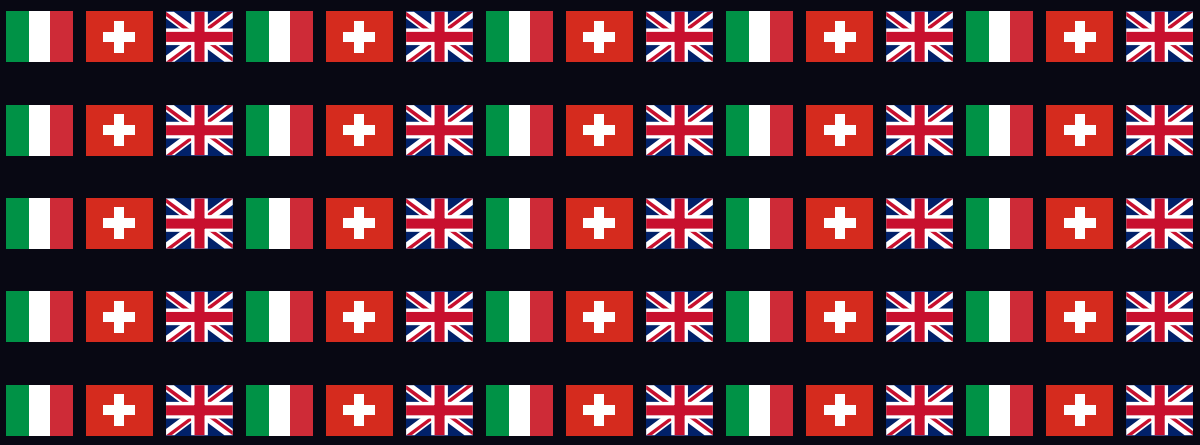
BUSINESS & HUMAN RIGHTS

Switzerland



LEXOLOGY
Getting The Deal Through

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Quick reference guide enabling side-by-side comparison of local insights, including into the applicable international and national legal and policy framework; corporate reporting and disclosure; corporate due diligence; criminal liability; civil liability; judicial redress, including class and collective actions and public interest litigation; non-judicial grievance mechanisms; and other recent trends.

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LEGAL AND POLICY FRAMEWORK

International law

Which international and regional human rights treaties has your jurisdiction signed or ratified?

Switzerland has signed and ratified several core international and regional human rights treaties, including:

- the International Convention on the Elimination of All Forms of Racial Discrimination, enforced on 29 December 1994;
- the International Covenant on Civil and Political Rights; Second Optional Protocol, aiming to abolish the death penalty and entered into force on 18 September 1992;
- the International Covenant on Economic, Social and Cultural Rights, enforced on 18 September 1992;
- the Convention on the Elimination of All Forms of Discrimination Against Women, enforced on 26 April 1997;
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, enforced on 26 June 1987;
- the Convention on the Rights of the Child, enforced on 26 March 1997;
- the International Convention for the Protection of All Persons from Enforced Disappearance, enforced on 1 January 2017;
- the Convention on the Rights of Persons with Disabilities, enforced on 15 May 2014;
- the European Convention on Human Rights, enforced on 28 November 1974;
- the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, enforced on 1 February 1989;
- the Council of Europe Convention on Action against Trafficking in Human Beings, enforced on 1 April 2013; and
- the Council of Europe Convention against Trafficking in Human Organs, enforced on 1 February 2021.

Law stated - 25 January 2023

Has your jurisdiction signed and ratified the eight core conventions of the International Labour Organization?

Switzerland has ratified the eight core conventions of the International Labour Organization as follows:

- the Forced Labour Convention, enforced on 23 May 1941;
- the Freedom of Association and Protection of the Right to Organise Convention, enforced on 25 March 1976;
- the Right to Organise and Collective Bargaining Convention, enforced on 17 August 2000;
- the Equal Remuneration Convention, enforced on 25 October 1973;
- the Abolition of Forced Labour Convention, enforced on 18 July 1959;
- the Discrimination (Employment and Occupation) Convention, enforced on 13 July 1962;
- the Minimum Age Convention, enforced on 17 August 2000; and
- the Worst Forms of Child Labour Convention, enforced on 28 June 2001.

