

EDA/SECO-Day 2024 for Heads of SBH

Challenges of new due diligence and reporting requirements for SME



Growing demand for legal advice



Overview of new legal requirements



Current situation and challenges for SME



Selected questions from our practice



Outlook

Growing demand for legal advice on new Swiss due diligence and reporting requirements



- Increasing demand for legal support since beginning of 2022 onwards
- Primarily questions regarding the scope of application ("are we affected?") and the timeline
- Different reasons for requests
- At present, increasingly substantive and in-depth questions on specific topics
- Overall: considerable legal uncertainty

New due diligence and reporting requirements in Switzerland



Transparency and reporting obligations on **non-financial matters**



Due diligence and reporting obligations regarding **child labour**



Due diligence and reporting obligations regarding **minerals and metals from conflict-affected areas**



Transparency and reporting obligations on **non-financial matters**



Affected:

- **Swiss companies of public interest**
- **if they reach, together with the domestic and foreign companies they control, over two consecutive financial years:**
 - an annual average of at least **500 full-time positions***** **and**
 - **either** a balance sheet total of more than CHF 20 million **or**
 - revenues of more than CHF 40 million

Public companies*



Banks/Insurance companies**



Generally **not** SMEs



* with listed equity securities or bonds outstanding or contribution of at least 20 % of the assets or the turnover to the consolidated accounts of another Swiss company with listed equity securities or bonds outstanding

** or other regulated entities in the financial industry

*** Note: The Federal Council intends to reduce this threshold from 500 to 250 full-time positions

Transparency and reporting obligations on **non-financial matters**



Duties for companies affected:

- Reporting on **environmental issues** (in particular **CO2 targets**), **social issues**, **employee concerns**, respect for **human rights** and the fight against **corruption**
- Principle: "comply or explain"
- Approval of report by board of directors and shareholders and electronic publication of report

Risk in the event of non-compliance

- Sanction of up to CHF 100,000
- Failure to meet customer expectations
- Reputational risks

Due diligence and reporting obligations regarding **child labour**



Affected:

- **Companies** whose seat, head office or principal place of business is located in **Switzerland**
- **offering products/services** re which **reasonable suspicion** that manufactured or provided using **child labour**

Large enterprises



SMEs



Exemptions: Certain SMEs, low-risk companies and companies adhering to internationally recognized equivalent regulations



Exemptions:

- **SME exemption (unless obvious use of child labour):** If, together with domestic and foreign companies controlled, **two of the following** thresholds not met in two consecutive FY:
 - a **balance sheet** total of CHF 20 million,
 - a **turnover** of CHF 40 million, and
 - an annual average of 250 full-time **employees**
- Companies with **low risks** according to UNICEF Children's Rights in the Workplace Index (**unless obvious use of child labour**)
- Companies that comply with certain **internationally recognized equivalent regulations**

Due diligence and reporting obligations regarding **child labour**



Two-step risk assessment:

1. **Risk classification ("made in" check):** Country of origin of products/services offered worldwide categorized as "*enhanced*" or "*heightened*" in UNICEF Children's Rights in the Workplace Index?
2. if so: **Product / service specific suspicion check:** Reasonable suspicion ("*begründeter Verdacht*") of child labour?

Due diligence and reporting obligations regarding **child labour**



Duties in case of reasonable suspicion

- Establishing a supply chain policy
- Maintaining a management system for tracing the supply chain
- Identification and assessment of risks
- Annual reporting approved by the highest management or administrative body of the company and electronic publication of the report
- No external audit required by law

Risk in the event of non-compliance

- Sanction of up to CHF 100,000
- Failure to meet customer expectations
- Reputational risks

Due diligence and reporting obligations regarding **minerals and metals from conflict-affected areas**



Affected:

- **Companies** whose seat, head office or principal place of business is located in **Switzerland**
- **if**
 - **quantities** of minerals or metals containing **tin, tantalum, tungsten** or **gold** imported into or processed in Switzerland, together with the foreign and domestic undertakings controlled, **exceed thresholds in Annex 1 of DDTrO, and**
 - minerals or metals **originate from conflict-affected or high-risk areas**

Large enterprises



SMEs



Exemption: companies adhering to internationally recognized equivalent regulations



- **Not affected:** Trading and processing outside of Switzerland
- **Exempted:** companies adhering to internationally recognized equivalent regulations

Due diligence and reporting obligations regarding **minerals and metals from conflict-affected areas**



Duties of affected companies

- Establishing a supply chain policy
- Maintaining a management system for tracing the supply chain
- Identification and assessment of risks
- Annual reporting approved by the highest management or administrative body of the company and electronic publication of the report
- External audit required (!)

