

SWISS DUE DILIGENCE AND REPORTING OBLIGATIONS IN RELATION TO MINERALS AND METALS FROM CONFLICT-AFFECTED AREAS AND CHILD LABOUR

What has happened?

Increasing interest from civil society in the implementation of corporate responsibility principles has led to the adoption into the Swiss Code of Obligation (the "CO") of articles 964j ff and the adoption of the Ordinance regulating the due diligence and reporting obligations in relation to minerals and metals from conflict-affected areas and child labour (the "DDTrO"), entered into force on 1 January 2022. Their impact is now starting to bite.

Who is affected?

Articles 964j ff CO and the DDTrO are applicable to companies whose seat, head office or principal place of business is located in Switzerland.

Given that Switzerland is a major hub in the commodity trading industry, counting around 900 companies active in this sector operating within its territory, the introduction of these articles into Swiss legislation is having a significant impact on the industry in Switzerland.

What are the due diligence obligations?

The due diligence obligations of articles 964j ff CO and the DDTrO impose significant obligations on affected companies.

Article 964k CO provides that companies shall:

- maintain a management system in which they define the supply chain policies for minerals and metals that potentially originate from conflict-affected areas as well as for products or services in relation to which there is a reasonable suspicion of child labour.
- implement a system by which the supply chain can be traced.
- identify and assess the risks of harmful impacts in their supply chain.
- minimise the risks identified.
- ensure their compliance with due diligence obligations is audited by an independent specialist.

What are the reporting obligations?

Article 964l CO and the Explanatory Report of the Federal Office of Justice² require companies to publish a report setting out the measures implemented in relation to their due diligence obligations regarding minerals and metals from conflict-affected areas and child labour.

The report should be prepared by the ultimate management or governing body of the relevant company each year. For Swiss companies limited by shares (*aktiengesellschafts*; *sociétés anonymes*), the report should be prepared by

¹ DDTrO is the Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour of 3 December 2021 (Status as of 1 January 2022) (RS 221.433).

² Explanatory Report of the Federal Office of Justice Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour, dated 3 December 2021 (https://www.skmr.ch/cms/upload/pdf/2022/220803_rapport_explicatif_ODiTr.pdf), p. 7.

the board of directors. Companies have freedom regarding the form of the report as neither articles 964j ff CO nor the DDTro provide further details on that point.

The new laws take into account the intrinsic international nature of business activities in Switzerland, including the commodity trading industry, by allowing companies to draft their reports not only in a Swiss national language (German, French or Italian) but also in English.

The report should be published online within six months of the end of the financial year and remain publicly accessible for ten years. Neither the CO nor the DDTro provide further details regarding how the report should be published online. In practice, it would generally be published on the company website. However, if the company decides to shut down its website before the ten year deadline (e.g. following the closing of its business), the directors of the company would have to ensure that it is published on another website.

The aim of articles 964j ff CO is to guarantee that the public have access to the reports. It would therefore be recommended that the report is easily accessible on the company website and/or through the main search engines by searching the name of the company with the word "report" (in English or in a Swiss national language).

What are the penalties for non-compliance?

Breaches of the due diligence or reporting obligations are criminal offences under Swiss law, subject to the Swiss Criminal Code (the "CP") and punishable by a fine of up to CHF 100'000 if the offence has been committed wilfully or up to CHF 50'000 if the perpetrator acted negligently.

It is worth noting that under Swiss law, in principle, only natural persons can be liable for criminal offences (a criminal offence can be attributed to a legal person only under certain limited conditions). Therefore a breach of 964j ff CO by a company would be attributed to the directors. This could be particularly problematic for company directors because if the amount of a fine exceeds CHF 5'000, the offence is entered into the Swiss criminal record of the person concerned.

Are there any exemptions?

In relation to Minerals and Metals from Conflict-Affected Areas

Exemption based on import and processing quantities

Due diligence and transparency obligations regarding minerals and metals from conflict-affected areas concern essentially tin, tantalum, tungsten and gold. The obligations are subject to certain thresholds, specified in Annex 1 of the DDTro. If a company imports or processes quantities of minerals or metals which are lower than the maximum quantities set out in Annex 1, it will be exempt from the obligations.

Where the quantities imported or processed exceed the maximum quantities specified in Annex 1, a company must investigate whether those goods originated from conflict-affected or high-risk areas. If this is not the case, the company must document this and will then be exempt from the obligations.

Compliance with Internationally Recognised Equivalent Regulations

Companies are also exempted from the due diligence and reporting obligations if they adhere to internationally recognised equivalent regulations, such as:

1. The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict and High-Risk Areas (OECD Conflict Minerals Guidance), dated April 2016, including all annexes and supplements.
2. Regulation (EU) 2017/821, the EU Conflict Minerals Regulation³.

³ For information on the EU Conflict Minerals Regulation 2021, see our client guide, [here](#).

In relation to child labour

Verification of the level of risk of child labour

Due diligence and reporting obligations in relation to child labour apply where there is an existence of *reasonable* suspicion of child labour based on an assessment made using one of the instruments mentioned in article 10(2) of the DDTro:

- (a) on-site checks.
- (b) information, in particular from public authorities, international organisations and civil society.
- (c) consulting experts and specialist literature.
- (d) assurances from economic operators in the supply chain and other business partners.
- (e) using recognised standards and certification systems.

A suspicion is reasonable if it is based on a concrete and substantiated indication, or on several concrete and substantiated observations, or on indications that child labour may have been used in the manufacture of goods or in the provision of a service. An example of such evidence would be a photograph.

If the investigation shows that there is no reasonable suspicion of child labour, a company must document this in order to be exempted from the obligations. The company must document the findings clearly, in writing, and should provide a background explanation of its position. This can be done in an internal documentation (to protect business confidentiality).

In accordance with the Explanatory Report of the Federal Office of Justice,⁴ the UNICEF index may raise the suspicion of child labour, but it is not sufficient to justify a reasonable suspicion.

Compliance with Internationally Recognised Equivalent Regulations

It is possible to be exempt from the due diligence and reporting obligations with respect to child labour by complying with internationally recognised equivalent regulations (art. 9 of the DDTro). Those regulations are:

1. ILO Conventions Nos 138 and 182 and the ILO-IOE Child Labour Guidance Tool for Business of 15 December 2015.
2. the OECD Due Diligence Guidance for Responsible Business of 30 May 2018 or the UN Guiding Principles on Business and Human Rights.

If a company wishes to rely on this exemption, it must prepare a report setting out the equivalent regulations with which it complies and apply them in their entirety.

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⁴ Explanatory Report of the Federal Office of Justice, p. 19.