network against Glencore. Concluded cases include specific instances brought against the following Swiss companies: International Olympic Committee, UBS, Syngenta, BKW Energie AG, LafargeHolcim, Phamakina SA, International Ice Hockey Federation, RSPO, Credit Suisse, Holcim Indonesien, WWF International Kamerun, FIFA, SGS Mali, Holcim Indien, Mopani Glencore Zambia, Paul Reinhart AG Uzbekistan, Louis Dreyfus Commodities Suisse SA Uzbekistan, ECOM Uzbekistan, Nestlé Indonesien, Triumph Thailand/Philippinen, Nestlé Russia, and El Cerrejon Kolumbien.

4 Possible defence strategies and measures of litigation risk prevention

4.1 ESG litigation risks as a realistic threat

The ESG litigation risks addressed in this paper materialise in (reputational) damage and legal sanctions following corporate acts and omissions, including communication on ESG matters. However, with few exceptions, they do not originate from newly-introduced ESG legislation. Rather, it is the new disclosure regimes and due diligence obligations introduced by ESG legislation that give a new meaning to pre-existing legal remedies.

These findings also dispel two common misbeliefs in connection with the regulations introduced with the counterproposal to the Responsible Business Initiative[131]: that

breaching the new reporting / due diligence obligations may only lead to a fine (quite the opposite – miscommunication may lead to more severe sanctions); and that the risk of group liability (Konzernhaftung) is off the table (whereas, under the existing rules, companies are still facing these liability risks). And the risk that such claims could be brought under foreign law is now even greater.

As a result, the ESG litigation risks discussed above must be considered as a realistic threat, warranting appropriate responses. So – how can companies effectively mitigate their exposure to ESG litigation risks and develop adequate defence strategies? The answer can only be a nuanced one, as it will inevitably be a function of the individual risks inherent in a particular business. Yet, some principles universally apply, as outlined below.

4.2 Proper governance is the best defence strategy

The starting point is to properly map the ESG litigation risk landscape. To succeed, a company must be able to consolidate all relevant information, embracing the newly-created disclosure and due diligence obligations and properly embedding them into a reporting architecture. The key is to avoid silos, where information is not passed on. ESG must be addressed across all business lines, including structure, processes, and allocation of decision-making powers within a corporation.

But proper reporting structures mean nothing without adequate response – including constant supervision, instruction and selection. We have seen that failure to adequately react to possible findings in connection with human rights due diligence may prevent a company from exonerating itself of vicarious liability. It is, therefore, important that any material information be correctly processed, shared and addressed. This is all the more important in connection with possible criminal offences. Since most of the relevant criminal offences can be committed in wilful blindness, the company leadership must ensure that any ESG communications are based on proper information gathering and a proper assessment of the information available. Here again, acting in silos can have a detrimental effect (and may, in certain circumstances, also be qualified as organisational dysfunction, triggering criminal liability of the company itself).

While corporate governance is important in achieving ESG goals, an effective ESG-oriented governance system can also serve as exonerating evidence. A well-functioning internal risk management and control system can contribute to discharge the corporation from both criminal and civil liability. All this requires that ESG matters become an inherent part of a company's strategy, including culture, risk management, and operational control arrangements such as data governance or third-party management. It also entails softer factors, such as the corporate culture and values among employees. Ultimately, only the board will be able to impose the required changes, making it the only credible guardian of ESG litigation risks. In other words, it is the "G" in ESG that acts as the best risk mitigant. In this context, we advise caution on the recommendation of Art. 23 para. 5 of the SCBP that the audit committee should discuss the reporting on non-financial matters. To prevent the silo effects described above, we recommend making use of the possibility afforded in art. 21 para. 1 SCBP and create a more specialised sustainability committee for this task, or arguably even an ESG committee.

However, as we have seen, a good corporate governance with appropriate internal policies and guidelines may, paradoxically, also increase ESG risks. In particular, the Swiss lead firm or parent company must be able to demonstrate that it took all reasonable care in appointing, instructing and supervising the subordinate company (subsidiary or supplier firm). Only such a due care defence will exonerate a Swiss company from vicarious liability claims, or any other claims under Swiss law. It should be noted and taken into consideration that such a due care defence does not exist under other laws, in particular under common law.[132] Swiss companies with a presence in such countries are therefore all the more exposed.

Thus, only “on the ground” implementation of a good corporate governance system can act as an effective defence against ESG-related claims brought under the various legal bases outlined in this paper.

Taking all reasonable care to appoint, instruct and supervise any firm integrated into the global production network or enterprise of a Swiss company means that the Swiss company must make sure that those firms comply with domestic and international ESG standards. In the end, the credibility of any defence to ESG litigation will, first and foremost, depend on the acts and omissions of the firms that operate in local societies – and only secondarily on the corporate governance system, ESG policies and codes of conduct in place at the Swiss lead company.

5 Endnotes

1 ESG is an umbrella term that covers factors relating to the environmental and social impacts and performance of companies, as well as to their governance. ESG factors may include the impacts of companies on climate change and their environmental management practices, companies' working and safety conditions, human rights and modern slavery policies, consumer protection and board diversity, as well as anti-bribery and corruption practices, data protection, and directors' duties and corporate reporting obligations. According to OECD's definition, environmental criteria look at how a company performs as a steward of the natural environment, social criteria examine how a company manages relationships with its employees, suppliers, customers and the communities where it operates (and often includes human rights and labour rights), and governance deals with a company's corporate governance, i.e. its leadership, executive pay, audits and internal controls, and shareholder rights (see OECD (2017), Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises, Annex I, available at https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf, last accessed on 12 September 2022).

2 For a proposal of categorization, see: Latham & Watkins LLP, 'ESG Litigation Roadmap', https://www.wbcsd.org/Programs/Redefining-Value/Making-stakeholder-capitalism-actionable/Enterprise-Risk-Management/Resources/ESG-Litigation-Roadmap, last accessed on 9 September 2022.