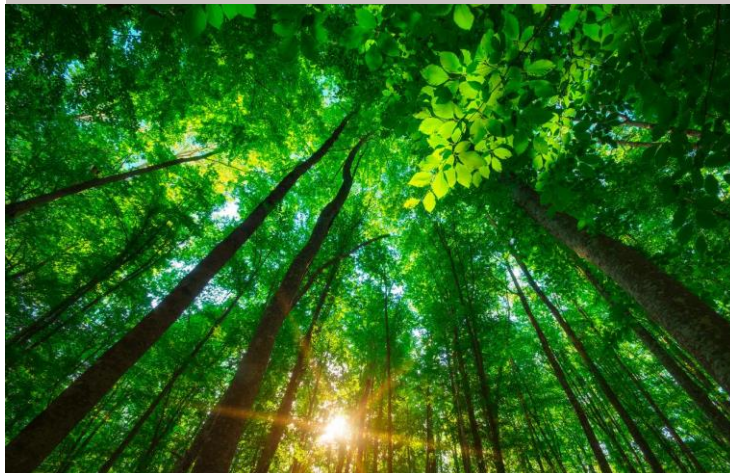
Risk in the event of non-compliance

- Sanction of up to CHF 100,000
- Failure to meet customer expectations
- Reputational risks

Overview of new requirements



Transparency and reporting obligations on non-financial matters



Due diligence and reporting obligations regarding **child labour**



Due diligence and reporting obligations regarding **minerals and metals from conflict-affected areas**



Where do we stand today?



- Obligations apply as of FY that started in 2023
- First reports of affected companies to be published now
- But: many companies in process of clarifying whether they are affected
- "Pragmatic approach" to be expected for first year

