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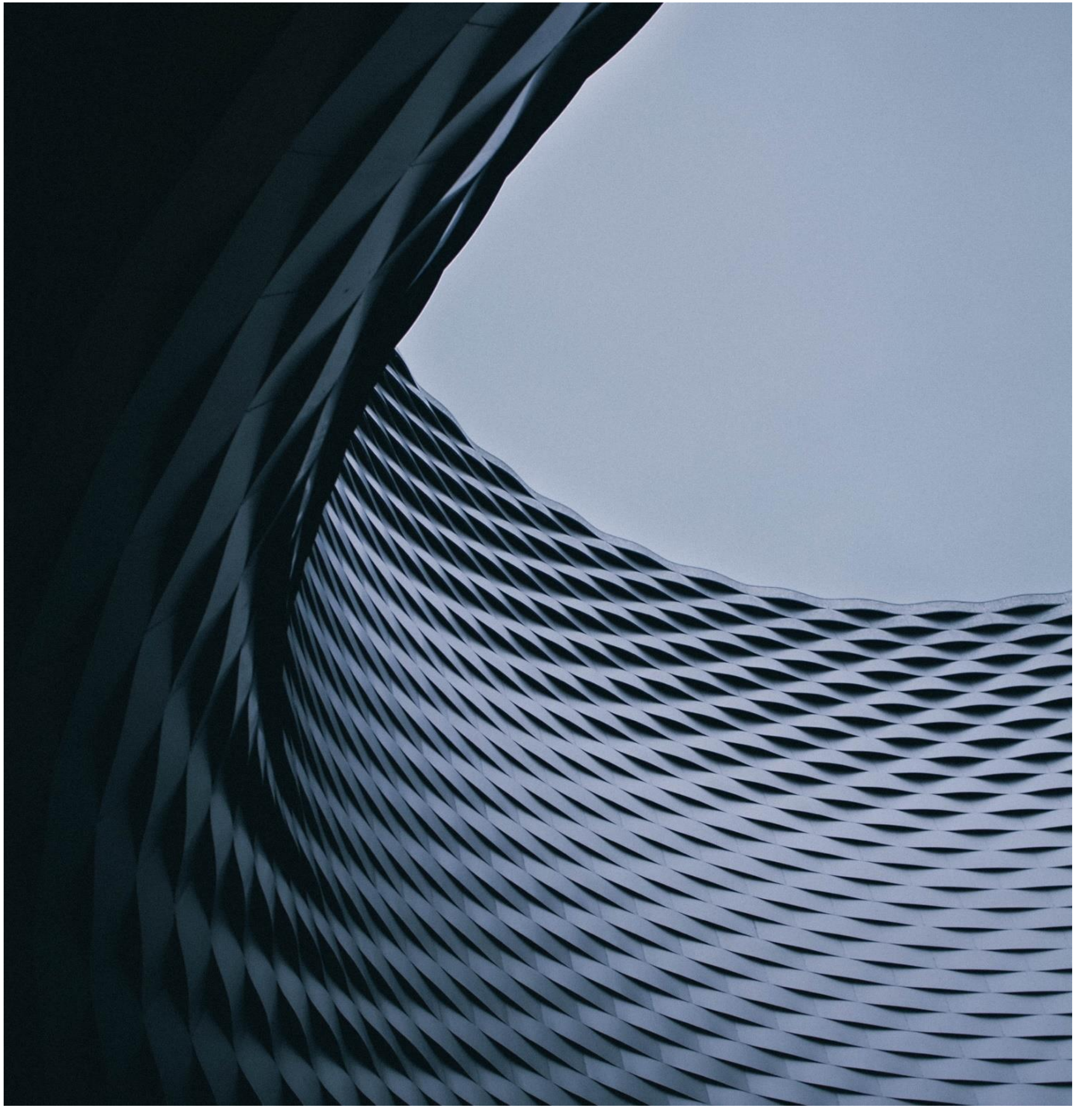
New Non-Financial Reporting and Due Diligence Obligations for Swiss Companies

Art. 964a et seq. Swiss Code of Obligations and Art. 325ter Swiss Criminal Code



Introduction

Companies of public interest and FINMA regulated financial institutions which meet the statutory thresholds should now prepare for the new due diligence and non-financial reporting obligations of the Swiss Code of Obligations (CO).

Art. 964a et seq. of the Swiss Code of Obligations (“CO”), which entered into force on 1 January 2022, include:

- non-financial reporting obligations on environmental, social, labour, human rights and bribery matters; and
- specific due diligence and reporting obligations in the areas of conflict minerals and child labour.

Art. 325ter of the Swiss Criminal Code (“CC”) imposes criminal liability on individuals failing to comply with the new reporting obligations.