Law stated - 25 January 2023

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How would you describe the general level of compliance with international human rights law and principles in your jurisdiction?

Switzerland's human rights record is good by international standards. In the context of the third United Nations Human Rights Council's Universal Periodic Review (UPR), some gaps and weaknesses have been highlighted (eg, the lack of a general law against discrimination). Switzerland's fourth UPR is ongoing.

Law stated - 25 January 2023

Does your jurisdiction support the development of a treaty on the regulation of international human rights law in relation to the activities of transnational corporations and other business enterprises?

According to the Swiss National Action Plan 2020–2023, approved by the government on 15 January 2020, the country will focus its efforts on the implementation of the United Nations Guiding Principles on Business and Human Rights (UNGPs) and will continue to observe the negotiations to develop a binding treaty on business and human rights, paying particular attention to its coherence with the UNGPs.

Law stated - 25 January 2023

National law

Has your jurisdiction enacted any of its international human rights obligations into national law so as to place duties on businesses or create causes of action against businesses?

The Responsible Business Initiative (RBI), which would have introduced specific obligations for and causes of action against businesses in relation to human rights abuses, was rejected by popular vote on 29 November 2020.

As a result, the milder parliamentary counterproposal to the RBI came into force on 1 January 2022. The new provisions set out reporting obligations on non-financial matters (in line with the European Union's Directive 2014/95/EU on non-financial reporting) as well as special reporting and due diligence obligations regarding minerals and metals from conflict-affected areas and child labour (in line with the European Union's Regulation (EU) 2017/821 on supply chain due diligence obligations for EU importers and the Netherland's Child Labour Due Diligence Act). The newly introduced articles 964a to 964c of the Code of Obligations (CO) require 'companies of public interest' that exceed certain thresholds to publish annual reports on non-financial matters (ie, on environmental matters, such as carbon dioxide emissions targets, social and employee-related issues, the respect for human rights and the fight against corruption). In addition, pursuant to the newly introduced articles 964j to 964l of the CO, companies with risks in the sensitive areas of child labour and conflict minerals must comply with special in-depth due diligence and reporting obligations. However, the new rules of the counterproposal do not provide for a separate cause of action against businesses for human rights abuses.

The new reporting and due diligence requirements apply from the financial year beginning in 2023 (ie, from 1 January 2023, if the company's financial year corresponds to the calendar year).

At the sector-specific level, the Federal Act on Private Security Services provided Abroad prohibits companies from supplying security services for the purpose of directly participating in hostilities or where it may be assumed that the recipients will use the services to commit serious human rights violations.

Law stated - 25 January 2023

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Has your jurisdiction published a national action plan on business and human rights?

The Federal Council published a national action plan (NAP) on business and human rights in December 2016, followed by a second plan in January 2020 for the period 2020 to 2023. The NAP focuses mainly on the state's duty to protect human rights and provide access to remedy, as well as on creating support measures for companies, in particular with regard to the implementation of human rights due diligence mechanisms.

Law stated - 25 January 2023

CORPORATE REPORTING AND DISCLOSURE

Statutory and regulatory requirements

Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related reporting or disclosure requirements?

As of 1 January 2022, pursuant to article 964a et seq of the Code of Obligations (CO), 'companies of public interest' (ie, Swiss listed companies and companies that are supervised by the Swiss Financial Market Supervisory Authority and required to perform an audit by an approved auditing company), must publish an annual report on non-financial matters if, together with the Swiss or foreign companies that they control, they meet the following thresholds in two successive financial years:

- they have at least 500 full-time equivalent positions on annual average; and
- they have either a balance sheet total exceeding 20 million Swiss francs or revenues exceeding 40 million Swiss francs.

In order to avoid a duplication of reporting duties within a group of companies, businesses are exempt from the reporting obligation on non-financial matters if they are controlled by another company that is required to publish:

- a Swiss report on non-financial matters under article 964a et seq of the CO; or
- an equivalent report under foreign law (eg, a report under the European Union's Directive 2014/95/EU on non-financial reporting).

The term 'control' in this context is to be interpreted in accordance with article 963(2) of the CO.

