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Purpose in Corporate Governance

Stämpfli Editions

The Swiss Non-financial Reporting Obligations

Scope of application and obligations (and need for reform)

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I. Introduction

The theme of Business and Human Rights (BHR) has received broader attention on the international level since the United Nations Human Rights Council unanimously adopted the UN Guiding Principles on Business and Human Rights (UNGPs) on the 16th June 2011 and the OECD adopted its Guidelines for Multinational Enterprises the same year[1]. The Declaration of Principles concerning Multinational Enterprises and Social Policy was adopted by the ILO in 2017 and constitutes another soft law pilar of BHR.

These texts, which were adopted by International Organizations, were followed by a range of national legislation, for example in France[2], Germany[3] and Norway[4] and, more recently, in EU law, where the European Parliament and the Council of the European Union adopted the Corporate Sustainability Reporting Directive (CSRD) in 2022[5] and where a proposal for a Corporate Sustainability Due

1 The articles and documents available on websites have been consulted for the last time on 29th August 2023.
These Guidelines have been updated on 8th June 2023 and are now called OECD Guidelines for Multinational Enterprises *on Responsible Business Conduct*.

2 *Loi nº 2017-399* (France) *du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF nº 0074 of 28 March 2017.*

3 *Gesetz* (Germany) *über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten (Lieferkettensorgfaltspflichtengesetz, LkSG) vom 16. Juli 2021, BGBl I 2959*.

4 *Lov* (Norway*) om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven) of 18th June 2021*.

5 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L322/15, 16.12.2022.

Diligence Directive (CSDDD) is currently under discussion[6]. They constitute a response to situations in which companies with their seat in developed economic countries commit human rights' violations in countries that are currently less developed and suffer from deficient state structures[7].

The principles developed at the international level eventually have also found their way into Swiss (hard) law. The Swiss BHR legislation is built around three sets of provisions. Articles 964*a*-964*c* SCO and 964*j*-964*l* SCO were adopted as an indirect counter-proposal to the popular initiative "*Responsible undertakings – to protect the people and the environment*" after a majority of cantons rejected the initiative on 29 November 2020 despite the people's majority[8]. These provisions foresee, on the one hand, an obligation for companies to provide information regarding transparency on non-financial matters (Articles 964*a* ff. SCO) and, on the other hand, an obligation of due diligence and transparency in relation to minerals and metals from conflict-affected areas and child labour (Articles 964*j* ff. SCO). Finally, Articles 964*d* ff. SCO, which were adopted during the last revision of the Swiss law regulating the Company Limited by Shares, foresee rules on transparency for raw material companies and address special reporting duties for undertakings active in the extraction of commodities in order to fight corruption. This legal framework is, according to the Swiss authorities, similar to the framework developed by the European Union (EU) with regard to the protection it confers[9].

This paper aims at presenting the new obligations which derive from the new legislative framework for companies that are subject to it. It successively analyses transparency on non-financial matters (II), transparency in raw material companies (III) and due diligence and transparency in relation to minerals and metals from conflict-affected areas and child labour (IV), before assessing some formal and temporal elements (V) and the possible liability of both the undertaking and the board if the obligations are violated (VI).

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6 European Commission, Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, 2022/0051 (COD).

7 NERI-CASTRACANE, Diligence, p. 48.

8 For a history of the legislative process leading to the adoption of the provisions, see CANAPA/SCHMID/CIMA, p. 557 ff.

9 KELLER-SUTTER ("*Der Gegenvorschlag ist hingegen international abgestimmt und übernimmt die Bestimmungen, die in Europa auch gelten. Damit haben wir gleich lange Spiesse*").

II. Transparency on Non-Financial Matters

A. Introduction

The Swiss regulations regarding transparency in non-financial matters are inspired by the Non-Financial Reporting Directive[10]. These regulations aims at providing transparency regarding the social impact of undertakings by encompassing environmental, social and governance (ESG) aspects. It aims to involve companies in the protection of human rights, workers' rights, the environment and the fight against corruption.

Articles 964*a*-964*c* SCO are completed by the Ordinance of the Federal Council on Climate Disclosures, which will enter into force on 1st January 2024[11].

The regulations require certain companies to report annually on non-financial issues (the reporting obligation). The purpose of the Report on non-financial matters is to increase the transparency of the company's impact on society[12].

B. Scope of application

The scope of application of the duty to report on non-financial matters is foreseen in Article 964*a* para. 1 SCO, which provides cumulative criteria. *Companies of public interest*, according to Article 2 lit. c of the Auditor Oversight Act[13], are obliged to report if, alone or together with the Swiss or foreign undertakings they control, they have at least 500 full-time equivalent positions on annual average in two successive fiscal years as well as a balance sheet total in excess of CHF 20 million or sales revenue over 40 million. It is the task of each company to determine whether it falls within the scope of Article 964*a* para. 1 SCO.

However, according to Article 964*a* para. 2 SCO, an undertaking controlled by another undertaking that must report on non-financial matters under Swiss or

10 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L330/1, 15.11.2014.