3 For example, Four Nigerian Farmers and Stichting Milieudefensie v. Royal Dutch Shell plc and another [2021] Court of Appeal of The Hague (the Netherlands).

4 An exemplary case is Saúl Ananías Luciano Lliuya v. RWE AG, Case No. 2 O 285/15 Essen Regional Court (currently pending on appeal).

5 Among many cases, Ramirez v. Exxon Mobil Corp., 334 F. Supp. 3d 832 (N.D. Tex. 2018).

6 The current leading case is Vedanta Resources Plc and another v. Lungowe and others [2019] UKSC 20.

7 See, for example, Nevsun Resources Ltd. v. Araya, 2020 SCC 5 (Canada).

8 Benjamin Triebe, Müssen Konzerne wie Holcim für Klimaschäden zahlen? Vier Indonesier wollen das durchsetzen – und könnten eine Klagewelle auslösen (NZZ, 28 July 2022), available at https://www.nzz.ch/wirtschaft/holcim-indonesier-wollen-schadenersatz-wegen-klimawandel-ld.1695361?reduced=true, last visited on 6 October 2022; Isabella Kaminski, Fossil fuel industry faces surge in climate lawsuits (Guardian, 30 June 2022), available at: https://www.theguardian.com/environment/2022/jun/30/fossil-fuel-industry-surge-climate-lawsuits, last visited on 6 October 2022.

9 Chandler v. Cape plc [2012] EWCA Civ 525.

10 Vedanta Resources Plc and another v. Lungowe and others [2019] UKSC 20; Okpabi and others v. Royal Dutch Shell Plc and another [2021] UKSC.

11 A quasi-judicial forum encompasses dispute resolution mechanisms whose processes and institutions resemble those of state-based judicial avenues but are either not state-based or do not take place within courts.

12 For more information on the National Contact Point of Switzerland, see https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/nachhaltigkeit_unternehmen/nkp.html, last accessed on 13 September 2022.

13 OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing, available online: https://www.oecd.org/daf/inv/mne/48004323.pdf, last accessed on 13 September 2022.

14 Sally Wheeler, "Global production, CSR and human rights: the courts of public opinion and the social licence to operate" (2015) The International Journal of Human Rights 19/6, 757-778.

15 The most important guidelines and frameworks include the UN Global Compact Principles (2000), the UN Guiding Principles on Business and Human Rights (2011) and the OECD Guidelines for Multinational Enterprises (2011). Soft law instruments in the area of ESG have been developed by different societal actors, including businesses themselves (for example the International Council on Mining and Metals), international organisations (for example the above-mentioned UN Global Compact Principles (2000), the UN Guiding Principles on Business and Human Rights (2011) and the OECD Guidelines for Multinational Enterprises (2011) or the 2030 Agenda for

Sustainable Development, including the UN Sustainable Development Goals (2015)) or in collaborative efforts by governments, companies and NGOs (for example the Voluntary Principles on Security and Human Rights (2000), the TCFD Climate-Related Financial Disclosure Recommendations (2017), the Swiss National Action Plan 2020–23 on the UN Guiding Principles on Business and Human Rights (2020) and the Swiss Action Plan 2020-2023 on Corporate Social Responsibility (2020) or the Swiss Climate Scores (2022)); see for an example of the incorporation of ESG considerations into investment protection agreements, art. 14, art. 17 – 20 and art. 24 of the Bilateral Investment Agreement between Morocco and Nigeria of 2016 and also art. 13 of the draft Bilateral Agreement on the Promotion and Protection of Investments between Switzerland and Indonesia, and art. 8.15 of the Free Trade Agreement between Brazil and Chile of 2018. Relevant for Switzerland is finally the just revised Swiss Code of Best Practice for Corporate Governance (the "SCBP"), https://www.economiesuisse.ch/sites/default/files/publications/swisscode_e_web.pdf, last visited on 1 March 2023, which sets the governance standards for Swiss companies in the form of non-binding recommendations. It newly incorporates a series of ESG related recommendations and explicitly declares (on p. 6) that *"[b]usiness activities are sustainable when the interests of different stakeholders in the company are taken into account and economic, social and environmental goals are pursued holistically."*

16 Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (1st edn, Hart 2010); Peer Zumbansen, "Neither "Public" nor "Private", "National" nor "International": Transnational Corporate Governance from a Legal Pluralist Perspective" (2021) Journal of Law and Society 38/1, 50-75; Daniel Augenstein, "Towards a new legal consensus on business and human rights: A 10th anniversary essay", (2022) Netherlands Quarterly of Human Rights 40/1, 35–55.

17 Lise Smit, Claire Bright, Irene Pietropaoli, Julianne Hughes-Jennett and Peter Hood, "Business Views on Mandatory Human Rights Due Diligence Regulation: A Comparative Analysis of Two Recent Studies" (2020) Business and Human Rights Journal 5/2, 261-269; Karin Buhmann, "Business and human rights: Understanding the UN Guiding Principles from the perspective of transnational governance interactions", (2015) Transnational Legal Theory 6/2, 339-434. See for a practice example: Glencore*, Sustainability Report 2021: Strengthening our performance*, 13, 16, 46-47, 52 (2022) available at https://www.glencore.com/.rest/api/v1/documents/59122a94d9c86731923614217b1ce1dc/GLEN_2021_sustainability_report.pdf, last visited 15 September 2022; Nestlé, *Creating Shared Value and Sustainability Report 2021*, 43, 46 (2022) available at https://www.nestle.com/sites/default/files/2022-03/creating-shared-value-sustainability-report-2021-en.pdf, last visited 15 September 2022; Holcim, *2021 Sustainability Performance Report*, 15–16, 21–31, 32–35 available at https://www.holcim.com/sites/holcim/files/2022-04/25022022-sustainability-performance_fy_2021_report-en.pdf, last visited 12 January 2023.