Furthermore, pursuant to article 964j et seq of the CO, companies whose registered office, head office or principal place of business is in Switzerland must comply with particular due diligence obligations in their supply chain and related reporting obligations if they:

- import or process minerals or metals containing tin, tantalum, tungsten or gold from conflict-affected and high-risk areas; or
- offer products and services in relation to which there is a reasonable suspicion that they have been manufactured or provided using child labour.

The implementing Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour provides for certain exemptions from these due diligence and reporting obligations,

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for example for companies that are below certain thresholds, are low risk or whose parent company has published an equivalent report.

Furthermore, large Swiss companies that are required by law to have their annual financial statements audited must prepare an annual management report providing, among other things, information on the conduct of a risk assessment, which could extend to human rights-related risks (article 961c(2)(2) of the CO). Therefore, companies that do not fulfil the above-mentioned criteria and are, accordingly, not obliged to comply with the newly introduced reporting obligations on non-financial matters and due diligence regarding conflict minerals and metals and child labour may still be required to report on human rights issues.

Listed companies must disclose any price-sensitive facts in their sphere of activity, which may include human rights-related issues, to the Swiss stock exchange (the SIX Exchange Regulation).

Under the Federal Act on Private Security Services Provided Abroad, a company that wishes to provide private security services from Switzerland abroad must declare its activities to the Export Control and Private Security Services Section of the Federal Department of Foreign Affairs and accede to the International Code of Conduct for Private Security Service Providers (the Code of Conduct). The Code of Conduct requires signatory companies to report reasonable suspicions of the commission of grave crimes to the authorities and to prepare reports of any incidents involving the use of weapons in the course of their activities.

Law stated - 25 January 2023

What is the nature and extent of the required reporting or disclosure?

Pursuant to article 964a et seq of the CO, large 'companies of public interest' are required to prepare an annual report on their business model, risks, policies and due diligence procedures, and measures taken in relation to environmental, social and corporate governance issues, human rights and anti-corruption (report on non-financial matters). Where no policy is followed with respect to any of the matters to be covered, the company must provide a clear and motivated explanation as to the reasons for this gap in the report (ie, the 'comply or explain' concept). If the reporting company controls one or more Swiss or foreign companies in accordance with article 963(2) of the CO, these must also be included in the report (consolidated report).

Pursuant to the Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour and article 964j et seq of the CO, companies whose registered office, head office or principal place of business is in Switzerland with risks in the sensitive areas of child labour and conflict minerals are required to follow a four-stage (regarding child labour) or five-stage (regarding conflict minerals and metals) due diligence and reporting procedure, consisting of:

- implementing a management system in which they define their supply chain policy and a supply chain traceability system;
- identifying and assessing the risks of harmful impacts in their supply chain;
- developing a risk management plan and taking measures to minimise the identified risks;
- retaining an independent auditor to audit compliance with the due diligence obligations in relation to conflict minerals and metals (there is no such obligation concerning child labour due diligence); and
- issuing an annual report on compliance with the above-mentioned due diligence obligations.

These annual reports must be adopted by the company's senior management or governing body (ie, the board of directors) in a national language or in English, published online and remain publicly accessible for at least 10 years.

The compulsory declaration for security services providers under the Federal Act on Private Security Services Provided

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Abroad (PSSA) must cover information such as the nature, provider and place of performance of the intended activities, details on the principal and on the recipient of the services, and an overview of the business sectors in which the company is active (article 10 of the PSSA).

Law stated - 25 January 2023

Which bodies enforce these requirements, and what is the extent of their powers?

If the company's external auditors become aware of non-compliance with the non-financial reporting, or conflict mineral and metals and child labour due diligence requirements, they must give written notice to the board of directors or general meeting of the company, and the company's directors may be held liable.

In addition, failure to comply with these requirements is punishable by criminal sanctions (ie, fines of up to 100,000 Swiss francs). Criminal prosecution of such offences falls to the cantonal public prosecutor.

Aside from this, there are no external or state authorities that enforce the non-financial reporting or conflict mineral and child labour due diligence requirements.