11 Federal Council, Press release.

12 Federal Department of Finances, Rapport explicatif, p. 7 f.

13 Companies of public interest are, on the one hand, publicly traded companies (Article 727 para. 1 SCO) and, on the other hand, companies that need a license, recognition or registration by the Financial Market Supervisory Authority (Article 3 FINMASA).

foreign law and undertakings that must prepare a Report on non-financial matters under foreign law are released from the reporting duty[14].

C. Obligations

Companies that are subject to the reporting obligations on non-financial matters (which are defined in Article 964*a* para. 1 SCO) must indicate the effects of the company's activity on various stakeholders, to the extent necessary to understand the business development description of the business model. On the one hand, these companies, having described their business model (Article 964*b* para. 2 (1) SCO) must identify the risks and measures taken (Article 964*b* para. 2 (2), (3), (4) SCO)[15] – which includes the due diligence applied in relation to their business model (Article 964*a* para. 2 (2) SCO) – and, on the other hand, they must assess and describe the effectiveness of the measures (Article 964*b* para. 2 (3) SCO)[16].

While the identification of the risks and measures taken can be fulfilled, *e.g.*, through the adoption of documents such as a group code of conduct, a supplier code of conduct, an ISO certification, or cooperation with NGOs[17], the description of the effectiveness of the measure is equivalent to an implicit obligation to collect and present data on the concrete implementation of the measures[18]. It entails the description of risks, of non-financial performance indicators and of the regulations applied. If a company decides not to report on a concept, it must provide a clear and reasoned explanation of the reasons for declining to do so ("*comply or explain*" principle, *cf.* Article 964*b* para. 5 SCO); this means, for example, that a company that would present only little or no risk due to its activity (*e.g.* a real estate company with no construction activities and operating exclusively in Switzerland) may decide on a voluntary basis to refrain from providing information on certain matters[19].

The way companies falling under the scope of application of Article 964*a* SCO must report is described in Article 964*b* para. 1 SCO, which lists the elements

14 Such as, for example, EU-based companies that are required to report under Directive 2014/95 (n. 10). See Federal Office of Justice, Transparence, p. 12 f.

15 See also NERI-CASTRACANE, Gouvernance, p. 405 f., for whom transparency and disclosure rules and guidelines tend to encourage a deeper reflection by the managers in favour of increased CSR and contribute to better corporate accountability and sustainability.

16 Federal Office of Justice, Transparence, p. 14.

17 FUCHS/SCHROEDER DE CASTRO LOPES, p. 48.

18 Federal Office of Justice, Transparence, p. 14.

19 Federal Office of Justice, Transparence, p. 15. See also BKodeS-KAUFMANN/BIGGOER, § 29, N 31.

to be included in the Report on non-financial matters. More specifically, five subjects must be covered by the Report[20].

The report must first provide information on *environmental matters*. This relates to everything that has a causal relationship with living beings; more specifically, details on the current and foreseeable effects of the companies' activity on the environment, in particular greenhouse gas emissions, must be given[21]. Then, linked to *social issues*, the report must explain the measures taken to protect the various stakeholders that interact with the company, such as shareholders, employees, customers, suppliers, or creditors[22]. On *employee-related issues*, the report has to provide information on the working conditions of employees, on the respect of their right to be informed and consulted, on health protection, and on respect for trade unions[23]. The report must also entail a section dealing *with human rights*, which lists the information on the respect of universal, inalienable and non-transferable rights deriving from international treaties, such as the Universal Declaration of Human Rights, the UN Covenants I and II, the Convention against Torture, or the Convention on the Elimination of All Forms of Discrimination against Women. Finally, the report must include information regarding *anti-corruption*; more specifically, the measures taken and instruments available to combat corruption under Swiss criminal law must be listed[24].

The Ordinance on Climate Disclosure [OCD] that has been issued by the Federal Council in link with climate issues, provides guidelines for the disclosure of climate issues, which is one part of the Report on non-financial matters (Article 4 para. 1 OCD). The OCD is based on the recommendations of the Task Force on Climate-related Financial Disclosure [TCFD][25], which was founded in 2015 by the Financial Stability Board with the aim of providing uniform climate reporting that companies can use to communicate information to lenders, insurers, investors and other stakeholders.

According to Article 3 para. 1 OCD, the climate disclosures must assess eleven recommendations of the TCFD Guidelines in the fields of governance, strategy, risk management, and key figures and targets[26]. A legal presumption exists that the disclosure obligations under Article 964*b* SCO are fulfilled with regard to climate issues if the company follows the recommendations of the TCFD,

20 For a description of these subjects, *cf.* BKodeS-Kaufmann/Biggoer, § 29, N 24 ff.
21 Federal Office of Justice, Transparence, p. 8.
22 Federal Office of Justice, Transparence, p. 8.
23 Federal Office of Justice, Transparence, p. 8 f.
24 Federal Office of Justice, Transparence, p. 10.
25 Federal Department of Finances, Rapport explicatif, p. 9.
26 Federal Department of Finances, Rapport explicatif, p. 9.

which are entailed in the OCD, when preparing the elements to be disclosed (Article 2 para. 1 OCD).

D. Comment

Article 964*a* para. 1 SCO foresees a reporting obligation that is accompanied, implicitly, with a duty of care, in line with the expectations expressed in the Swiss National Action Plan for Business and Human Rights. The fact that the due diligence applied with regard to the policies adopted in relation to the specific business model of each undertaking must be described reinforces this finding, which derives from a teleological interpretation of the law, together with the application of the principle of effectivity.