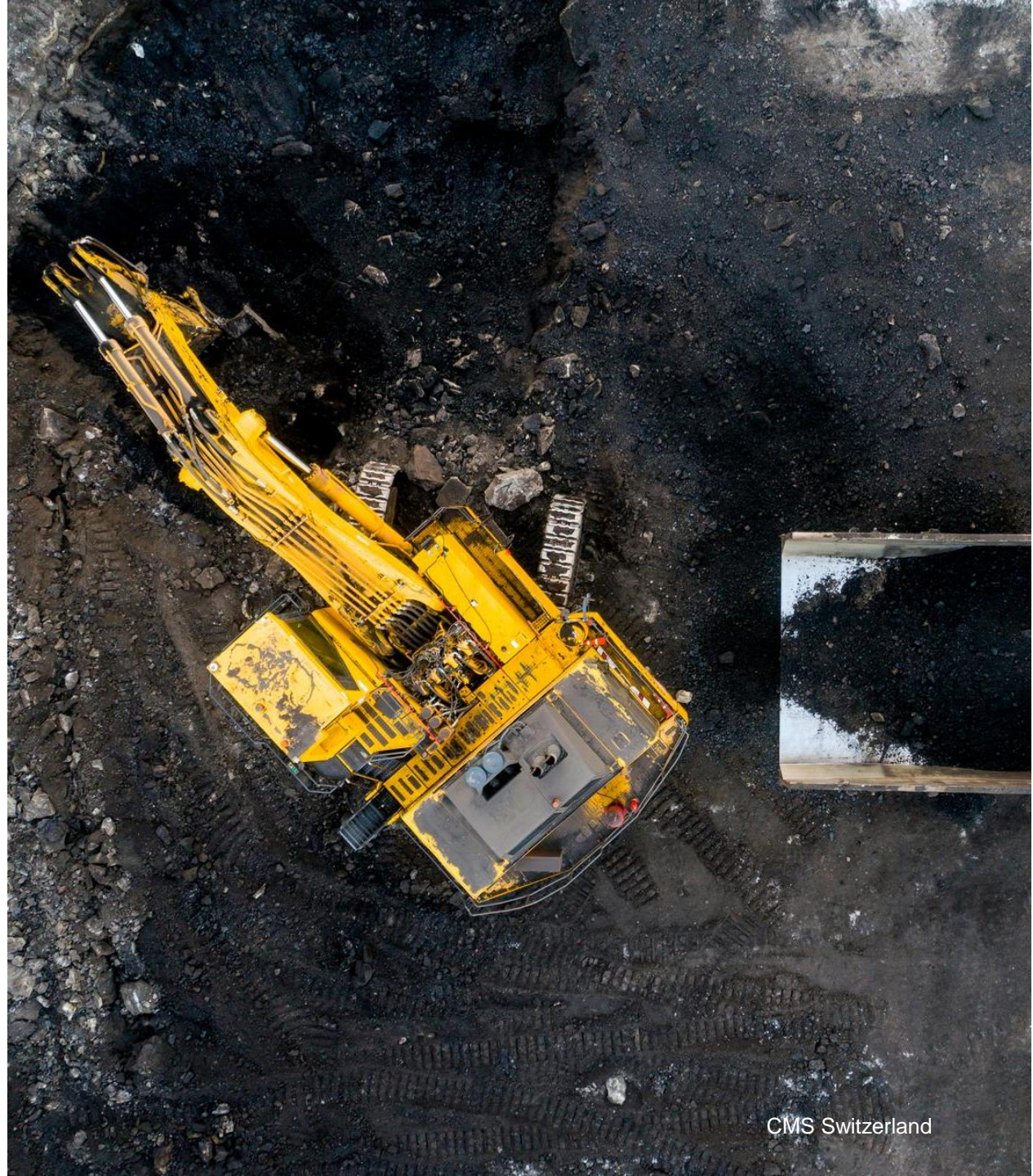
Challenges for SMEs



- Most SMEs are not sufficiently prepared
- Unavailability of data necessary for assessment
- Software-based supply chain solutions available, but
 - often (too) comprehensive for SMEs
 - often (too) expensive for SMEs
 - often still in development
 - implementation takes time
- Uncertainty about future developments, in particular of indirect effects of (further reaching) EU requirements
- Many open questions



Selected questions from our practice



Questions from our practice: **conflict minerals and metals**



- Are finished products also affected?
- Are only minerals or metals originating from a conflict or high-risk area to be considered for the thresholds?
- Are the due diligence and reporting obligations limited to those minerals and metals that exceed the thresholds?

Questions from our practice: **child labour**



- "Made in" check:
 - **What is the country of origin** ("made in")?
 - Country of origin under **customs law**? Designation of origin under **trade mark law**? **Others**?
- Suspicion check:
 - What is meant by "**reasonable suspicion**"?
 - **How and to what extent** does the specific suspicion check have to be carried out?
 - ... for the **entire upstream** supply chain?
 - ... for all (**possibly thousands**) of **products/services**?
 - To what extent can a **risk-based approach** be applied in the screening process?

Questions from our practice: **documentation of assessment**



- If no obligation to publish a report (due to conclusion that the company is not subject to the regulations):
 - Do the respective assessments have **to be documented internally**?
 - Does the internal assessment/documentation have **to be approved**?
 - If so: **who** should do so within the company?



- Where will the journey take us?
 - Uncertainty about **legal developments in the EU** and their direct and/or indirect impact on SMEs
 - As a result: Uncertainty about **development of legal requirements in Switzerland**
- Uncertainty amongst companies, especially SMEs, is likely to increase
- Thus: Need for additional **clarifications/guidance** and/or **best practice!**

Our list of proposals and wishes

- Clarifications/assistance/guidelines from the authorities
 - in the interest of legal certainty
 - to ease the burden, particularly on SMEs
 - to increase compliance with and the effect of the new obligations
- Exchange of experience between companies, authorities and external consultants to establish a best practice
- Consider compliance with international rather than Swiss specific standards

Contact us



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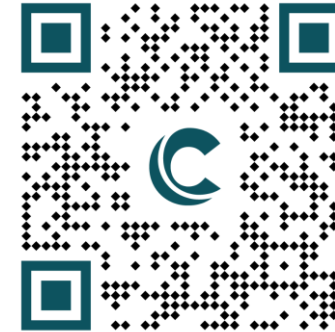
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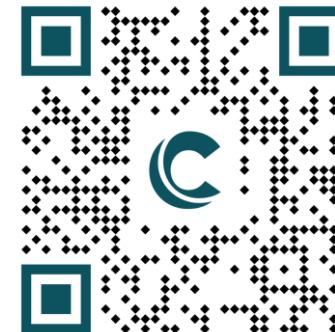
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Marquard Christen specializes in commercial public and administrative law, with a particular focus on ESG (Environmental Social Governance), competition (antitrust) law, public procurement law and regulated markets. He heads the firm's ESG, competition and public procurement practice groups, and is a member of the global CMS competition group's steering committee.

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