The Swiss stock exchange authority may issue sanctions (eg, reprimand, fine of up to 10 million Swiss francs and delisting) if listed companies do not comply with reporting requirements.

The Private Security Services Section of the Federal Department of Foreign Affairs examines the declarations of security services providers and may initiate a review procedure if there are indications of a breach, including any violation of the prohibition on providing services in connection with the commission of serious human rights violations. Failure to declare an activity is subject to sanctions ranging from a fine to a custodial sentence not exceeding one year.

In addition, the International Code of Conduct Association monitors the reporting duties of private security providers under the Code of Conduct and may take disciplinary action if there is a breach, including suspending or terminating membership.

Law stated - 25 January 2023

Voluntary standards

What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human rights-related corporate reporting and disclosure regimes?

Businesses that report on human rights-related risks and impacts in Switzerland often rely on the Global Reporting Initiative (GRI) Standards, the United Nations Global Compact (UNGC), the Sustainable Development Goals and the United Nations Guiding Principles on Business and Human Rights (UNGPs).

Large 'companies of public interest' that (already) report on human rights-related risks and impacts based on international guidelines or standards, such as the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the GRI Standards, the United Nations Principles for Responsible Investment, the UNGC, the ISO 26000 international standard for social responsibility or the Sustainability Accounting Standards Board's standards, do not have to publish a supplementary report on non-financial matters pursuant to article 964a et seq of the CO, provided that the applied standard is mentioned in the report and all the requirements set out in article 964b of the CO are met.

Similarly, companies are exempt from the reporting requirements on due diligence pursuant to article 964j et seq of the CO – provided that the applied standards are mentioned in the report and applied in their entirety – if they already publish a report based on:

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- for conflict minerals and metals: the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict and High-Risk Areas; and
- for child labour: the ILO Conventions Nos. 1389 and 18210, the ILO-IOE Child Labour Guidance Tool for Business and, cumulatively, the OECD Due Diligence Guidance for Responsible Business Conduct or the UNGPs.

At the sectoral level, the Swiss government has issued guidance on implementing the UNGPs in the commodity trading sector, which includes recommendations on reporting and communication of human rights impacts. The guidance draws on the relevant OECD guidelines.

Law stated - 25 January 2023

CORPORATE DUE DILIGENCE

Statutory and regulatory requirements

Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related due diligence requirements?

Large companies that are required by law to have their annual financial statements audited must report on the result of their risk assessment annually, according to article 961c(2)(2) of the Code of Obligations (CO). This implies that they must have conducted such an assessment, which could extend to human rights-related risks. Some authors have also expressed the view that the directors' duty of care (article 717 of the CO) and overall management of the company (article 716a(1)(1) of the CO) could be held to encompass a corporate social responsibility component requiring businesses – at least multinationals or companies acting in a high-risk sector – to consider the human rights impacts of their activities.

Furthermore, article 964j et seq of the CO provides for specific in-depth due diligence obligations for Swiss companies with risks in the areas of child labour and conflict minerals and metals. The implementing Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour provides for certain exemptions from these due diligence and reporting obligations, for example for companies that are below certain thresholds, are low risk or that adhere to internationally recognised standards.

Pursuant to the Federal Act on Private Security Services Provided Abroad, private security providers are required to show proof of accession to the International Code of Conduct for Private Security Service Providers that, in turn, provides for a duty to exercise due diligence, including in relation to human rights-related risks.

Law stated - 25 January 2023

What is the nature and extent of the required due diligence?

There are no specific requirements regarding the nature and scope of the risk assessment that large companies must report on pursuant to article 961c(2)(2) of the CO. These may, therefore, vary depending on the size and type of activity of the company.

Pursuant to article 964j et seq of the CO and the Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour, Swiss companies whose operations involve conflict minerals and metals or a risk of child labour are required to put in place a management system to identify risks and to ensure traceability in their supply chain, and a risk management plan allowing the company to identify, evaluate, manage and mitigate adverse effects in its supply chain. They are also required to publish an annual report on compliance with their due diligence obligations, and with respect to conflict minerals and metals compliance with the

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due diligence obligations is subject to an independent audit.

