

Legislative projects

Non-financial information, commodities and child labour

Par Giulia Neri-Castracane le 5 May 2021

Following the rejection on 29 November 2020 of the popular [initiative 'Responsible Businesses – Protecting Human Rights and the Environment'](#), the [indirect counter-project](#) should, barring a referendum, amend accounting law as of 1 January ²⁰²² with an obligation of transparency on non-financial issues (art. 964 bis to 964 quater CO) according to the model of [Directive 2014/95/EU](#) and obligations of diligence and transparency regarding minerals and metals from conflict zones and child labour (art. 964 quinquies to 964 septies) according to the models of [Regulation 2017/821/EU](#) and the [Dutch Child Labour Due Diligence Act](#).

On 14 April, the Federal Council opened a consultation (until 14 July 2021) on [the draft ordinance on due diligence and transparency in the areas of minerals and metals from conflict zones and child labour](#) (ODiTr), concurrently with the opening of the 100-day referendum period on the counter-proposal.

The counter-proposal establishes, both for non-financial issues and for minerals and metals from conflict zones and child labour, a duty to draw up a report that must be published electronically and remain accessible to the public (with the underlying documents kept on file) for at least ten years. The report must provide explanations on the policy adopted or the absence of a specific policy on the topics concerned (*comply or explain* principle). The sanction is a fine (maximum CHF 100,000), without a new liability rule. Civil or criminal liability seems possible through other provisions. As for the duty of care with regard to minerals from conflict zones or child labour, the Federal Council does not impose a ban. Thus, minerals from conflict zones may be imported into Switzerland. Similarly, goods and services for which there is a well-founded suspicion of the use of child labour may be offered in Switzerland. The legislator is relying on consumers, financiers and civil society actors to regulate these practices. This use of societal normative force is reflected in recommendation 7 of the [report of the Federal Council of 21 April 2021 on the status of implementation of its 2018 recommendations on the commodities sector](#) : the Federal Council refuses to extend the transparency requirements for payments relating to the extraction of raw materials ([art. 964 a to f CO](#)) to commodity trading, instead promoting adherence to the EITI principles and the ICoC.

The ODiTr and the related [explanatory report](#) refer to international regulations for undefined legal concepts : to [Regulation 2017/821/EU](#) and the [OECD Guide of 2016](#) for exemptions in the field of minerals, to [Recommendation 2018/1149/EU](#) for the concept of conflict or high-risk area, to ILO [Conventions no. 138](#) and [182](#) of the ILO for the definition of the minimum age for admission to employment, the [UNICEF Children's Rights in the Workplace Index](#) for low risks of

child labour and the [OECD Guide of 2018](#) for exemptions in the area of child labour. References to international regulations are static : the version of the year indicated in the ODiTr applies. In the absence of details in the indirect counter-project or in the ODiTr – except for the expressly mentioned CO2 objectives that thus link the indirect counter-project to the [draft revision of the law on CO2 and climate protection](#) – the specific topics included in the environmental, social, personnel, respect for human rights and the fight against corruption on which to report must be understood by reference to Directive 2014/95/EU and the [guidelines of the European Commission of 2017](#) and [2019](#). The issue of diversity in management bodies, mentioned in Directive 2014/95 but not in the counter-proposal, is addressed in [Article 734f CO](#).

The scope of the companies subject to the transparency obligation is also based on European regulations. The Swiss text is more restrictive. Thus, only companies that are open to the public or subject to authorisation, recognition, accreditation or registration by FINMA and that reach, individually or in a consolidated manner with Swiss or foreign companies, a total turnover of 50 million Swiss francs or a balance sheet total of 100 million Swiss francs are subject to the transparency obligation on non-financial matters are companies that are open to the public or subject to authorisation, recognition, accreditation or registration by FINMA and that reach, individually or in a consolidated manner with the Swiss or foreign companies that they control, 500 full-time jobs on an annual average and a total balance sheet of CHF 20 million and a turnover of CHF 40 million over two consecutive financial years. For transparency and diligence in the area of minerals from conflict zones and child labour, only companies with their headquarters, central administration or main establishment in Switzerland that release specific minerals or metals (tin, tantalum, tungsten or gold) for free circulation or process them in Switzerland, or offer goods or services for which there is a well-founded suspicion of recourse to child labour, are targeted.

The counter-proposal thus seems difficult to understand without reference to European regulations. An (unfortunate) coincidence of timing : one week after the Federal Council's announcement on 21 April, the European Commission adopted a draft revision of Directive 2014/95. The [draft of the new CSR Directive \(CSRD\)](#) would enshrine, from 2023, a duty to report according to binding European standards, an extension of the scope of companies subject to it, the introduction of more detailed requirements, the revision of reports and the digital 'labelling' of the information communicated to feed a single European access point.