The application of the *comply or explain* principle provides the company with considerable leeway, as there is no control over the substance of the explanations. A company which decides to "*explain instead of comply*" could however influence in a negative way its stock market value, in the long term[27].

III. Transparency in Raw Material Companies

A. Introduction

The regulations directed at insuring transparency by companies active in the raw material industry is part of an evolution of the international legislation[28], particularly in Europe[29] (amendment of the Accounting Directive 2013/34/EU, transposed in the Member States), the United States (introduction of the Dodd-Frank Act[30] and of the Final Rule published on 27 June 2016) and Canada (Extractive Sector Transparency Measures Act, which came into force on 1 July 2015).

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27 FUCHS/SCHROEDER DE CASTRO LOPES, p. 49; PARAMALINGAM, p. 5.

28 NERI-CASTRACANE, p. 245 f.

29 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L182/19, 29.6.2013.

30 Dodd-Frank Wall Street Reform and Consumer Protection Act H.R.4173 adopted on 21 July 2010.

The content of Articles 964*d* ff. SCO is based in particular on EU Directive 2013/34 and essentially corresponds to the standards of European law enacted in the field of transparency in the raw material industry companies[31].

Transparency rules are intended to address the fact that developing countries, which are rich in natural resources, often have legal systems which – due to the political and legal structures of these countries – are often unable to prevent the diversion of funds for inappropriate purposes in the context of drawing up contracts for the extraction or trading of raw materials.

These rules therefore play an important role in the accountability of State bodies in raw materials-producing countries, both in terms of the population and in terms of reputation.

B. Scope of application

1. Minimum company size requirement

In accordance with Article 964*d* para. 1 SCO, companies with their seat in Switzerland that are subject to an ordinary audit are required to prepare an annual Report on payments made to State bodies.

Companies that are subject to an ordinary audit are described in Article 727 para. 1 SCO. These companies are (i) publicly traded companies; (ii) companies that have, in two successive financial years, exceeded two of the following thresholds: at least 250 full-time equivalent positions on annual average, a balance sheet total in excess of CHF 20 million or sales revenue over 40 million; and (iii) are required to prepare consolidated accounts.

The obligation to draw up a Report on payments made to State bodies therefore only applies to companies that reach a certain size and are therefore subject to ordinary supervision[32]; SMEs are excluded from the scope of application of Articles 964*d* ff. SCO.

According to Article 964*d* para. 2 and 3 SCO, an undertaking controlled by another undertaking that must report payments to foreign State bodies under Swiss or foreign regulations, as well as undertakings that must prepare such a report under foreign law, are released from the reporting duty.

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31 Federal Council, FF 2017 353, p. 427 f., p. 564. See also Federal Office of Justice, Matières premières, p. 8 ff. for an international overview.

32 Contrary to what the FF 2017 353 might suggest, the scope of application of the provision is not limited to public companies, but includes all companies that meet the criteria set out in art. 727 SCO, *cf.* Federal Council, FF 2017 353, p. 564.

2. Company's fields of activity

According to Article 964*d* para. 1 SCO, the obligation to draw up a financial Report on payments made to State bodies applies to companies that, directly or indirectly, are "*involved in the extraction of minerals, oil or natural gas or in the harvesting of timber in primary forests*".

The obligation therefore concerns companies active in production through their own activity and those active in production through the activity of a company they control[33], typically a subsidiary[34].

According to Article 964*d* para. 1 *cum* 4 SCO, the following activities are covered by this concept: (i) the exploration and prospecting of raw materials, which includes all activities relating to the search for raw materials; (ii) the discovery of raw materials, which concerns the search for new deposits or raw materials; (iii) the development of raw materials, *i.e*. the fact of making raw materials accessible and usable; and (iv) the extraction (in particular industrial extraction) of the deposits or raw materials referred to in the law[35].

Trading in raw materials is not explicitly covered, but the Federal Council may extend the scope of the law as part of an internationally coordinated procedure in this direction, following Article 954*i* SCO.

3. The notion of State body

Article 964*d* para. 5 SCO gives a broad definition of the concept of "*State body*", which includes any form of authority specific to a third country.

This includes national, regional or local authorities, their administrations and the organisations (*e.g.* economic development agencies and state-owned companies) controlled by them. The concept of State body authority thus encompasses all public organisations or entities with governmental or executive functions within a State[36].

33 On the notion of control, *cf.* CR CO II-CANAPA/SCHMID/CIMA, Art. 964*a*, N 23 ff.

34 Same opinion: BKodeS-SCHNEUWLI, § 28, N 47; the German version is more explicit, stating that: "[…] *und selber oder durch ein von ihnen kontrolliertes Unternehmen* […]".

35 On the whole aspect, *cf.* Federal Council, FF 2017 353, p. 565.

36 FF 2017 353, p. 565.

C. Obligations

As mentioned before, the main obligation of companies is to report annually on payments made to foreign State bodies. There is however a threshold under which such payments are not required. Payments of all sorts must be declared, as will be explained bellow.

