CENTRE DE DROIT
BANCAIRE ET FINANCIER

Reporting on climate matters

The Swiss approach according to the Federal Council Ordinance

Par Hristina Stoyanova le 15 December 2022

On November 23, 2022, the Federal Council (FC) adopted the implementing ordinance on climate reporting by large Swiss companies. From January 1, 2024, reporting on climate issues must be integrated and published as part of the report on non-financial issues referred to in Art. 964a to 964c CO.

I. Scope of application

The scope of the FC Ordinance is defined by Art. 1 para. 1 of the Ordinance, which refers to Art. 964a of the Swiss Code of Obligations. Large Swiss companies must cumulatively meet the following criteria :

They must be public-interest companies ;
have achieved a group-wide headcount of 500 full-time jobs over two consecutive financial years ;
for two consecutive financial years, again at group level, have had a balance sheet total of at least CHF 20 million or sales of at least CHF 40 million.

Swiss law differs from EU law in that the thresholds are lower. Insofar as Swiss rules are not considered equivalent to the new European legislation, certain Swiss companies would not be able to avail themselves of the possibility of being released from the obligation to disclose a second report under the new CSRD (cf. cdbf.ch/1262/).

II. Content of the report

The information to be disclosed as part of the climate report is specified in Art. 1 para. 2 of the Ordinance. This involves, on the one hand, a detailed description of the current and foreseeable impact of the climate on the company’s business activities, and, on the other, the effects of these activities on the climate. Art. 1 para. 2 of the Ordinance thus embodies the “double materiality” required by Art. 964b para. 1 and para. 2 no. 4 of the Swiss Code of Obligations. The report must present both the impact of climate issues on the company and the effects of the company’s activities on climate change. The information disclosed must also be based on “national, European or international regulations”, as set out in Art. 964b para. 3 CO.

Art. 2 para. 1 of the FC Ordinance presumes that the obligation to report on climate issues is

met if the report is drafted in accordance with Art. 3 of the Ordinance and is based on the eleven recommendations of the Task Force on Climate Change Reporting (TCFD). Larger companies still have the option of choosing other international standards as a reference. In this case, however, they must 1) justify their choice and 2) clearly state why the TCFD recommendations have not been adopted (cf. art. 2 para. 2 let. b of the Ordinance). Given the requirement to give reasons for the choice of other standards, reference to the TCFD recommendations would become de facto mandatory. The presumption of conformity of the report based on the TCFD recommendations could nevertheless be explained by the need for standardization of climatic information and the comparability of reports.

III. Scope of climate accountability

The scope of climate accountability needs to be put into perspective. Swiss law does not oblige companies to change their practices or internal policies on climate issues. The FC ordinance adopts a “comply or explain” approach. This means that, while the company concerned is obliged to communicate the consequences of climate issues on its business and the effects of this business on climate change, it is not obliged to take internal measures, improve its climate risk management or reduce its CO2 emissions. In reality, the reputational risk and the risk of investment loss are just as important as the incentive for companies to change their activities in order to reduce their ecological impact.

IV. The special case of financial institutions

For financial institutions, the obligation to report goes one step further. Under Art. 3 para. 5 of the FC Ordinance, financial institutions are required to take account of sectoral guidelines and to present forward-looking, scenario-based analyses of climate compatibility. The additional information required would imply specific skills on the part of financial institution staff, as well as an increase in administrative costs. However, Swiss law does not (yet) require climate audits to be carried out by an external auditor, unlike the new European legislation (cf. e.g. point 61 of the CSRD).

V. Non-compliance with the obligation to publish a climate report

Non-compliance with the obligation to publish a climate report is punishable under Art. 325ter of the Swiss Penal Code, which imposes a criminal fine of up to CHF 100,000 for any breach of reporting obligations. Financial institutions under prudential supervision would be more exposed to the risks of various sanctions at global level, as the recent example of Goldman Sachs Asset Management sanctioned by the SEC for non-compliance with internal policies and procedures on ESG investments clearly illustrates. In Switzerland, the LSFin and LPCC do not contain specific rules to combat greenwashing (cf. cdbf.ch/1205). At present, transparency requirements are the only truly binding ones in Switzerland, and would be a necessary evil for changing practices.

Reproduction autorisée avec la référence suivante: Hristina Stoyanova, The Swiss approach according to the Federal Council Ordinance, publié le 15 December 2022 par le Centre de droit

bancaire et financier, https://cdbf.ch/en/1263/