Security service providers must exercise due diligence when selecting, vetting and reviewing their personnel and subcontractors.

Law stated - 25 January 2023

Which bodies enforce these requirements, and what is the extent of their powers?

Compliance with the due diligence obligations in relation to conflict minerals and metals must be audited annually by an independent auditor. The latter must examine whether there are circumstances from which it may be concluded that the relevant due diligence obligations have not been complied with and, if not, issue a 'negative assurance' in a report to the company's senior management and governing body (article 964k(3) of the CO) in connection with article 16 of the Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour.

If the external auditors become aware of non-compliance with the general risk assessment requirements under the CO or the due diligence obligations in relation to conflict minerals and metals and child labour, they must give written notice to the board or general meeting of the company, and the company's directors may be held liable.

There are no external or state authorities that enforce the due diligence obligations in relation to conflict minerals and metals and child labour or the general risk assessment requirements for companies under the CO.

Due diligence duties of private security providers under the Code of Conduct are monitored by the International Code of Conduct Association, which may take disciplinary action in the case of a breach, including suspending a member. In addition, the Private Security Services Section of the Federal Department of Foreign Affairs may prohibit the exercise of an activity by a company in the case of non-compliance with the Code of Conduct.

Law stated - 25 January 2023

What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human-rights related corporate due diligence regimes?

Popular voluntary standards or regimes for human rights-related due diligence include the United Nations Global Compact, the Sustainable Development Goals and the United Nations Guiding Principles on Business and Human Rights (UNGPs).

Companies adhering to the following international standards (ie, the 'internationally recognised equivalent regulations') are exempt from the due diligence obligations pursuant to article 964j et seq of the CO, provided that the regulations are applied in their entirety:

- for conflict minerals and metals: the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict and High-Risk Areas; and
- for child labour: the ILO Conventions Nos. 1389 and 18210; the ILO-IOE Child Labour Guidance Tool for Business; and, cumulatively, the OECD Due Diligence Guidance for Responsible Business or the UNGPs.

In addition, pursuant to the Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour, companies should be guided by the aforementioned regulations when establishing their supply chain policy and risk management plan.

The Swiss government's guidance for commodity trading highlights the importance of human rights due diligence and

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proposes implementation measures.

The government also supports the Voluntary Principles on Security and Human Rights, which are guidelines to help mining, gas and oil companies to identify risks and exercise due diligence.

Law stated - 25 January 2023

CRIMINAL LIABILITY

Primary liability

What criminal charges can be asserted against businesses for the commission of human rights abuses or involvement or complicity in abuses? What elements are required to establish guilt?

There are no specific provisions in the Criminal Code (CC) regarding the practice of human rights abuses by business enterprises, but there is a general provision on corporate criminal liability. Article 102 of the CC provides for both primary and secondary liability for misdemeanours and crimes committed within the business and during commercial activities in connection with the business's purpose. Primary liability applies where a deficiency in the business's organisation caused or failed to prevent the commission of a listed offence (paragraph 2). Secondary liability applies if an organisational deficiency prevented the identification of the individual offender within the company (paragraph 1).

The objective elements required to establish liability are that:

- the accused is a business as defined in article 102(4) of the CC;
- a criminal offence was committed by an employee or director of the business;
- the offence was committed in the exercise of business functions in accordance with the business's purpose; and
- there is an organisational deficit within the business.

There is some debate as to the subjective elements required and how they may be attributed to a business. There is no definitive authority on this issue.

A business may only be held primarily liable if one of the specific offences referred to in article 102(2) of the CC has been committed (ie, criminal organisation, terrorism financing, money laundering or bribery). There has been at least one case in Switzerland where a business was investigated for money laundering offences in connection with foreign war crimes. However, the proceedings were ultimately discontinued.

Law stated - 25 January 2023

What defences are available to and commonly asserted by parties accused of criminal human rights offences committed in the course of business?

For both primary and secondary liability pursuant to article 102 of the CC, businesses may seek to assert the defence that there was no organisational deficiency by showing that they took all possible organisational measures to prevent the offence or to allow the identification of the responsible individual offender within the business. Measures are assessed based on the geographical region in which the business is active, sector-specific risks and any applicable national or international regulations or standards.