1. The threshold for indicating payments

With regard to the content of the report, Article 964*f* para. 2 SCO stipulates that payments of at least CHF 100'000.– per business year (*i.e.* the year in which the annual accounts are closed) arising from the production of minerals, oil or natural gas, or from the exploitation of primary forests must be included in the Report on payments made to State bodies. This threshold of CHF 100,000.– may be reached through a single payment or through a series of payments accumulated over the fiscal year[37].

2. The various types of payments considered

Generally speaking, the form of the payment is irrelevant; according to Article 964*e* para. 1 SCO, payments to State bodies may be made in cash (by bank transfer or in cash) or in kind. Article 964*e* para. 1 SCO also sets out a non-exhaustive list (using the expression "*in particular*") of services that constitute payments made to State bodies within the meaning of the law.

These include production rights, taxes on production, income or profits, royalties, asymmetrical dividends to publicly owned companies, signature, discovery and production bonuses, licence, rental and entry fees and any other consideration for authorisations or concessions, and payments for infrastructure improvements[38].

3. Formal aspects concerning the presentation of the report

With regard to formal requirements, Article 964*f* para. 3 SCO specifies that the report must indicate (1) the total amount of payments made to each State body and (2) differentiate payments (i) by type of service provided, as listed in Article 964*e* para. 2 SCO, (ii) by State body and (iii) by specific

37 FF 2017 353, p. 367.
38 FF 2017 353, p. 367.

project category[39]. The report may take the form of a table listing the payments, the type of service, the date, the project concerned and the beneficiary.

Under the terms of Article 964*f* para. 4 SCO, the Report on payments made to State bodies must be drawn up in a national language or in English, which corresponds to the rules applying to accounting law (Article 958*d* para. 4 SCO).

In accordance with Article 964*g* para. 1 SCO, a company operating in the raw material sector that is required to draw up a Report on payments made to State bodies must make its report available to the public electronically within six months of the end of the financial year[40].

D. Comments

The obligation to Report on payments made to State bodies covers rather broadly all forms of payments or advantages in order to provide the general public with enough information to ensure accountability through transparency. The fact that Swiss law does not include the trading of raw materials in the report is a significant drawback, given that many international trading companies are registered in Switzerland.

IV. Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour

A. Introduction

Regarding minerals and metals from conflict-affected areas, the Swiss regulation is inspired by Regulation (EU) 2017/821 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. The Dutch Child Labour Due Diligence Act, by the way, served as a base for the part of the regulations relating to child labour. These regulations foresee

39 The 2016 message (FF 2017 353) specifies that a project is defined as all operational activities arising from a single contract, licence, lease, concession or other similar legal agreement and which give rise to payment obligations towards a third party. Similar legal agreement and which form the basis of payment obligations to a State body; several agreements linked in substance are considered to be a single project, FF 2017 353, p. 567.

40 FF 2017 353, p. 368.

obligations of due diligence and transparency at the upstream level of the supply chain of certain economic sectors[41].

Articles 964*j*-964*l* SCO regulate the matters and are completed by the Ordinance of the Federal Council on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour (DDTrO). The second text "*regulates the due diligence and reporting obligations to be complied with by companies under Articles 964j-964l SCO in relation to minerals and metals from conflict-affected and high-risk areas and in relation to child labour*" (DDTrO 1).

B. Scope of application

The scope of application of due diligence and transparency in relation to minerals and metals from conflict-affected and high-risk areas is described in Article 964*j* para. 1 (1) SCO while Article 964*j* para. 1 (2) SCO describes this scope for child labour.

1. Minerals and metals

According to Article 964*j* para. 1 (1) SCO, undertakings whose seat, head office or principal place of business is located in Switzerland and which import or process certain volume thresholds, as foreseen by Article 964*j* para. 2 SCO and Article 4 and Annex 1, parts A (minerals) and B (metals) DDTrO, of tin, tantalum, tungsten or gold, must comply with due diligence obligations in the supply chain and report thereon. If an undertaking controls one or more other undertakings, the thresholds are assessed with regards to the whole group of undertakings (Article 4 para. 2 DDTrO). The wording of the article implies that the targeted – Swiss or foreign – companies that offer products and services mainly or exclusively abroad fall within the scope of application of the provision. The provision contains a private international law norm which takes precedence over Article 154 PILA, in application of the principle *lex specialis derogat generali*[42]. By contrast, undertakings that do not reach the thresholds foreseen by the Annexes to the DDTrO (which are aligned on the thresholds of Regulation 2017/821) fall outside the scope of application of Article 964*j* SCO.

41 The upstream sector of the supply chain includes all economic operators who hold the minerals and metals and are involved in their transport and processing from the site of extraction to their incorporation into the finished product.

42 Federal Office of Justice, Rapport explicatif ODiTr, p. 9.

It is surprising, however, that cobalt, which is used in many electronic devices such as smartphones or batteries, is currently not listed by the Swiss or by the EU regulations[43] as a mineral or metal that would trigger the application of the due diligence and reporting obligations. This metal, indeed, mainly originates from the Democratic Republic of Congo, which appears on the list of conflict or high-risk areas established by *RAND Europe*[44]. The importance of the metal for modern western industries probably explains this decision that seems to have a political rather than a fully rational background.