18 These include the EU Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU (Non-Financial Reporting Directive, amended by the Corporate Sustainability Reporting Directive "CSRD") as regards disclosure of non-financial and diversity information by certain large undertakings and groups; the United Nations Framework Convention on Climate Change (2015); the English Modern Slavery Act of 2015; the French Duty of Vigilance Law of 2017; the Australian Modern Slavery Act (2018); the EU Regulation 2019/2089 amending EU Regulation 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks (2019); the EU Regulation 2019/2088 on sustainability-related disclosures in the financial services sector (2019) and the EU Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment, amending EU Regulation 2019/2088 (2020) (Sustainable Finance Disclosure Regulation), which, as of 2023, will require disclosure of ESG considerations by all funds; the German Supply Chain Due Diligence Law of 2021; the Norwegian Transparency Act of 2021; the Draft UN Treaty on Business and Human Rights (2021); the EU Corporate Sustainability Reporting Directive amending the EU Non-Financial Reporting Directive (2021; to be adopted in 2022); the proposal of the EU Commission for a Directive on Corporate Sustainability Due Diligence (2022), which includes due diligence obligations in the ESG area, an administrative supervisory mechanism and civil liability; as well as Art. 964a et seq. in the Swiss Code of Obligations on the reporting on non-financial information and selective, issues-specific human rights due diligence obligations (2022).

19 French Loi de Vigilance of 2017; German Supply Chain Due Diligence Law of 2021; Norwegian Transparency Act of 2021.

20 These provisions as well as art. 964*d* – *i* CO mentioned below were introduced in reaction to the so-called Swiss Responsible Business Initiative ("RBI"); for more information about the legislative process see https://www.bj.admin.ch/bj/de/home/wirtschaft/gesetzgebung/verantwortungsvolle-unternehmen.html.

21 In regard to this second set of amendments, the Federal Council issued an Ordinance to implement the due diligence obligations (Verordnung über Sorgfaltspflichten und Transparenz bezüglich Mineralien und Metallen aus Konfliktgebieten und Kinderarbeit). Please note, the history of the new ESG rules in the core legislative act on obligations has not yet come to an end. For instance, in May 2022, the Legal Affairs Committee of the National Council adopted a parliamentary initiative on adding the issue of forced labour to the new Art. 964j - l CO on due diligence obligations. For the legislative train for the parliament initiative, see: https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20210427, last accessed on 14 September 2022.

22 The reporting obligations also apply to Swiss companies which control raw material companies in the above-mentioned areas (Art. 964d CO). The relevant payments may be in cash or kind, and include, among others, taxes and revenues, licence and concession fees (Art. 964e CO). The report must be approved by the highest management or administrative body (Art. 964f para. IV CO).

23 The due diligence obligations in the timber sector are based on the EU Timber Regulation 995/2010 (Erläuterungen zur Verordnung über das Inverkehrbringen von Holzerzeugnissen (Holzhandelsverordnung, HHV), 12 May 2021).

24 We use the term *lead* firm to refer to the companies that govern multinational enterprises and global value chains. In contrast to the notion of the parent company which indicates equity relations between different companies, lead firm also includes companies that steer value chains based on contractual arrangements and economic dependence structures. Hence, the notion of a parent company should only indicate enterprise structures that arise from equity relations between different companies (Joonkoo Lee and Gary Gereffi, "Global value chains, rising power firms and economic and social upgrading" (2015) Critical Perspectives on International Business 11/3-4, 319–399; Gary Gereffi, John Humphrey and Timothy Sturgeon, "The Governance of Global Value Chains" (2005) Review of International Political Economy 12/1, 78–104).

25 According to the OECD Guidelines for Multinational Enterprises, *multinational enterprises* are enterprises that usually comprise companies or other entities established in more than one country and are so linked that they may coordinate their operations in various ways. The degree of autonomy of the companies within the enterprise varies widely from one multinational enterprise to another. Multinational enterprises operate in all sectors of the economy and may be private, state-owned, or mixed. See for the definition OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing, available online: https://www.oecd.org/daf/inv/mne/48004323.pdf, last accessed on 14 September 2022.

26 The term *value chain* is used to describe the activities, resources and investments to create a product or provide a service. We use the notions of supply chains, commodity chains and global production networks interchangeably and as synonyms for the term value chain. For a discussion on the differences of the concepts of global production network, supply, commodity and value chains, see: Jennifer Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" (2005) Competition & Change 9/2, 153-180.

27 Vedanta Resources Plc and another v. Lungowe and others [2019] UKSC 20; Okpabi and others v. Royal Dutch Shell Plc and another [2021] UKSC 3; Mariana and others v. BHP plc and BHP Ltd [2021] EWCA Civ 1156; Hamida Begun (on behalf of MD Khalil Mollah) v. Maran (UK) Ltd [2021] EWCA 1846 (QB) (all UK); Nevsun Resources Ltd v. Araya [2020] SCC 5; Choc v. Hudbay Minerals Inc. [2013] ONSC 1414 (all Canada); Izabela Barroso Cãmara Pinto et al v. Tüv Süd, pending before the Landgericht München.

28 Saúl Ananías Luciano Lliuya v. RWE AG [2015] Landgericht Essen, 2 O 285/15; Ulf Allhoff-Cramer v. Volkswagen AG, Landgericht Detmold; Martin Kaiser et al. v. Volkswagen AG, Landgericht Braunschweig, 6 O 3931/21 (all Germany); Four Nigerian Farmers and Stichting Milieudefensie v. Royal Dutch Shell plc and another [2021] Court of Appeal of The Hague (the Netherlands).

