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Insight

The Swiss Responsible Business Initiative: what business & human rights obligations for Swiss companies?

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The growing reach and impact of business enterprises have given rise to a debate about the roles and responsibilities of such actors regarding human rights and have led to the placement of business and human rights ("**BHR**") on the agenda of many international organisations and countries.

At an international level, the UN Guiding Principles on Business and Human Rights ("**UN Guiding Principles**")[1] and the OECD Guidelines for Multinational Enterprises ("**OECD Guidelines**")[2] were adopted in 2011. At a national level, several countries are already implementing BHR legislations, such as France, the United Kingdom or the United States, to name a few of Switzerland's most important economic partners. As we will see below, the European Union is also increasingly active in the field.

This is Switzerland's turn with the Swiss **Responsible Business Initiative** ("**RBI**"), a popular initiative demanding the introduction of BHR provisions into the Swiss Federal Constitution. The RBI collected 120,000 signatures in less than a year and was validated by the State administration in October 2016. In 2017, the Federal Council recommended to the Parliament to reject the initiative. Following parliamentary discussions, on 9 June 2020, the **Parliament however agreed on a counterproposal**. The counterproposal has been deemed insufficient by the RBI Committee which refused to withdraw the RBI. The RBI will thus be **submitted to the popular vote on 29 November 2020** and when the vote takes place, Swiss voters will be faced with three alternatives:

1. The **RBI**,[3] which would:

- require **compulsory due diligence** to the effect that Swiss companies must identify and review the environmental and human rights risks within their operations as well as their supply chain, and respond to the risks identified by eliminating their adverse impact;
- allow for the **civil liability** of Swiss companies for environmental and human rights violations perpetrated by themselves and entities under their control in Switzerland or abroad. The notion of "control" would be construed as a factual control instead of a legally binding control. Hence, a Swiss company may be regarded as having a certain degree of control over its supply chain and, in turn, its third-party service providers;
- provide a **safe harbour** protecting Swiss companies from potential civil liability for environmental and human rights violations if such companies have satisfactorily conducted due diligence; and
- **not apply to small and medium-sized companies**[4] that are considered "low risk" from an environmental and human rights perspective.

2. The **counterproposal**,[5] which would:

- set out **reporting requirements** on environmental, social, human rights and corruption risks as well as a duty of care (also including reporting requirements) in the areas of conflict minerals and child labour for (i) Swiss major financial institutions[6] and (ii) Swiss public benefit corporations;
- **not include provisions on the liability** of Swiss companies in case of environmental and human rights violations; and

3. The **status quo**.

Even the status quo is however not without risks or obligations for Swiss companies.

Larger Swiss companies are indeed already required to report non-financial information related to their risk profile on annual basis, which should cover human rights risks considering their potential impact on a company's operations and value.[7] This is all the more so for listed companies which must specifically report price-sensitive information, and thus also information as regards reputational and liability risks, to SIX Swiss Exchange (Switzerland's leading stock exchange). Board members may also come under scrutiny, as their duty of due care commands to act in accordance with the standard of quality which is contingent upon the circumstances of the case at hand and should be identified objectively against the background of what a reasonable board member would do under the same circumstances.[8] Accordingly, as international standards and best practice gradually include the assessment of human rights risks, directors may increasingly be exposed to potential claims in respect of incidents related to such risks.[9]

On the same premises and in view of the out-reaching case law in matters of corruption, money laundering or terrorism, allegations of criminal liability for the company itself may also not be excluded, as illustrated by recent proceedings initiated in Switzerland involving Argor-Heraeus SA,[10] Lundin SA[11] and Kolmar Group AG[12] or abroad involving Glencore.[13] The same is true of the company's civil liability.[14] Considering BHR contractual clauses are becoming increasingly common, contractual liability may also have to be taken into account.[15]

Yet, this is just the Swiss regime. Companies must additionally take into account the legislations adopted by foreign countries, **which have increasingly far-reaching effects and rely on notions of economic control, thereby piercing through the corporate veil**.[16] In this respect, one may notably think of:

- **France** and its *devoir de vigilance raisonnable* which requires companies to adopt and implement a vigilance plan including measures adequate to identify risks and prevent serious harm to human rights resulting from their activities and those of the companies they control directly or indirectly, as well as the activities of the subcontractors or suppliers with which they have an established commercial relationship. To this end, the vigilance plan, which has to be published and included in the company's mandatory reports, must contain (i) the mapping of the companies' risks, (ii) regular evaluation procedures of the companies' subsidiaries, subcontractors and suppliers, (iii) adequate actions to mitigate risks and prevent serious harm, (iv) an alert and complaint mechanism, and (v) monitoring of the implementation and effectiveness of the measures. In case of breach of these obligations, the company can be held liable for the damage that compliance could have prevented. The law applies to any company established in France which, either (i) at the end of two consecutive financial years employs 5,000 employees itself and its direct and indirect subsidiaries, the registered office of which is located on French territory, or (ii) employs at least 10,000

employees itself and its direct and indirect subsidiaries, the registered office of which is located on French territory or abroad.[17]