A company that imports or processes minerals and metals listed in Article 964 para. 1 (1) SCO is exempted from the due diligence and reporting requirements, however, if it comes to the conclusion that the minerals and metals do not come from conflict-affected or high-risk areas (Article 964*j* para. 1 (1) SCO; Article 3 para. 2 DDTrO)[45]. This requires the company active in the importation of processing of minerals and metals to tracing the upstream supply chain to determine whether the minerals or metals come from such an area.

2. Child labour

Regarding child labour, Article 964*j* para. 1 (2) SCO foresees that the obligation of due diligence and reporting concerns undertakings whose seat, head office or principal place of business is located in Switzerland, provided they meet threshold values – which typically exclude SMEs from the obligation (Article 964*j* para. 3 SCO; Article 6 para. 1, 2 DDTrO, which corresponds to Article 727 para. 2 (2) SCO) – and that there is reasonable ground to suspect that they have been manufactured or provided with the help of child labour[46].

Thus exempted from due diligence and reporting are companies which, based on the indication of origin ("*made in*"), procure their goods or services predominantly in countries that are rated "Basic" in the UNICEF *Children's rights in the workplace index*, which is part of the UNICEF Atlas of Children's Rights and Business, and that indicates that there is a low risk of child labour (Article 7 paras 1, 2 DDTrO)[47]. Procuring a good or service "*predominantly*"

43 Annexes I and II of Regulation 2017/821.

44 <https://www.cahraslist.net/>.

45 Conflict or high-risk areas refer to armed conflicts and post-conflict fragile area, and failed states. To determine whether an area falls under this definition, it is possible to refer to Regulation 2017/821 or to the conflict or high-risk areas established by *RAND Europe*.

46 For the definition of child labour in this context, *cf.* CR CO II-Canapa/Schmid/Cima, Art. 964*j*, N 20 ff.

47 Federal Office of Justice, Rapport explicatif ODiTr, p. 21 f.

in such a country means that at least 50% of the added value must originate from this area[48].

If the risk is rated "*enhanced*" or heightened in the UNICEF *Children's rights in the workplace index*, the company must assess in a second step whether, in the case at hand, there are reasonable grounds to suspect child labour is being used (Article 5 para. 1 DDTrO)[49]. It is not sufficient to that extent that the country's due diligence response is rated enhanced or heightened in the index, but there must exist a well-founded suspicion of child labour for a specific good or service[50]. If, after review, there is no reasonable ground to suspect this, the company falls outside the scope of application of the regulation. If, by contrast, the company concludes that reasonable ground exists to suspect use of child labour, it is subject to the due diligence and reporting obligations[51]. Such a situation arises where there are concrete and substantiated indications or several concrete and substantiated observations or indications that child labour was used in the manufacture of a good or in the provision of a service[52]. Such indications can be provided, for example, by photos or on-site checks[53].

Two additional elements must be underscored. On the one hand, where a company concludes that it presents a low risk of child labour or that there is no reasonable ground to suspect child labour, it does not have any diligence or reporting obligation, but the company needs to document this fact (Article 5 para. 2; Article 7 para. 3 DDTrO); contrasting with the importation of minerals and metals, the SCO does not limit the personal scope of application with regard to child labour by threshold values[54]. On the other hand, a company, including an SME, can never be exempted from the obligation to report, however, if it offers goods or services that have clearly been produced or provided using child labour (Article 8 DDTrO). Such a finding must be supported by reliable, objective and independent sources.

48 Federal Office of Justice, Rapport explicatif ODiTr, p. 21 f. JOTTERAND criticizes this percentage threshold.
49 Federal Office of Justice, Rapport explicatif ODiTr, p. 18 f.
50 Federal Office of Justice, Rapport explicatif ODiTr, p. 19. This index is one of the components of the Children's Rights and Business Atlas, available at <https://www.childrensrightsatlas.org/>.
51 Federal Office of Justice, Rapport explicatif ODiTr, p. 18.
52 Federal Office of Justice, Rapport explicatif ODiTr, p. 18. On the obligation to report suspicious activities in the context of money laundering see also Federal Council, Message LBA, FF 1996 1086.
53 Federal Office of Justice, Rapport explicatif ODiTr, p. 19.
54 Federal Office of Justice, Rapport explicatif ODiTr, p. 7.

3. Exemption because of the existence of an equivalent report

In addition to the preceding explanations, also exempted from the obligation of due diligence and reporting are undertakings that comply with equivalent internationally recognized regulations, as foreseen by Article 964*j* para. 4 SCO *cum* Article 9 and Annex 2 DDTrO[55]. These pieces of legislation concern, for minerals and metals (Annex 2, Part A), static referrals to the 2016 OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict and High-Risk Areas, and Regulation 2017/821 in its version from 17 May 2017. For child labour (Annex 2, Part B), the static referrals refer to the 2015 ILO Conventions Nos 138 and 182 and the 2015 ILO-IOE [International Organisation of Employers] Child Labour Guidance Tool for Business, and, on the other hand, the 2018 OECD Due Diligence Guidance for Responsible Business or the UN Guiding Principles on Business and Human Rights. This implies a company that fulfils the conditions of internationally recognized regulations that are be stricter than the ones to which the static referrals are made must also be exempted from the due diligence and reporting obligations[56].

The exempted company must refer to the international equivalent regulation on which the equivalent report is based (Article 964*j* para. 4 SCO; Article 9 and Annex 2 DDTrO).