29 BHP Billiton Ltd Securities Litigation, U.S. District Court, Southern District of New York, No. 16-01445.

30 Nike v. Kasky, 539 U.S. 654 [2003]; Ramirez v. Exxon Mobil Corp., 334 F. Supp. 3d 832 (N.D. Tex. 2018) (all US); Verbraucherzentrale Hamburg v. Lidl Dienstleistungen GmbH & CO KG [2015] Landgericht Heilbronn (Germany).

31 L'association Les Amis de la Terre France and others v. société Totalenergies, anciennement dénommée société Total (SE) and another [2021] Cour de Cassation, Arrêt n 893 FS-B.

32 Vedanta Resources Plc and another v. Lungowe and others [2019] UKSC 20; Okpabi and others v. Royal Dutch Shell Plc and another [2021] UKSC 3.

33 Vedanta Resources and another v. Lungowe and others [2019] UKSC 20; Okpabi and others v. Royal Dutch Shell Plc and another [2021] UKSC 3.

34 German Supply Chain Due Diligence Law of 2021; art. 964j – 964l CO. Whereas the referenced laws oblige lead firms to conduct human rights due diligence processes, their implementation will affect the downstream and upstream supply chain. Downstream and upstream suppliers will have to follow the same standards so that lead firms can meet their new legal obligations.

35 The most prominent example is the German Supply Chain Due Diligence Law of 2021.

36 Neubauer et al. v. Germany, Urteil BvR 2656/18 des Bundesverfassungsgerichts of 24 March 2021; Urgenda Foundation v. State of the Netherlands, ECLI:NL:HR (2019/2007), Hoge Raad, 19/00135.

37 Nestlé USA, Inc. V. Doe, 593 U. S. ___ (2021); Corte Constitucional de Colombia, Sentencia SU698/17 [ESG-related case decided against Cerrejon, a coal mine owned by Glencore].

38 More information available at https://www.ecchr.eu/pressemitteilung/pestizid-vergiftungen-yavatmal/, last accessed on 13 September 2022.

39 More information available at https://callforclimatejustice.org/en/, last accessed on 13 September 2022.

40 J. Eckert, Z. Ö. Biner, B. Donahoe and C. Strümpell (2012), "Introduction: Law's travels and transformations", in J. Eckert, B. Donahoe, C. Strümpell and Z. Ö. Biner (eds*), Law against the State: Ethnographic Forays into Law's Transformations* (Cambridge: Cambridge University Press), 1–22.

41 For possible definitions of the term greenwashing in the financial sector cf. Tadas Zukas/Uwe Trafkowski, Sustainable Finance: The Regulatory Concept of Greenwashing under EU Law, EuZ 02/2022, C 2 et seq. (available at https://eizpublishing.ch/ausgabe/euz-zeitschrift-fuer-europarecht-ausgabe-2-2022/; last accessed 25 November 2022).

42 Recently also Aline Darbellay/Yannick Caballero Cuevas, The Materiality of Sustainability Information under Capital Markets Law, SZW 2023, p. 44-59, p. 56 et seq.

43 Philippe Weissenberger, in Marcel Alexander Niggli/Hans Wiprächtiger (eds.), *Basler Kommentar Strafgesetzbuch/Jugendstrafgesetz* (4th edn, Basel 2018), Commentary on Art. 152 SCC, N 2; Stefan Trechsel/Dean Crameri, in Stefan Trechsel/Mark Pieth (eds.), *Schweizerisches Strafgesetzbuch, Praxiskommentar* (4th edn, Zurich/St. Gallen 2021), Commentary on Art. 152 SCC, N 1; Andreas Donatsch, *Strafrecht III: Delikte gegen den Einzelnen* (11th edn, Zurich 2018), 287; Bger 6B_484/2011, E. 5.3.

44 Which may include the omission to submit an ad hoc announcement by a listed company (cf. Oliver Thormann/Cédric Remund, in Alain Macaluso/Laurent Moreillon/Nicolas Queloz (eds.), Commentaire Romand Code penal II, 1st ed., 2017, commentary on Art. 152, N 36; Aline Darbellay/Yannick Caballero Cuevas (Fn. 42), p. 56 et seq.

45 Andreas Donatsch (Fn. 43), 289; Stefan Trechsel/Dean Crameri (Fn. 43), Commentary on Art. 152 SCC, N 4; Philippe Weissenberger (Fn. 43), Commentary on Art. 152 SCC, N 18.

46 Cf. Federal Office of Justice, comparative chart on counter-proposals to the Swiss Responsible Business Initiative, 27 February 2020, p. 2, third row, criminal sanctions (see https://www.bj.admin.ch/dam/bj/de/data/wirtschaft/gesetzgebung/verantwortungsvolle-unternehmen/gegenueberstellung-kvi-gegenvorschlag-d.pdf.download.pdf/gegenueberstellung-kvi-gegenvorschlag-d.pdf, last accessed 22 November 2022).

47 Andreas Donatsch (Fn. 43), 290; Philippe Weissenberger (Fn. 43), Commentary on Art. 152 SCC, N 24.

48 Andreas Donatsch (Fn. 43), 290; Philippe Weissenberger (Fn. 43), Commentary on Art. 152 SCC, N 25.

49 Art. 155 of the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FinMIA), which shall prevent price manipulation, may also become relevant, which carries a custodial sentence not exceeding three years or a monetary penalty for any person who, with the intention of gaining a pecuniary advantage for themselves or for another, substantially influences the price of securities admitted to trading on a trading venue or DLT trading facility which has its registered office in Switzerland in that they disseminate false or misleading information against their better knowledge. Where the elements of crime of Art. 152 SCC and Art. 155 FinMIA are present both provisions apply concurrently (cf. Wolfgang Wohlers/Sonja Pflaum, in Rolf Watter/Rashid Bahar (eds.), *Basler Kommentar*

Finanzmarktaufsichtsgesetz/Finanzmarktinfrastrukturgesetz (3rd edn, Basel 2019), Commentary on Art. 155 FinMIA, N 94). False or misleading information regarding ESG matters may well substantially influence the price of securities.