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Background

In 2015, the responsible business initiative was launched by a broad coalition of civil society organisations. The Swiss parliament agreed on an indirect counter-proposal in June 2020. In the November 2020 popular vote, a narrow majority of the Swiss population approved the responsible business initiative, but the initiative failed to reach the required majority of the cantonal votes and the indirect counter-proposal became valid following expiry of the referendum period. This act was implemented on January 1 2022 in Art. 964a et seq. of the Swiss Code of Obligations (CO). First report is due in 2024.

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01/ Reporting Obligations

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1.1 Reporting on Non-Financial Matters

Reporting on non-financial matters in accordance with Art. 964a para. 1 CO affects companies with the following cumulative characteristics:

Public Interest Companies

Public interest companies (as defined in the Audit Supervisory Act) are public companies and companies subject to the Financial Market Supervisory Authority's oversight. Under Art. 727 CO, public companies are listed companies and companies with outstanding bonds.

+

≥500 FTE

Companies with an annual average of at least 500 full-time employees in two consecutive financial years on a consolidated basis (i.e. including all controlled companies).

+

Thresholds

At least one of the following values exceeded in two consecutive financial years: (i) balance sheet total of CHF 20 million, or (ii) turnover of CHF 40 million.

These companies, including all controlled subsidiaries worldwide, must report as of 2024 on environmental, social, labour, human rights and anti-corruption matters. They must prepare an annual report providing information on their business and show how their business activities affect the above-mentioned non-financial matters.

The report needs to contain information required for the understanding of the course of business, the results of operations, the position of the company and the effects of its activities on the non-financial matters (Art. 964b para. 1 CO).

Combatting Corruption – Implementing the Swiss Non-financial transparency obligations:

1	Activity	A description of the company's business model.
2	Concept	A description of the concepts, i.e. policies and standard(s) adopted on combatting corruption, including the due diligence applied (e.g., ISO 37001 Anti-bribery management systems); zero-tolerance policy; no facilitation payments etc.
3	Effectiveness	A presentation of the measures taken to implement these standards on combatting corruption and an evaluation of their effectiveness.
4	Risk	A description of the main risks related to combatting corruption associated with the company's business model and the management of those risks – in particular, those arising from the company's own business activities, and, if *relevant and proportionate*, also any corruption risk arising from its business relationships (entire upstream and downstream supply chain, incl. all intermediaries).
5	KPI's	Key ("main") performance indicators for the company's activities relating to combatting corruption, for instance due diligence assessments conducted, percentages of negative due diligence assessments, number of trainings successfully accomplished etc.

Companies controlled by a reporting company are exempt from reporting obligations.

Companies controlled by an entity that prepares an equivalent report under applicable foreign law are exempt from the reporting obligation (Art. 964a para.2 CO).

The role of the board

Non-financial reports must be signed by the board of directors and made publicly available for at least 10 years (Art. 964c para. 2 CO).

Comply or explain

If a company does not follow any standard with respect to one or more non-financial matters, this is not against the law, but the reasons must be clearly explained in the report ("comply or explain" according to Art. 964b para. 5 CO). This implicitly presupposes that as a rule the reporting is based on a recognised standard, for instance ISO 37001 (anti-bribery management systems) regarding the management of bribery risk.