Law stated - 25 January 2023

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Director and officer liability

In what circumstances and to what extent can directors and officers be held criminally liable for involvement or complicity in human rights abuses? What elements are required to establish liability?

According to the case law of the Swiss Federal Supreme Court, members of senior management and the board who have a controlling position in the business can be held criminally liable if they were aware of the commission of offences by others in the business but took no action to prevent or stop that conduct (liability by omission). For example, in two leading cases, members of the top management were held criminally liable for not having intervened despite being aware of the business's non-compliance with export restrictions on war material.

Law stated - 25 January 2023

Piercing the corporate veil

When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

There are no statutory provisions that expressly establish a basis for criminal liability of parent companies.

For the purposes of criminal liability, businesses are defined as public or private legal entities, companies or sole proprietorships (article 102 of the CC). There is some debate as to whether the narrow wording of this provision can be interpreted to include a group of companies or parent company.

It has been argued that the parent company could be held liable if it is not only the sole or dominant shareholder, but is also involved at an operational level in the running of the subsidiary. There is, however, no settled practice in this respect.

Law stated - 25 January 2023

Secondary liability

In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

Article 102(1) of the CC provides for the secondary liability of a business where, due to its inadequate organisation, the offence cannot be attributed to an individual person within the business. This provision applies to offences committed by employees where the latter cannot be identified. Businesses may rely on the defence that they took all necessary organisational measures to allow the identification of the individual offender.

Businesses cannot be held criminally liable for the actions of their contractors, provided that the contractors are organisationally independent and not subordinated to the business. However, if the relationship between the contractor and the business is akin to that of employee and employer, article 102 of the CC could apply.

The penalty under article 102(1) of the CC is a fine of up to 5 million Swiss francs. The court determines the fine, taking into account the gravity of the offence, the degree of the organisational failure, the damage caused and the economic capacity of the business.

Law stated - 25 January 2023

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Prosecution

Who may commence a criminal prosecution against a business? To what extent do state criminal authorities exercise discretion to pursue prosecutions?

Criminal prosecution falls to the federal or cantonal public prosecutor, depending on the criminal offence at stake. Prosecution concerning failures to comply with the recently enacted obligations to report on non-financial matters or on due diligence regarding conflict minerals and metals and child labour, for instance, falls to the cantonal public prosecutor.

Private citizens or organisations (eg, victims or non-government organisations) may report an offence to the public prosecution services or to the police. The public prosecutor must investigate if there is reasonable suspicion of the commission of an offence for which they have jurisdiction and bring charges in court depending on the investigation's results.

State criminal authorities exercise prosecutorial discretion in the following cases:

- Article 53 of the CC provides that if an offender has made reparation for the harm they have caused, the competent authority shall refrain from prosecuting them, bringing them to court or punishing them if the requirements for a suspended sentence are fulfilled and the interests of the general public and of the persons harmed in prosecution are negligible. However, the federal prosecutor's office refrains from applying article 53 of the CC when the proceedings concern a business with transnational operations, meaning that it will not exercise prosecutorial discretion in those cases.
- Pursuant to article 8 of the Swiss Criminal Procedure Code, the competent authority may, under certain circumstances, decide to refrain from prosecuting an offender if the offence is already being prosecuted by a foreign authority or the offender has already been convicted abroad.

Victims may participate in the proceedings and bring civil claims in that context. Furthermore, they can challenge a prosecutor's decision not to investigate or bring charges in court. Private citizens or organisations that report an offence but are not victims themselves do not have these rights.

Law stated - 25 January 2023

What is the procedure for commencing a prosecution? Do any special rules or considerations apply to the prosecution of human rights cases?

If the police or public prosecutor have sufficient suspicion of the commission of an offence, formal investigation proceedings must be started that may ultimately lead to charges being brought by the public prosecutor in court.

No special rules or considerations apply to the prosecution of human rights cases. Some offences that may be relevant in this context fall within the remit of the federal prosecutor rather than cantonal prosecutors.

Some offences deemed minor may only be prosecuted upon formal complaint by the victim (eg, common assault or sexual harassment).