Another criminal offence that may therefore become relevant is Art. 154 FinMIA (insider regime, cf. Aline Darbellay/Yannick Caballero Cuevas (Fn. 42), p. 55).

50 Karl Hofstetter, Gegenvorschlag zur Konzernverantwortungsinitiative und Unternehmenshaftung, SJZ 117/2021, pp. 571 et seq., p. 573, Fn. 21.

51 Internationally, an exemplary case is the pending lawsuit filed against several consumer goods companies, including Coca-Cola, by the Earth Island Institute, an NGO, in the District of Columbia Superior Court under DC's Consumer Protection Procedures Act. The plaintiff alleges (among other things) that the recycling symbols on plastic packaging are deceptive. Contrary to the company's statements, plastics recycling would be ineffective (Earth Island Inst. v. The Coca-Cola Company, Case No. 2021 CA 001846 B; cf. also Earth Island Inst. V. Crystal Geyser Water Co., No. 20-1213 (Cal. Super. Ct. Feb. 26, 2020); Earth Island Inst. V. Crystal Geyser Water Co., No. 20-02212 (N.D. Cal. Apr. 1, 2020). For more and up to date information on the lawsuits, see: https://www.earthisland.org/index.php/advocates/suit/coca-cola-plastic, last accessed on 16 June 2022.

52 In that regard noteworthy, on 30 March 2022 the EU Commission proposed amending the Unfair Commercial Practices Directive (UCPD) to explicitly include environmental characteristics of a product into the list of characteristics about which consumers must not be misled, more information available at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2098, last visited on 6 October 2022.

53 See for reporting on the matter, https://www.handelsblatt.com/finanzen/banken-versicherungen/banken/schweizer-grossbank-credit-suisse-interne-aufarbeitung-des-greensill-skandals-verzoegert-sich-offenbar/27696700.html, last accessed on 12 August 2022.

54 A noteworthy example of the latter is the United States Securities and Exchange Commission (SEC)'s recent action against a Brazilian mining company in relation to the deadly Brumadinho dam collapse. The regulator sued Vale SA for allegedly making false and misleading disclosures about the safety of its dam (Securities and exchange commission v. Vale SA, No. 22-cv-2405, United States District Court Eastern District of New York, the SEC's complaint is available at https://www.sec.gov/litigation/complaints/2022/comp-pr2022-72.pdf, last accessed on 17 June 2022).

55 Vedanta Resources Plc and another v. Lungowe and others [2019] UKSC 20; Okpabi and others v. Royal Dutch Shell Plc and another [2021] UKSC 3.

56 Angelica Choc v. Hudbay Minerals Inc. [2013] ONSC 1414; for a discussion on vicarious liability in multinational enterprises, see: Phillip David James Morgan, "Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?" Journal of Professional Negligence (2015) 31/4, 276-299.

57 This analysis is limited to the identification of provisions that may provide a legal basis for a claim. To establish liability, a claimant must prove further elements such as causation, amount of the damage and fault. These depend on the factual circumstances. Accordingly, we do not analyse these elements in this paper.

58 Christoph B. Bühler, in Lukas Handschin (ed.), Zürcher Kommentar Die Aktiengesellschaft, Generalversammlung und Verwaltungsrat. Mängel in der Organisation, Art. 698-726 und 731b OR (3rd edn., 2018), Commentary on Art. 722 CO, N 1.

59 Cf. Martin Kessler, in Corinne Widmer Lüchinger/David Oser (eds.), *Basler Kommentar Obligationenrecht I* (7th edn, Basel 2020), Commentary on Art. 41 CO, N 31.

60 Karl Hofstetter, Gegenvorschlag zur Konzernverantwortungsinitiative und Unternehmenshaftung, SJZ 117/2021, pp. 571 et seq., p. 574.

61 Cf. Michel Verde, Straftatbestände als Schutznormen im Sinne des Haftpflichtrechts (2014), p. 4, Fn. 9; Rolf Watter/Paula Reichenberg, La responsabilité des sociétés cotées en bourse liée à leurs communications financières défaillantes, AJP 2005, p. 969 et seq., p. 977. *Contra* the qualification of Art. 325ter SCC as a *Schutznorm* Aline Darbellay/Yannick Caballero Cuevas (Fn. 42), p. 57 et seq.

62 Cf. Tanja Domej, in Reto Heinzmann/Leander D. Loacker (ed.), *UWG Kommentar* (Zurich/St. Gallen 2018), Commentary on Art. 9 UCA, N 54.

63 This includes (i) the prohibition of an imminent infringement, (ii) the removal of an existing infringement, and (iii) the determination of the unlawfulness of an infringement if it continues to have a disruptive effect (art. 9 para. 1 UCA). The customer can request that a correction or the judgment be communicated to third parties or published (art. 9 para. 2 UCA).

64 Tanja Domej, in Reto Heinzmann/Leander D. Loacker (ed.), *UWG Kommentar* (Zurich/St. Gallen 2018), Commentary on Art. 9 UCA, N 8. Claims for damages and disgorgement of profits follow the general rules set forth in the CO. Claims for damages are based on art. 41 CO (cf. Tanja Domej, ibidem, Commentary on Art. 9 UCA, N 40).

65 Tanja Domej, in Reto Heinzmann/Leander D. Loacker (eds.), *UWG Kommentar* (Zurich/St. Gallen 2018), Commentary on Art. 10 UCA, N 9; David Rüetschi, in Reto M. Hilty/Reto Arpagaus (eds.), *Basler Kommentar Bundesgesetz gegen den unlauteren Wettbewerb* (Basel 2013), Commentary on Art. 10 UCA, N 7.