4. Partial exemption because imported and processed metals originate exclusively from recycling

If a company falling under the scope of Article 964*j* para. 1 (1) SCO imports or processes metals that originate exclusively from recycling, it has only limited diligence obligations (Article 12 para. 3 DDTrO). In such a case, due diligence exists with regard to the supply chain policy (Article 10 DDTrO) and traceability (Article 12 DDTrO) and the risks must be evaluated. However, no reporting procedure (Article 14 DDTrO), risk management (Article 15 DDTrO) or audit is then required (Article 16 DDTrO).

C. Obligations

Companies that fall under the scope of application of Article 964*j* para. 1 (1) or (2) SCO are subject to a risk-based approach: they

55 Federal Office of Justice, Transparence, p. 19. Criticizing this possibility: ATAMER/WILLI, p. 696 f.

56 Same opinion: NERI-CASTRACANE, Diligence, p. 50 f.

must prioritize their due diligence based on the identified risks and conduct a risk assessment, taking into account the probability and potential severity of an incident (Article 15 para. 1 DDTrO).

More specifically, these companies must introduce and maintain a management system (Article 964*k* para. 1 SCO)[57], design a risk management plan (Article 964*k* para. 2 SCO) and, in the case of minerals and metals, conduct an audit that allows actions to eliminate, prevent or mitigate identified and assessed risks in the supply chain (Article 964*k* para. 3 SCO)[58]. The duties of care create an obligation to act with due diligence (duty of care), which is an obligation of means for the board and executive board of the company[59].

These different obligations are an ongoing and recurring process: undertakings which are subject to the regulation need to identify and monitor the risks of adverse effects, take adequate measures to eliminate, prevent or minimise the risks according to their likelihood of occurrence and severity of adverse impact, and, finally, review the results (Article 15 para. 2 DDTrO).

The regulation on due diligence and transparency in relation to minerals and metals from conflict-affected areas and child labour thus does not entail any absolute import ban, but is built around the principle that consumers, equity and foreign funders and civil society actors and organizations will sanction the undertakings.

1. Management system

The management system can be defined as a set of processes, tools and methods used by a company to direct its activities towards the desired objectives[60]. More specifically, it defines the policy of the company and a supply chain traceability system that is focused on minerals and metals, on the one hand (Article 10 DDTrO), and child labour, on the other hand (Articles 11 DDTrO).

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57 RÖTHELI *et al*.

58 See also BKodeS-KAUFMANN/BIGGOER, § 29, N 13 ff.

59 Same opinion: Federal Office of Justice, Rapport explicatif ODiTr, p. 39 f.; CANAPA/SCHMID/CIMA, p. 564 ff, p. 570 f.; FORSTMOSER/KÜCHLER, Art. 964*k*, N 6; KAPTAN, p. 601; BÖCKLI, § 6, N 720 f. Less convinced: NERI-CATRACANE, Diligence, p. 53 f., who argues that "*the risks highlighted during the management process required by Articles 964j-l SCO are to be taken into account by directors as per Article 716a para. 1 (3) and Article 717 SCO to the extent that they will impact on the long run on the financial performance of the company*".

60 Federal Office of Justice, Rapport explicatif ODiTr, p. 6. Federal Office of Justice, Transparence, p. 20.

The material and formal requirements of the policy must be documented internally; a company must decide on document retention and make sure to maintain up-to-date and easily understandable information (Article 10 para. 1 and 11 para. 1 DDTrO). To fulfil its policy, a company may use instruments such as on-site inspections, the provision of pieces of information from public authorities, international organizations and civil society stakeholders (such as NGOs, UN, ILO, UNICEF, and the OECD). The company may also consult experts and specialist literature, obtain assurances from economic operators in the supply chain and other business partners, or use recognized standards and certification systems (*e.g.* Conflict-free gold standard of the World Gold Council; the Code of Practice of the Responsible Jewellery Council; *cf.* generally Article 10 para. 2 and Article 11 para. 2 DDTrO)[61].

A company subject to due diligence and transparency in relation to minerals and metals from conflict-affected and high-risk areas must also foresee a supply chain traceability system that includes and documents various elements (Article 964*k* para. 1 (3) SCO; Article 12 para. 1 DDTrO). The traceability system must, among other elements, describe the mineral or metal and give the name and address of its supplier (Article 12 para. 1 (a) and (b) DDTrO). Regarding metals, this includes the name and address of the smelters and refineries and the records of third-party verification reports from the smelters and refineries (Article 12 para. 1 (d) and (g)). For minerals, the quantities extracted must be indicated and, if they originate from conflict or high-risk areas, the mine and places where the mineral is aggregated with other minerals, traded or processed must also be given (Article 12 para. 1 (e) and (f)). Regarding child labour, undertakings that fall within the scope of application of Article 964*j* para. 1 SCO must establish a traceability system for the supply chain that includes and documents the description of the product or service. In addition, if it exists, both the trade name and the names and addresses of the supplier and production sites or of the service provider for the undertaking, must also be given (Article 13 DDTrO)[62].