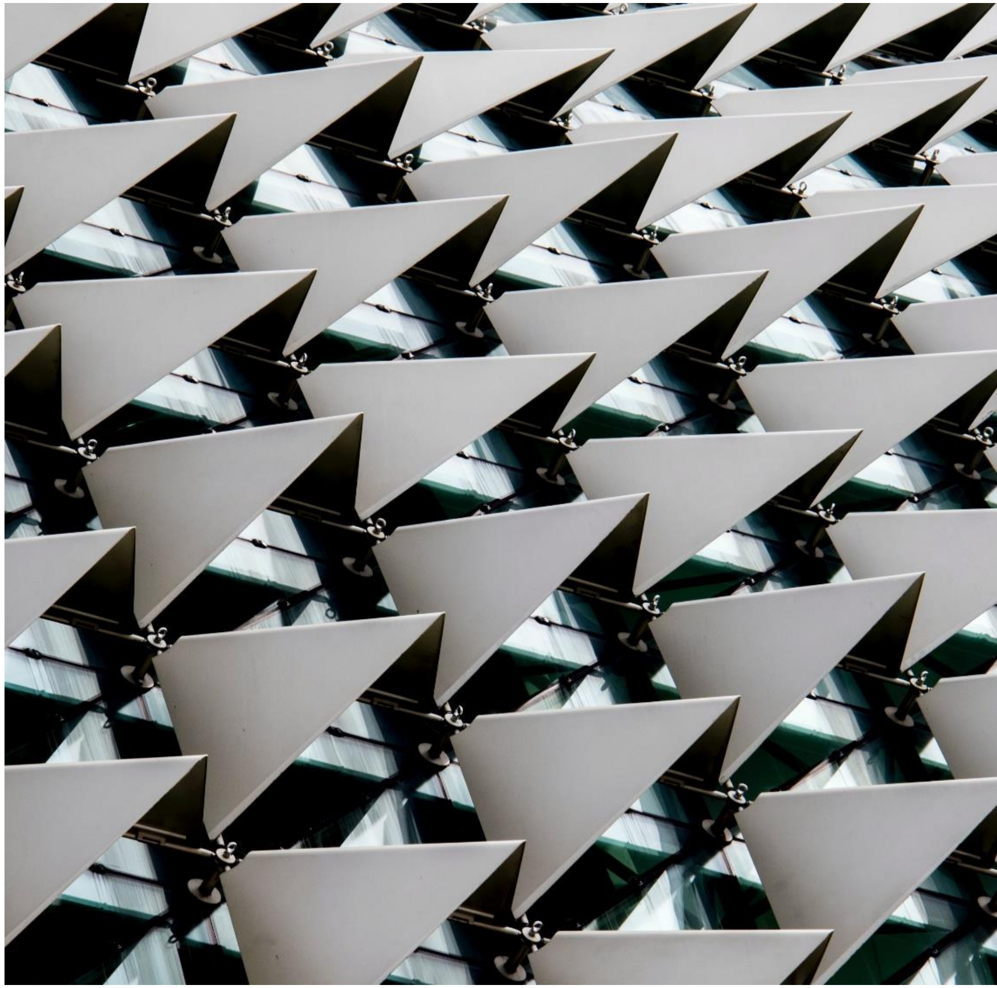
1.2 Due Diligence on Conflict Minerals and Child Labour

Companies with their registered office, head office or principal place of business in Switzerland that freely put into circulation certain quantities of specific minerals or metals (in particular tin, tantalum, tungsten, gold or their ores or minerals) from conflict and high-risk areas, into Switzerland (or process them in Switzerland), are subject to due diligence requirements (Art. 964j para. 1 no. 1 CO).

The applicable import and processing quantities are set annually by the Federal Council in the Ordinance on Due Diligence and Transparency Regarding Minerals and Metals from Conflict Areas and Child Labour ("the Ordinance") and are based on the threshold values applicable in the EU (EU Ordinance 2017/821).

Due diligence obligations on child labour apply to companies with their registered office, head office or principal place of business in Switzerland that offer products or services for which there is a tangible suspicion that they have been manufactured or provided using child labour (Art. 964j para. 1 no. 2 CO).

The only exceptions are so-called "low-risk companies" and SMEs. If the use of child labour is obvious, the exceptions do not apply (Art. 8 of the Ordinance). In the case of exemptions for SMEs, the thresholds that apply to the ordinary audit of the annual financial statements have to be considered.



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Art. 964j CO
If they place in free circulation process in Switzerland conflict minerals or if there is a reasonable suspicion of child labour in the upstream supply chain

SME's which, together with the domestic and foreign companies they control, fall below two of the following thresholds in two consecutive financial years are exempt from reporting on child labour risk (Art. 6 of the Ordinance):

Balance Sheet Total CHF 20 MIO	250 FTE Annual Average	Sales Revenue of CHF 40 MIO

But attention: counter exemptions in case of evident child labour risks

Due Diligence Requirements:

1. Establishment of a management system and definition of a supply chain policy.
2. Identification and assessment of risks in the supply chain.
3. Establishment of a risk management plan with concrete measures to avoid or minimise the identified risks.
4. An annual report.
5. (For conflict minerals) An audit conducted by an external independent third party (Art. 964k para. 3 CO).

1.3 Sanctions

All directors signing and approving the reports who (i) make false statements on non-financial information, conflict minerals and child labour, or fail to report, or (ii) fail to comply with the legal obligation to keep and document the reports, are liable to a criminal fine of up to CHF 100,000 (Art. 325ter CC). Negligence is punishable by a fine of up to CHF 50,000 and sanctions are imposed on the responsible natural persons within the companies (i.e. the board members) – not on the legal entities themselves.