66 Similar communications include presentations, press releases, notices on a website, annual reports or letters to shareholders which are published in a functional connection with a public offer or an admission to trading and serve to provide potential investors with information for their purchase decision (Philippe Weber/Lukas Fahrländer, *Kommentar zum Finanzdienstleistungsgesetz FIDLEG* (Zurich 2021), Commentary on Art. 69 FIDLEG, N 65).

67 In this spirit; Rolf H. Weber and Andreas Hösli, Corporate Climate Responsibility – aktienrechtliche Haftungsrisiken für den Verwaltungsrat?, SJZ 116/2020, pp. 605, p. 610 et seq.; cf. also Michael Nagel, Die Pflichtverletzung nach Art. 754 OR in Bezug auf Corporate Social Responsibility, in: Jusletter 25 June 2018, para. 16 et seq.

68 The relationship between art. 754 CO and art. 41 CO is not absolutely clear, cf. in this respect Peter Böckli, *Schweizer Aktienrecht* (4th edn., Zurich/Basel/Geneva 2009), § 18, N 245 et seq.; Thierry Luterbacher, in Willi Fischer/Thierry Luterbacher (ed.), *Haftpflichtkommentar* (Zurich/St. Gallen 2016), Vorbemerkungen zu Art. 754–760 CO, N 63.

69 For claims based on the UCA see Section 3.2.2.3.

70 Absolute protected rights are, in particular, life, physical and mental integrity, personality rights, and property rights (cf. Martin Kessler (Fn. 56), Commentary on Art. 41 CO, N 33).

71 For the latter requirement see Section 3.2.1.1.

72 Martin Kessler (Fn. 56), Commentary on Art. 41 CO, N 37.

73 Karl Hofstetter, “Gegenvorschlag zur Konzernverantwortungsinitiative und Unternehmenshaftung“, SJZ 117/2021, pp. 571 et seq., p. 578.

74 Roland Spicher and Dan Otz, “Produktesicherheit und Produktehaftpflicht aus versicherungsrechtlicher Sicht” (2018) HAVE, 462 et seq., 465.

75 For more information on the case, see: documentation of the ECCHR, available at https://www.ecchr.eu/pressemitteilung/pestizid-vergiftungen-yavatmal/, last accessed 12 August 2022.

76 Martin Kessler (Fn. 56), Commentary on Art. 55 CO, N 6 et seq.

77 Federal Supreme Court, Decision 4C.1/1992 of 11 June 1992, summarised and cited in parts in Carina Fröhli, “Geschäftsherrenhaftung der Muttergesellschaft für Handlungen von Tochtergesellschaften”, Diss. St. Gallen 2021, 124–128; Walter A. Stoffel and Camille Sautier, “Aktuelle Rechtsprechung zur Haftung im Konzern” SZW 2019, 509 et seq., 516 et seq.

78 Walter A. Stoffel and Camille Sautier (Fn. 77), 516, Fn. 35.

79 Walter A. Stoffel and Camille Sautier (Fn. 77), 516.

80 Karl Hofstetter, “Konzernverantwortungsinitiative und Geschäftsherrenhaftung”, SJZ 115/2019, 271 et seq., 273 et seq.; Karl Hofstetter, “Gegenvorschlag zur Konzernverantwortungsinitiative und Unternehmenshaftung”, SJZ 117/2021, 571 et seq., 574; Gregor Geisser, “Die Konzernverantwortungsinitiative”, AJP 2017, 943 et seq., 954; Carina Fröhli, “Geschäftsherrenhaftung der Muttergesellschaft für Handlungen von Tochtergesellschaften”, Diss. St. Gallen 2021, 152; Franz Werro, “Indirekter Gegenentwurf zur Konzernverantwortungsinitiative – Haftungsnorm im Einklage mit der schweizerischen Tradition” (2018) sui-generis, 428 et seq., 433 et seq.

Contra the possibility of establishing civil liability between companies based on art. 55 CO: Christoph B. Bühler, "Geschäftsherrenhaftung im Konzernverhältnis?" SZW 2022, 202 et seq.

81 Carina Fröhli, "Geschäftsherrenhaftung der Muttergesellschaft für Handlungen von Tochtergesellschaften", Diss. St. Gallen 2021, 142.

82 BGE 110 II 456.

83 Hans-Joachim Hess, in *Stämflis Handkommentar Produktehaftpflichtgesetz (PrHG)* (3rd ed. 2017), systematic part, N 13.

84 Cf. BGer 4A_306/2009, E. 7.1.2; BGE 124 III 297 E. 5a; Dieter Gericke/Stefan Waller, in Heinrich Honsell/Nedim Peter Vogt/Rolf Watter (eds.), *Basler Kommentar Obligationenrecht II* (5th edn, Basel 2016), Commentary on Art. 754 CO, N 47.

85 For the relief that can be sought cf. footnote 63 above.

86 Peter Jung/Philippe Spitz, in Peter Jung/Philippe Spitz (eds.), *Stämpflis Handkommentar, Bundesgesetz gegen den unlauteren Wettbewerb (UWG)* (2nd edn, Bern 2016), Commentary on Art. 10 UCA, N 32 and 40.

87 This turn towards future-oriented remedies is well illustrated in the development of claims from the applications in Luciano Lliuya v. RWE which focus on damages for climate change related harms (pending in front of the Higher Regional Court of Hamm, Germany) and the remedies sought in Kaiser et al v. Volkswagen AG (pending in front of the Regional Court of Braunschweig, Germany) and Ulf Allhoff-Cramer v. Volkswagen AG (pending in front of the Regional Court of Detmold, Germany) that include the request to oblige Volkswagen AG to the reduction of greenhouse emissions. The claimants in Milieudefensie v. Shell successfully pleaded in front of the Hague District Court that Shell must be ordered to reduce its CO2 emissions by 45 percent before 2030, as compared with the 2019 levels (Milieudefensie et al v. Royal Dutch Shell, Rechtbank Den Haag, ECLI:NL:RBDHA:2021:5337. An English translation of the decision is available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339, last accessed on 14 June 2022).