- In the **UK**, the Modern Slavery Act, that combines criminal liability with obligations to report on the measures taken throughout the company's entire supply chain. The Act's scope of application is also substantial. It applies to all companies that carry on business, or part of business, in the UK, supplying goods or services, and reach an annual global turnover of GBP 36,000,000.[18]
- In the **US**, the California Transparency in Supply Chain Act, which contains reporting obligations similar to those under the UK Modern Slavery Act and broadly applies to all retail sellers or manufacturers doing business in California, the annual worldwide gross receipts of which are in excess of USD 100,000,000.[19] Also from the US, one cannot ignore the US Office of Foreign Assets Control ("**OFAC**"), which has intensified sanctions against human rights abusers by making use of the US Global Magnitsky Human Rights Accountability Act. As an example, in July 2020, OFAC designated two individuals as well as one entity for their involvement in alleged human rights abuses in the Xinjiang Uyghur Autonomous Province.[20]
- At the **EU** level, the Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 includes obligations to report on the impact of the company's activities on human rights and the main risks associated and measures adopted.[21] In addition, the Regulation (EU) 2017/821 lays down supply chain due diligence obligations for EU importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.[22] Finally, in April 2020, the EU Commissioner for Justice officially pledged for an EU initiative on compulsory Human Rights and Environmental Due Diligence and a first piece of legislation is to be expected in 2021.[23] Such EU legislation will undeniably introduce additional due diligence requirements on Swiss companies that may be exposed to environmental and human rights risks in Europe and elsewhere.

Ultimately, it is already more than 80% of the economic partners of Switzerland that are bound by BHR obligations.[24] As these legislations often use unspecified terms and tend to have extraterritorial effects, Swiss companies can very well end up in proceedings before foreign courts for human rights violations committed within their supply chain abroad. This is currently the case in *Doe v. Nestle S.A.* pending in California following allegations of human trafficking and slavery in cocoa plantations in Ivory Coast.[25] Also deserve a mention, amongst others: the criminal complaints filed by the Bruno Manser Fund and the following proceedings by the Office of the Attorney General of Switzerland for corruption, embezzlement and money laundering in the 1MDB scandal;[26] the proceedings against Lafarge SA in France for complicity in war crimes, crimes against humanity, financing of a terrorist enterprise, and forced labour;[27] or the complaint filed against Vedanta Resources Limited before UK courts over water pollution caused by the copper mining operations of the company's subsidiary.[28]

These cases however only illustrate the legal liabilities for a company. Yet, even if the risk does not translate into the breach of a law, the mere existence of litigation against the company, regardless of the final ruling, already generates substantial costs and damages for the company, including potential administrative sanctions, loss of funding, increase in operating costs, reputational damage and decline in stock performance, as notably shown by the 50% drop BP's stock price following the Deepwater Horizon oil spill.[29] This should however not be surprising, as respect for human rights is becoming an expectation of the market.[30]

In view of these risks, introducing the BHR within a company thus allows not only to mitigate human rights risks, but also to increase mitigation of more common risks,[31] and many Swiss companies have already started to adapt, with the Swiss government's support:

- In December 2016, the Swiss government adopted a National Action Plan ("**NAP**") revealing how the implementation of the UN Guiding Principles was to be conducted over a four-year period.[32] 50 policies resulted from the NAP which contributed to the advancement of human rights due diligence within Swiss companies;
- In January 2020, the Swiss government approved a revised NAP ("**Revised NAP**") now covering the period of 2020 to 2023.[33] Following on the accomplishments of the previous NAP, the Revised NAP now defines the priority action as regards communication, support for business enterprises and policy coherence for the next years to come;[34] and
- Also in January 2020, the Swiss government adopted a separate revised Action Plan on corporate social responsibility for the period of 2020 to 2023, [35] which will involve various stakeholders such as academic institutions, civil society organizations and business associations, and will aim at creating further human rights due diligence policies and mechanisms while placing greater emphasis on the transparency of Swiss companies regarding their implementation of corporate social responsibility measures.