Undertakings that must comply with the due diligence and reporting obligations according to Article 964*j* para. 1 SCO must establish a reporting procedure that allows all interested parties to raise reasonable concerns about the existence of a potential or actual adverse impact related to minerals and metals from conflict-affected or high-risk areas or child labour. This reporting procedure works as an early warning mechanism to identify risks (Article 14 para. 1 DDTrO)[63].

61 Federal Office of Justice, Rapport explicatif ODiTr, p. 29 f.
62 See also Federal Office of Justice, Rapport explicatif ODiTr, p. 37 f.
63 See also Federal Office of Justice, Rapport explicatif ODiTr, p. 38 f.

2. Risk management plan

The risk management plan consists in the implementation of a strategy to identify, manage and reduce the risks identified. What is essential in this regard is to take into account the assessment of the identified risks, the likelihood of the adverse effects occurring and the magnitude of the expected effects (Article 964*k* para. 2 SCO; Article 5 para. 1 DDTrO)[64].

3. Audit

Finally, when the undertaking is active in the sectors of minerals and metals, an audit must be conducted and action must be taken to eliminate, prevent or mitigate the risks that were identified and assessed in the supply chain; the audit must also assess whether it is possible the company has not complied with its due diligence obligation (Article 964*k* para. 3 SCO; Article 16 para. 2 DDTrO). This operation must be carried out annually by an audit firm that is licensed by the Federal Audit Oversight Authority as an audit expert in accordance with the Audit Oversight Act (Article 16 para. 1 DDTrO).

V. Form and temporal elements

Companies that fall under the scope of application of Articles 964*a* ff., 964*d* ff. and/or 964*j* ff. SCO must report annually. The report must be prepared in a national language or in English (Articles 964*b* para. 6, 964*f* para. 4, 964*l* para. 2 SCO).

The first reports on non-financial matters and the Report on compliance with the due diligence obligations were both published in 2024 and covered the year 2023. However, the date of entry into force of the OCD being 1st January 2024, the first climate disclosures will cover the financial year 2024 and be published in 2025[65]. On the other hand, the first reports on payments

64 See also Federal Office of Justice, Rapport explicatif ODiTr, p. 40 ff.

65 <https://www.sif.admin.ch/sif/fr/home/finanzmarktpolitik/finance-durable.html>. Article 5 OCD contains a transitional provision, which concerns the publication in electronic format of the climate disclosures (and therefore not the entire report on non-financial matters). The publication in electronic format of the first climate disclosures, in 2025, will have to take place in the year of approval, *i.e.* no later than 31 December 2025, and not "*immediately following approval*" (Article 964*c* para. 2 (1) SCO).

made to State bodies have already been published in 2023, covering the year 2022[66].

The Report on non-financial matters (Art. 964*a* ff. SCO), the Report on payments made to State bodies (Art. 964*d* ff. SCO) and the Report on compliance with the due diligence obligations (Art. 964*j* ff. SCO) can be integrated into a single document; this possibility is explicitly foreseen by the Federal Office of Justice regarding the Report on compliance with the due diligence obligations, which can be integrated in the Report on non-financial matters[67] and this possibility should further be extended to the Report on payments made to State bodies.

While the three reports are conceived as stand-alone reports that are separate from the management report (Art. 961*c* SCO)[68], they can also be integrated to the management report, as the SCO does not contain any prohibition against this. The merit of such integrated publication is currently under debate[69] and some scholars therefore recommend the publication of the non-financial reports in a separate document[70]. Whatever solution is chosen, it should always remain possible to present and preserve the content of the non-financial reports on a separate basis[71].

VI. Liability and sanctions[72]

The law obliges companies to be transparent so they may face public scrutiny. A very important role is thus delegated to NGOs, to verify and document the reports prepared by the companies. While no direct liability is derived from this control, undertakings may suffer from the negative image that the report would show.

In our view, however, sound teleological reasoning, together with the principle of effectivity, however, allows the interpretation of new transparency and due

66 See *e.g.* Glencore's "Payments to Governments Report 2022", available under <https://www.glencore.com/.rest/api/v1/documents/static/a574baa8-d3b0-4214-b247-2ec0fbf892e9/GLEN_2022-Payments-to-Governments-Report.pdf>.

67 On the whole aspect, *cf.* Federal Office of Justice, Rapport explicatif ODiTr, p. 7.

68 Federal Office of Justice, Transparence, p. 16; FF 2017 353, p. 353.

69 *Pro*: OFK OR-Eberle/Buchmann, Art. 964*e*, N 2 and Schneuwly/Darbellay; *contra*: Forstmoser/Küchler, Art. 964*f* OR, N 6; BKodeS-Kaufmann/Biggoer, § 29, N 35.

70 Forstmoser/Küchler, Art. 964*f*, N 6.

71 OFK OR-Eberle/Buchmann, Art. 964*e*, N 2; Schneuwly/Darbellay.

72 For an extended assessment of the liability, *cf.* Canapa.

diligence provisions as a *"Schutznorm"* to the benefit of potentially harmed individuals.

This is especially true for the obligations linked to due diligence and transparency in relation to minerals and metals from conflict-affected areas and child labour. In this case, in material terms, the Report on compliance with the due diligence obligations shows whether the duties of care have been fulfilled and, if so, how. The same is true for the obligations linked to non-financial matters[73] and for those relating to payments made to State bodies[74].