88 For more information, see: https://callforclimatejustice.org/de/, last accessed on 12 August 2022.

89 At the conciliation hearing before the justice of peace in Zug at the beginning of October 2022, no settlement was reached. On 30 January 2023, claimants have filed a civil lawsuit against Holcim with the Cantonal Court of Zug (see https://callforclimatejustice.org/en/four-indonesians-file-climate-litigation-against-holcim/; last visited on 6 February 2023).

90 Federal Act on Private International Law, PILA.

91 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007, Lugano Convention.

92 Art. 132 et seq. PILA will generally not apply if the Swiss lead company faces liability because it is regarded as factual director of the foreign controlled company. In this situation, the law applicable to the controlled company (cf. art. 154 PILA) will apply. Art. 132 et seq. PILA will, however, apply in the context of vicarious liability under art. 55 CO (cf. for all these questions Karl Hofstetter, *Konzernverantwortungsinitiative und Geschäftsherrenhaftung*, SJZ 115/2019, 271 et seq., 276).

93 Example: The company has its statutory seat in Switzerland. The harmed party is a resident of India. The tort manifested in India which, under the given circumstances, was foreseeable for the company. Therefore, Indian law applies. A court would then have to establish whether the action in question constitutes a tort under Indian law and what remedies Indian law provides. A company may benefit from this rule if the foreign law is more lenient than Swiss law. It may be an incentive for the company to argue that it was foreseeable for it that the tort would manifest in the foreign country.

94 Because of the control required to establish liability in the present context, it is difficult to imagine a situation in which foreseeability would be denied (cf. below).

95 An objective standard applies to determine whether the territorial impact of a tortious act was foreseeable (Rodrigo Rodriguez/Melanie Krüsi/Robert Umbricht, in Pascal Grolimund/Leander D. Loacker/Anton K. Schnyder (eds.)*, Basler Kommentar Internationales Privatrecht* (4th edn, Basel 2021), Commentary on Art. 133 PILA, N 12).

96 Example: The lead firm provides detailed guidelines (including supplier codes of conduct) for how another company shall execute its tasks in a specific country. In such circumstances, it would be difficult to argue that it was not foreseeable that harmful effects of such other company's actions would manifest in the foreign country.

97 This is also the conclusion reached by HOFSTETTER and GEISSER in their respective analyses of non-contractual civil liability and ESG-related harms (Karl Hofstetter, "Konzernverantwortungsinitiative und Geschäftsherrenhaftung" SJZ 115/2019, 271 et seq., 276; Gregor Geisser, Ausservertragliche Haftung privat tätiger Unternehmen für "Menschenrechtsverletzungen" bei internationalen Sachverhalten – Möglichkeiten und Grenzen der schweizerischen Zivilgerichtsbarkeit im Verhältnis von Völkerrecht und Internationalem Privatrecht, Diss. Zürich 2013, N 445).

98 Carina Fröhli, "Geschäftsherrenhaftung der Muttergesellschaft für Handlungen von Tochtergesellschaften", Diss. St. Gallen 2021, 93.

99 Rodrigo Rodriguez/Melanie Krüsi/Robert Umbricht (Fn. 94), Commentary on Art. 135 PILA, N 10 and 11.

100 Felix Dasser, in Pascal Grolimund/Leander D. Loacker/Anton K. Schnyder (eds.)*, Basler Kommentar Internationales Privatrecht* (4th edn, Basel 2021), Commentary on Art. 136 PILA, N 14 et seq.

101 For recent developments in the EU cf. Tadas Zukas/Uwe Trafkowski (Fn. 41), C 1 et seq.

102 FINMA, *Strategic Goals 2021 to 2024* (Bern 2020) Goal 7, p. 13, available at https://www.finma.ch/en/news/2020/11/20201118-mm-strategische-ziele-2021-2024/, last accessed 3 October 2022.

103 FINMA, *FINMA Guidance 05/2021: Preventing and combating greenwashing* (Bern 2021), p. 3 et seq., available at https://www.finma.ch/~/media/finma/dokumente/dokumentencenter/myfinma/4dokumentation/finma-aufsichtsmitteilungen/20211103-finma-aufsichtsmitteilung-05-2021.pdf, last accessed 4 October 2022.

104 FINMA, *FINMA Guidance 05/2021: Preventing and combating greenwashing* (Bern 2021), p. 5, available at https://www.finma.ch/~/media/finma/dokumente/dokumentencenter/myfinma/4dokumentation/finma-aufsichtsmitteilungen/20211103-finma-aufsichtsmitteilung-05-2021.pdf, last accessed 4 October 2022.

105 Rundschreiben 2016/1, Offenlegung – Banken, Aufsichtsrechtliche Offenlegungspflichten, dated 28 October 2015, last amended 8 December 2021; Rundschreiben 2016/2, Offenlegung – Versicherer (Public Disclosure), Grundlagen zum Bericht über die Finanzlage, dated 3 December 2015, last amended 6 May 2021.

106 Rundschreiben 2016/1, Offenlegung – Banken, Aufsichtsrechtliche Offenlegungspflichten, dated 28 October 2015, last amended 8 December 2021, Schedule 5; Rundschreiben 2016/2, Offenlegung – Versicherer (Public Disclosure), Grundlagen zum Bericht über die Finanzlage, dated 3 December 2015, last amended 6 May 2021, no. 13.1-13.7.

107 Cf. BGer 2C_894/2014, E. 4.6.1. FINMA is also the competent authority for prosecuting violations of Art. 142 and 143 FinMIA which prohibit the exploitation of insider information and market manipulation.