All in all, the Swiss government's position is thus clear: it "expects companies based and/or operating in Switzerland to act responsibly in accordance with international Corporate Social Responsibility (CSR) standards and to fulfil their responsibility to respect human rights in all of their business activities, wherever they operate."[36]

On the ground, company codes of conduct and internal policies including provisions on BHR are accordingly becoming increasingly common,[37] and the same goes for adherence to voluntary standards such as the Equator Principles,[38] the International Finance Corporation's Performance Standards on Environmental and Social Sustainability,[39] Shift and Mazars's UN Guiding Principles Reporting Framework Assurance Guidance,[40] or the Voluntary Principles on Security and Human Rights from the extractive industry.[41]

Some companies have already taken one step further and, in line with increasing market expectations, started to **implement policies and compliance management systems in line with international best practice which are capable of identifying, preventing and mitigating human rights abuses** as well as their contribution to negative human rights effects.[42] Again, these developments should not come as a surprise, as the need for a compliance system does not depend on the existence of specific Swiss regulation but on whether or not there is a risk for the company. Yet, human rights violations have now become a risk that companies cannot ignore and in turn justifies the inclusion of BHR risks within compliance.

To this end, the requisite preliminary action before implementing a BHR compliance management system is to **conduct a group-wide human rights due diligence process to identify, prevent, mitigate and account for how the company addresses its adverse human rights impacts**. Such process is based and adjusted depending on the company's size and complexity, the nature of its business, and the regions/countries where its activities are conducted.[43] Including the company's entire supply chain – along with all stakeholders – is key to successfully carry out this process. Indeed, when companies engage subcontractors, one cannot exclude the possibility that such third-party service providers, even if declared admissible from a

compliance standpoint, may push illegal activities down the contractual chain to further underlying subcontractors. Once all findings have been identified and categorized, such findings should then be integrated into the company's compliance management system, which will have to comprise a zero-tolerance policy by senior management and a group-wide company culture as to human rights, and notably include: a Business Ethics Committee ("**BEC**"); comprehensive policies and guidelines; a whistleblowing management system; adequate training; internal policies as regards breaches of company policies; and an effective grievance management system.[44]

In support of a company's compliance system, **negotiating BHR contract clauses** should further be of particular interest to companies. It is not only becoming the norm in major international contracts, considering that 80% of the economic partners of Switzerland are bound by BHR obligations, but it also represents a cost-efficient opportunity for Swiss companies to address and mitigate human rights risks, as well as their more usual legal, reputational and operational risks.[45] The purpose is not to alter the economic balance of contracts, but to identify the clauses and mechanisms available that are the most suitable to the size of the company, its operations and locations, its counterparts as well as its capacity to influence them.[46] While all contracts will accordingly be different, a few essential elements should be common to most:[47]

- The general due diligence mentioned above should be implemented before entering into the contract and during the life of the contract. Responsibility for the prevention and mitigation of human rights risks should thus be clarified before the contract is finalised;
- The entire contractual chain and its stakeholders should be considered. To this end, agreements should not merely set out that the contractor must "ensure that its sub-contractors/suppliers" respect the agreed upon BHR provisions. They should instead directly **require the contractor to inform its own sub-contractors and suppliers of the rules applicable** and to include back-to-back clauses in its own contracts. Contractual limitation on the number of sub-contractors, or on pre-approved or industry-certified sub-contractors, may also be contemplated;
- **Specifying what is clearly expected** from the contracting party in plain but precise clauses should be the preferred option. Clauses providing that "the parties will respect human rights" should thus be avoided, for lack of precision and enforceability. The more specific the clause is, the easier it will be to rely upon and to seek redress in case of breach. References to industry standards and certifications may be considered but may need to be further detailed to be enforceable as they tend to be generic;
- As supply chains become increasingly complex, a **contractual right to information** throughout the supply chain should be included. Information may also be obtained through contractual reports and audit obligations, as well as complaint and whistleblowing mechanisms. Outsourcing and resorting to local NGOs may also be considered;
- Contracting parties should be given **incentives to prevent human rights violations**, not to pay compensation once damages have occurred, as the latter will be difficult to quantify and repair; and
- **Dispute resolution mechanisms** favouring negotiations and alternatives to domestic courts should be included. In this respect, the OECD National Contact Points for the OECD Guidelines already propose mediation in case of allegations of human rights violations. Arbitration should also not be excluded, namely for its efficiency, flexibility and confidentiality. This has notably been illustrated by the USD 2,300,000 settlement reached within

arbitration proceedings between Switzerland-based labour organizations UNI Global Union, IndustriALL Global Union and a multinational fashion brand on 17 January 2018.[48]

In conclusion, as with the risks of corruption, money laundering and tax compliance, BHR is a risk that has become a reality for all companies and the legislative trend will likely continue to crystallise companies' obligations in Switzerland and abroad. Lack of anticipation by companies and their executives may not only be inconsistent with best practices but may now give rise to legal liability. The question is indeed not anymore whether or not to take human rights into account, but how.

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[6] Meaning financial institutions having more than 500 employees and a balance sheet total of CHF 20,000,000 or a turnover of CHF 40,000,000 over two consecutive financial years, generated on their own or jointly with one or several Swiss or foreign companies under their control.

[7] Art. 961*c*(2)(2) SCO.

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