The liability of the members of the board of directors could be also engaged in addition to the liability of the company (Article 722 SCO). In this case, damage to the company or company investors should derive from the fact that appropriate information has not been disclosed or that the report would contain significant omissions. Damage could, *e.g.*, materialize through a significant drop in share prices for listed companies. While it may be difficult to demonstrate a causal relationship between the damage and the absence of disclosure of certain information, this should nonetheless not be excluded.

One must also note that the law introduces possible fines if the obligation to report on non-financial matters (Art. 964*a* ff. SCO), on compliance with the due diligence obligations (Art. 964*j* ff. SCO) and on payments made to State bodies (Art. 964*d* ff. SCO) are disregarded by the company. The fines are rather limited in size (maximum CHF 100'000.– for the first two listed obligations to report under Article 325*ter* SCC[75] and CHF 10'000.– for the last report obligation under Article 325*bis* SCC) in comparison with the economic importance of companies subject to those obligations. One could argue that failure to abide by the regulation could result in a loss of confidence among the general public and the customers, this being potentially more detrimental to the company than a possible fine.

VII. Conclusion

The importance of corporate reporting on non-financial issues has been articulated in different contexts internationally. The UN Rio+20 conference, for example, recognized "*the importance of corporate sustainability*

73 CR CO II-Schmid/Cima/Canapa, Art. 964*b*, N 20 ff; CR CO II-Canapa/Schmid/Cima, Art. 964*a*.

74 In this case, the *"Schutznorm"* is protecting the interest of the State, as an entity, in which payments to State bodies are made, CR CO II-Canapa/Barakat, Art. 964*d*, N 40.

75 Swiss Criminal Code of 21 December 1937, SR 101 (cited: SCC).

reporting" and encouraged "*companies, where appropriate*, […] *to consider integrating sustainability information into their reporting cycle*"[76].

Corporate Reporting on the social and environmental impacts of the activities of corporations ideally enables sustainability risk assessment and management, but also provides investors and consumers with easier access to information on the social impact of corporations, thereby increasing investor confidence. Given the direct and indirect financial nature of the new reporting obligations of Articles 964*a* ff., 964*d* ff. SCO, the title of Chapter VI (before Article 964*a SCO*), *i.e.* "*Transparency on Non-Financial Matters*", could have been "*Transparency on Extra-Financial matters*". Such a title would have apprehended in a better way the nature of the reporting obligations.

One central issue with the current regulations are its very narrow personal scope of application: SMEs are generally excluded from the obligation to report on non-financial issues (Articles 964*a* ff. SCO) and from the obligation to report on payments made to State bodies (Articles 964*d* ff. SCO), while their obligation with regards to the duties of due diligence and transparency with regard to minerals and metals potentially originating from conflict-affected areas and child labour (Articles 964*j* ff. SCO) are also limited. As a result, only a small number of companies are subject to the reporting obligation, which negatively influences the scope and effectiveness of the regulation[77].

More specifically, the transparency obligation may only apply to a few hundred companies, divided between less than 400 listed companies and other companies active in the financial sector[78]. It is also hard to say how many companies are affected by transparency in the commodities sector; their number is likely also be limited, however, as trading activities are currently excluded, which involves hundreds of companies in Switzerland[79]. Finally, regarding the duty of information on minerals and metals from conflict zones and on child labour, the numbers are hard to estimate, as no reliable source of information exists[80].

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76 United Nations, Future We Want, A/RES/66/288, § 47.

77 See generally CANAPA/SCHMID/CIMA, Limitations et perspectives, p. 562 ff.

78 <https://www.ejpd.admin.ch/dam/bj/de/data/wirtschaft/gesetzgebung/verantwortungsvolle-unternehmen/gegenueberstellung-kvi-gegenvorschlag-d.pdf.download.pdf/gegenueberstellung-kvi-gegenvorschlag-d.pdf>.

79 <https://www.sif.admin.ch/sif/fr/home/finanzmarktpolitik/negoce-matieres-premieres.html>; see also : <https://www.publiceye.ch/de/themen/rohstoffhandel/schweiz/rohstoff-drehscheibe>, where *PublicEye* mentions companies such as *Glencore*, *Vitol*, *Trafigura*, *Gunvor* or *Mercuria*.

80 <https://www.ejpd.admin.ch/dam/bj/de/data/wirtschaft/gesetzgebung/verantwortungsvolle-unternehmen/gegenueberstellung-kvi-gegenvorschlag-d.pdf.download.pdf/gegenueberstellung-kvi-gegenvorschlag-d.pdf>.

There is thus an urgent need to expand the scope of application of the regulation. For example, as mentioned above, the regulation should also apply to companies trading in raw materials and include cobalt on the list of metals that trigger the application of the due diligence and transparency obligations.

Finally, one should note that the Federal council has very recently acknowledged that in view of the recent developments regarding transparency and accountability currently underway in the European Union, with the adoption of the CSRD and the probable future adoption of the CSDDD, Switzerland's legislation – although only very recently adopted – contains several gaps and needs to be adapted[81]. The Federal Council gives priority to possible future reforms on transparency and has said will publish recommendations after it has studied the possible implications of these changes for Switzerland. Legal changes in this legal field could thus occur sooner than later.

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[81] Federal Office of Justice, Mandat, p. 22 f.

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