Market Participants trading on the basis of ESG related information may well fall within the scope of Art. 142 FinMIA (cf. Aline Darbellay/Yannick Caballero Cuevas (Fn. 42), p. 55 et seq.).

Art. 143 Para. 1 lit. a declares it inadmissible to publicly disseminate information which the person knows or should know gives false or misleading signals regarding the supply, demand or price of securities admitted to trading on a trading venue or DLT trading facility which has its registered office in Switzerland. Information within the meaning of Art. 143 para. 1 lit. a FinMIA is every information about occurences that are relevant for the valuation of a security (cf. in Benedikt Maurenbrecher/Marc Hanslin, in Rolf Watter/Rashid Bahar (eds.), Basler *Kommentar Finanzmarktaufsichtsgesetz/Finanzmarktinfrastrukturgesetz* (3rd edn, Basel 2019), commentary on Art. 143 FinMIA, N 25). ESG related occurrences will in our view often be relevant for the valuation of a security.

108 Swiss Bankers Association, Guidelines for the financial service providers on the integration of ESG-preferences and ESG-risks into investment advice and portfolio management, June 2022, Art. 1 para. 1.

109 Asset Management Association Switzerland, Self-regulation on transparency and disclosure for sustainability-related collective assets from 26 September 2022, Art. 1.

110 Cf. https://www.finma.ch/en/documentation/self-regulation/anerkannte-selbstregulierung/, last accessed on 6 February 2023.

111 Such as reporting requirements on corporate governance; cf. Art. 49 para. 2 LR and Art. 1 Directive Corporate Governance ("DCG") or, for Issuers "opting-in" in accordance with Art. 9 para. 2.03 of the Directive Regular Reporting Obligations (Art. 9 para. 1 DCG), a sustainability report.

112 Cf. in this respect Aline Darbellay/Yannick Caballero Cuevas (Fn. 42), p. 53; BGE 145 IV 407 E. 3.4.1 p. 423.

113 Cf. Aline Darbellay/Yannick Caballero Cuevas (Fn. 42), p. 53 et seq.

114 Cf. Trading on SIX Swiss Exchange, Module – Rules and Regulations, December 2022, p. 49, para. 4.5.2, third bullet point, available at https://www.six-group.com/dam/download/sites/education/preparatory-documentation/trading-module/trading-on-ssx-module-2-rules-regulations-en.pdf, last visited on 24 February 2023.

115 See https://www.faire-werbung.ch/de/, last accessed on 28 May 2022.

116 For news coverage, see: article in Luzerner Zeitung on the complaint, available at https://www.luzernerzeitung.ch/wirtschaft/rohstoffe-unlautere-charmeoffensive-glencore-muss-sich-fuer-kohle-expansion-erklaeren-ld.2281469?reduced=true, last accessed on 28 May 2022.

117 OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing, available online: https://www.oecd.org/daf/inv/mne/48004323.pdf, last accessed on 30 September 2022. The OECD Guidelines contain recommendations for responsible business conduct in a global context, regarding human rights, employment and industrial relations, environment, combating bribery, bribe solicitation and extortion, consumer interests, science and technology, competition and taxation.

118 OECD (2021), Annual Report on the OECD Guidelines for Multinational Enterprises: Update on National Contact Point Activity, available online: http://mneguidelines.oecd.org/2020-Annual-Report-MNE-Guidelines-EN.pdf, last accessed on 19 January 2022, p. 7.

119 Ibid., p. 7.

120 Ibid, p. 7-8.

121 For the website of the Swiss NCP, see: https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/nachhaltigkeit_unternehmen/nkp.html, last accessed on 25 November 2022.

122 SECO, OECD Guidelines for Multinational Enterprises: National Contact Point for Switzerland, Information on the Specific Instances Procedure, Bern, November 2014 (available at https://www.seco.admin.ch/dam/seco/en/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/NKP/NKP-Verfahrensanleitung.pdf.download.pdf/Verfahrensanleitung_NKP_2014_E.pdf; last accessed 12 January 2023).

123 For an overview on the procedure, see Treatment of specific instances: role and mandate of the ad hoc working groups (available at https://www.seco.admin.ch/dam/seco/en/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/NKP/Treatment_of_specific_instances_Role_and_mandate_of_the_ad_hoc_working_groups.pdf.download.pdf/Treatment_of_specific_instances_Role_and_mandate_of_the_ad_hoc_working_groups.pdf; last accessed 25 November 2022).

124 NCP Information (available at https://www.seco.admin.ch/dam/seco/en/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/NKP/NKP-Verfahrensanleitung.pdf.download.pdf/Verfahrensanleitung_NKP_2014_E.pdf; last accessed 12 January 2023), 3.

125 NCP Information, 3 et seq.

126 NCP Information, 4.

127 NCP Information, 4 et seq.

128 NCP Information, 5.

129 National Contact Point of Switzerland, Initial Assessment: Specific Instance regarding Credit Suisse submitted by the Society for Threatened Peoples Switzerland, Berne, 19 October 2017, 7.

130 Information on current and concluded cases is available at: https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/nachhaltigkeit_unternehmen/nkp/Statements_zu_konkreten_Faellen.html, last accessed on 25 November 2022.

131 Regarding the RBI, see footnote 20.

132 Franz Werro, “Indirekter Gegenentwurf zur Konzernverantwortungsinitiative – Haftungsnorm im Einklage mit der schweizerischen Tradition” (2018) sui-generis, 428 et seq., 431 et seq.

LALIVE

GENEVA
Rue de la Mairie 35
1211 Geneva 6
Switzerland
+41 58 105 2000

ZURICH
Stampfenbachplatz 4
P.O. Box 212 8042 Zurich
Switzerland
+41 58 105 2100

LONDON
9 Cloak Lane
London EC4R 2RU
United Kingdom
+44 20 3880 1540

lalive.law