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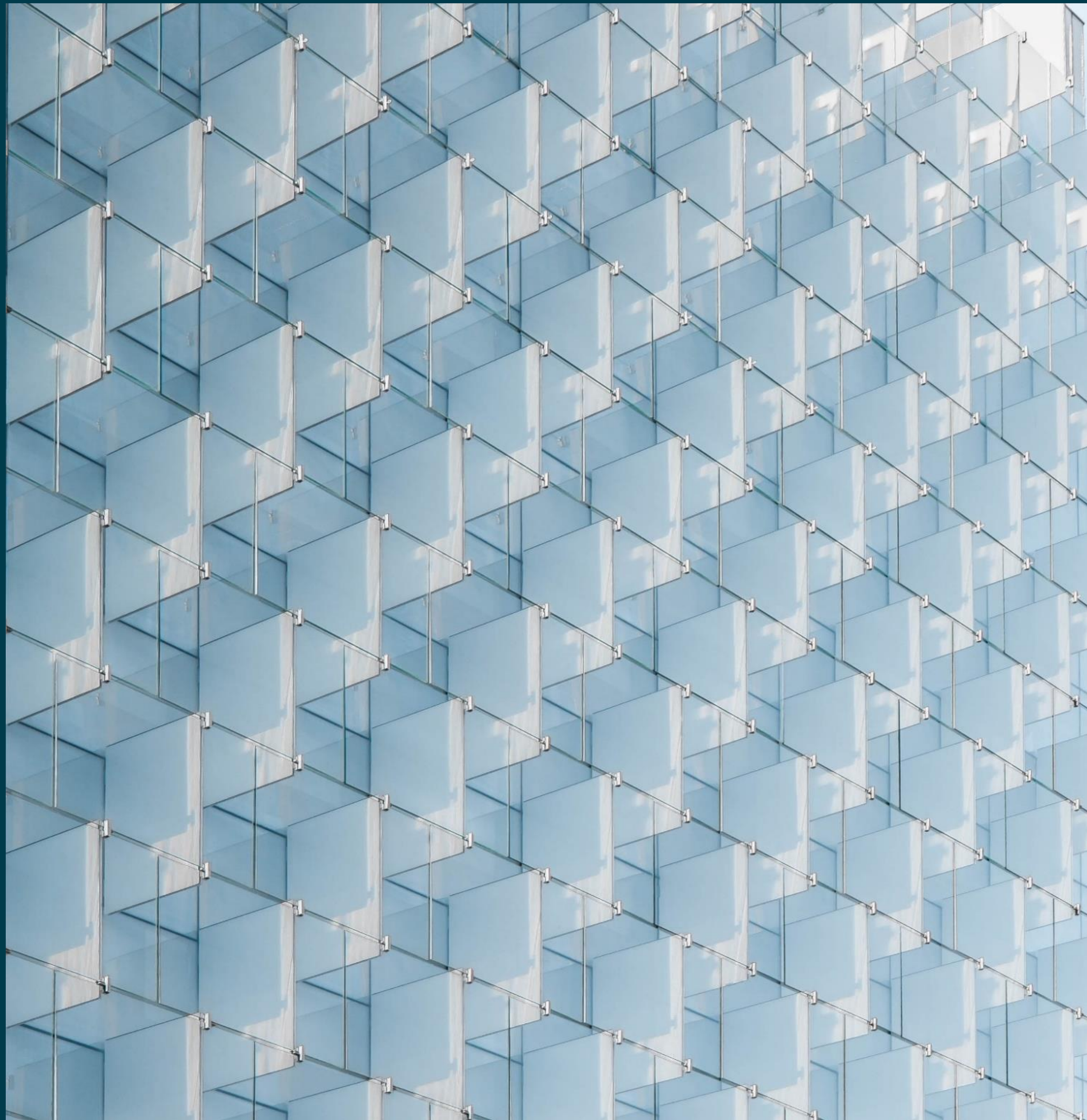
02/ Implications



2.1 Three Main Challenges

For many of the companies concerned, the identification, analysis and evaluation of non-financial risks represents a major challenge. Similarly, the introduction of a management system for trade in conflict minerals or child labour– and the fact that supply chains must be handled diligently and transparently – will be uncharted territory for many. The new criminal provision also puts additional pressure on companies and their senior management to publish complete and accurate reports.

2.2 Timeline of New Reporting System

The Federal Council put the new provisions of the CO and the Ordinance into force on 1 January 2022. The law allows companies one year to adapt to the new obligations (i.e. until the end of 2022). Consequently, the new obligations will be applied in the 2023 financial year and the non-financial reports are due for signature and approval by all members of the board and subsequently the shareholders, with publication for the first time by the end of June 2024.

2022

Art. 964a et seq. CO and Art. 325ter CC entered into force on 1 January 2022[1]

2023

Companies must comply with their non-financial obligations for the fiscal/calendar year 2023

2024

The non-financial report must be signed by the members of the board and approved by the shareholders. The companies must publish their non-financial reports for the fiscal/calendar year 2023 by the end of June 2024

1) In March 2022, the Federal Council also opened the consultation on the implementing ordinance on climate reporting by large companies (Ordinance on Climate Disclosures). The ordinance specifies existing disclosure requirements for environmental non-financial matters and enters into force on 1 January 2024.

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