

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

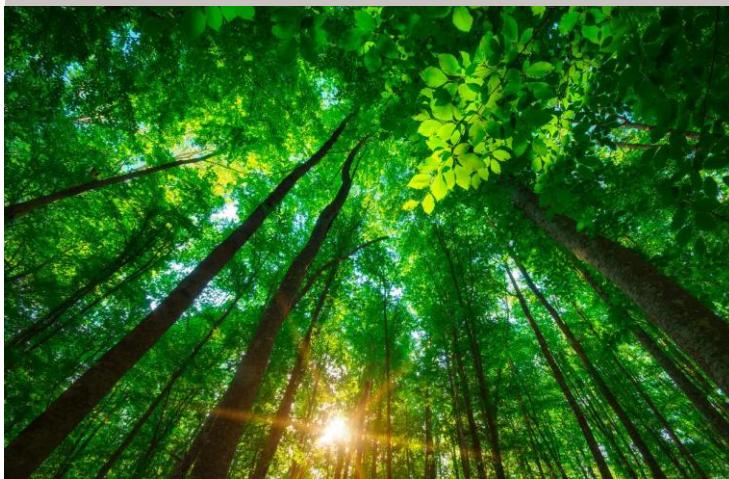


- Increasing demand for legal support since beginning of 2022 onwards
- Primarily questions regarding the scope of application ("are we affected?") and the timeline
- Different reasons for requests
- At present, increasingly substantive and in-depth questions on specific topics
- Overall: considerable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

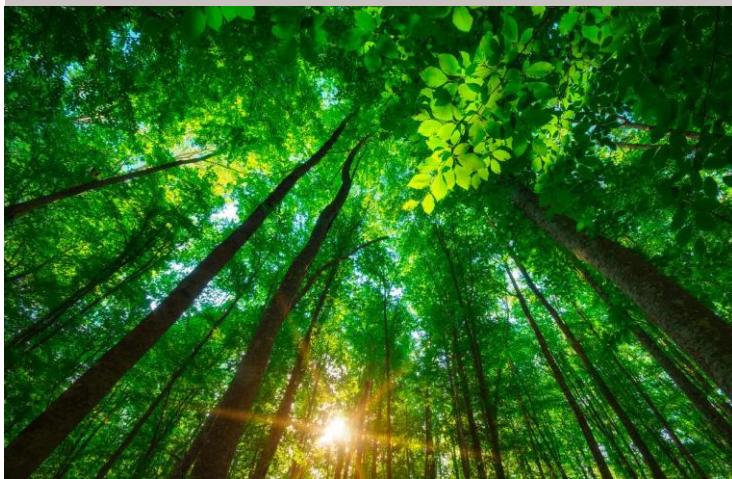
## Risk in the event of non-compliance

- 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

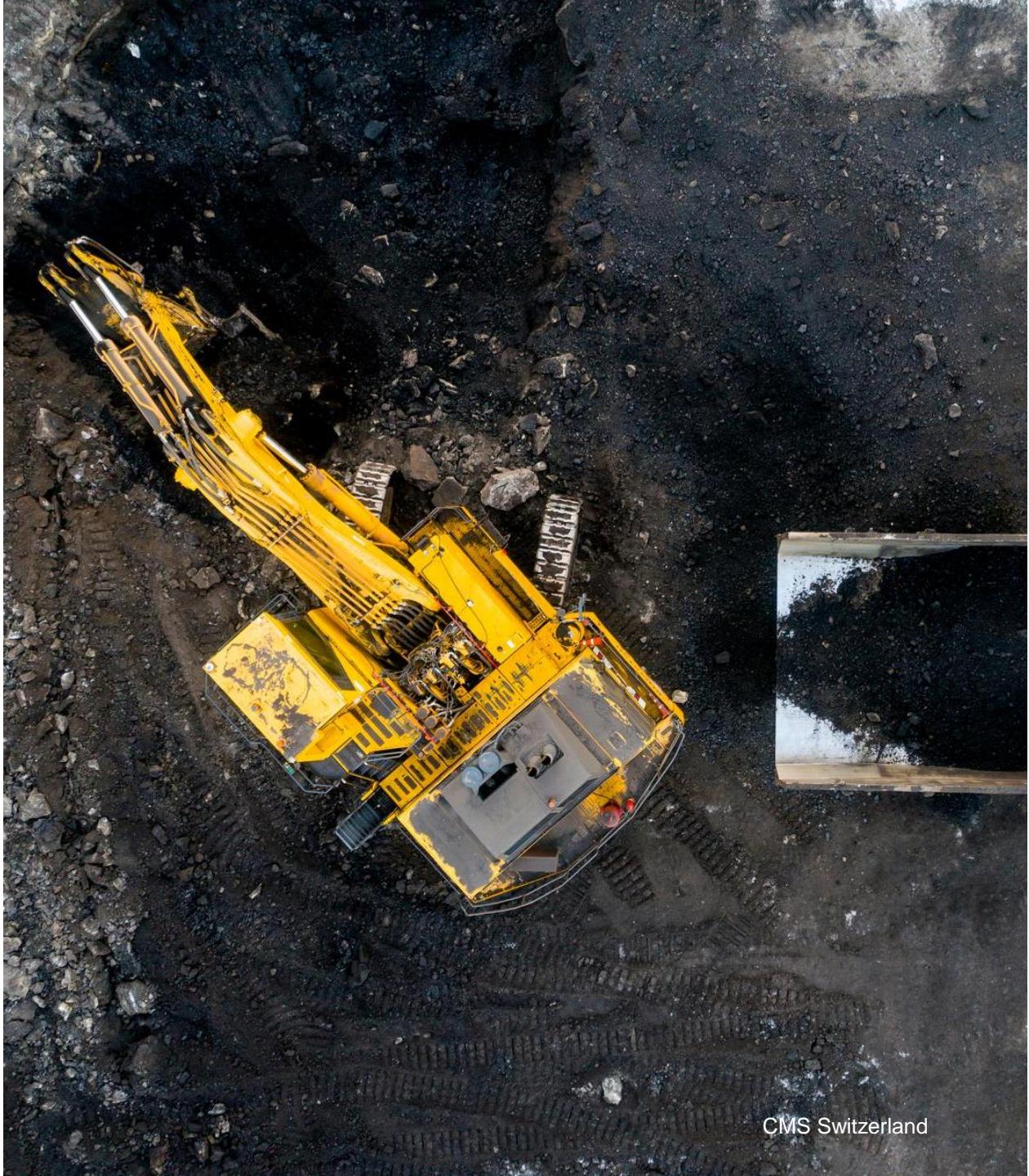
# Challenges for SMEs



- 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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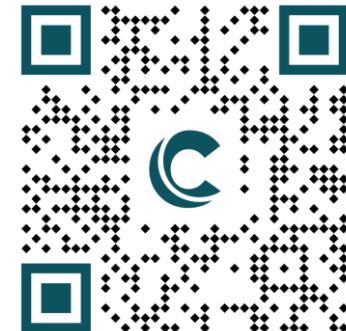


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CONTACT DETAILS



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# About us



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### Practice Area Groups

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### Areas of expertise

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.

### Languages

German, English, French, Spanish, Dutch

### Education and work experience

- Master of Advanced Studies (MAS) in International Humanitarian Law and Human Rights (Geneva)
- Master of International Law (LL.M., Sydney)
- Bar Admission
- Delegate of the International Committee of the Red Cross (ICRC, Pakistan)



## Dr Julia Haas

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### Education

- Doctorate in public organisational law
- Bar Admission
- Law clerk at the Federal Administrative Court

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