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Insight

ESG litigation in Switzerland – risks and possible defence strategies

LALIVE partner Matthias Gstoehl examines the main ESG litigation risks and possible defence strategies for companies and their directors in Switzerland, a topic high on the agenda for many corporates and their boards.

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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:

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 quasilegal 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 I 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 I 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.

Read more here.