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CIVIL LIABILITY

Primary liability

What civil law causes of action are available against businesses for human rights abuses?

Employees may bring contractual claims for workplace-related human rights violations, but there are currently no specific extra-contractual causes of actions against businesses for human rights abuses under Swiss law. Therefore, the general provisions on extra-contractual liability apply – in particular, articles 41 (for primary liability) and 55 (for secondary liability) of the Code of Obligations (CO).

Article 41(1) of the CO provides that any person (including a legal entity) who unlawfully causes loss or damage to another, whether wilfully or negligently, is liable to pay compensation. The elements required to establish liability are, therefore:

- loss or damage;
- causation;
- unlawful conduct; and
- fault.

Establishing unlawful conduct can be problematic in the context of human rights abuses. Businesses are not directly bound by human rights and their conduct, therefore, can only be deemed unlawful if it impinges on a right that is legally protected under private or criminal law (eg, physical integrity or property).

As to fault, one available defence for businesses is that they took adequate measures to prevent identified risks, even if those measures then failed. International and national standards may be taken into account in this context. Other defences include self-defence, emergency or self-help (ie, securing endangered rights).

The remedy under article 41 of the CO is damages. The claimant must demonstrate an actual loss or damage; punitive damages do not exist under Swiss law and reparation for moral damage is only due in the event of homicide or personal injury.

The Responsible Business Initiative (RBI) would have introduced an express cause of action against businesses for human rights abuses committed by a Swiss business or its Swiss or foreign subsidiaries, in Switzerland or abroad, but it was rejected. The counterproposal, which entered into force on 1 January 2022 in lieu of the RBI, does not provide for a separate cause of action against businesses for human rights abuses.

Law stated - 25 January 2023

Director and officer liability

In what circumstances and to what extent are directors and officers of businesses subject to civil liability for involvement or complicity in human rights abuses?

Directors and officers of businesses may be subject to civil liability for the business's commission of or involvement in human rights abuses based on article 41 of the CO, to the extent that the requirements of that provision are fulfilled with respect to them personally. They may also be held indirectly liable based on article 754 of the CO, which provides that directors and officers are liable to the company, its shareholders and its creditors for any loss or damage caused in breach of their duties. The requirement to establish liability under article 754 of the CO is a breach of duty causing loss or damage to the company, a shareholder or a creditor, wilfully or negligently.

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Directors are not required, as a matter of Swiss law, to consider the interests of third parties. Their primary duty is to act in the interest of the company. Nevertheless, directors are required to comply with the law and to protect the company from legal or reputational damage. In that context, they may have to consider the impacts – including the human rights impacts – of the company's activities and take measures to prevent liability or reputational risks from materialising. In addition, the business's internal regulations and policies may include human rights-related duties, a breach of which could trigger liability under article 754 of the CO. Directors can defend themselves by showing they exercised due care and diligence in the performance of their duties.

Only the company, its shareholders and creditors may bring a claim for damages against a director under article 754 of the CO. Third parties do not have standing to sue. Therefore, as a rule, a victim of human rights abuses committed by a business will not be able to bring a claim against the business's directors under article 754 of the CO, but may do so under article 41 of the CO if the requirements are fulfilled with respect to the directors personally.

Law stated - 25 January 2023

Piercing the corporate veil

When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

In general, businesses cannot be held liable for the acts or omissions of separate legal entities, including those of fully owned subsidiaries. However, a number of exceptions to this rule exist in practice.

The Swiss Federal Supreme Court has recognised that the corporate veil may be pierced where it would be abusive to rely on the separate legal personalities of two entities (eg, where the entities form a single economic unit or where the separate legal personalities of the entities are used to circumvent legal regulations). A further exception exists where the parent company's conduct creates the legitimate expectation that it intends to be liable for obligations of its subsidiary (good faith liability). In addition, a parent company may be held liable as a principal for the acts of its auxiliaries, which may include subsidiaries to the extent that they must follow the parent company's instructions (vicarious liability).

The exceptions listed could, in theory, apply in the context of human rights-related claims. However, they do not provide an independent cause of action and the courts apply them with restraint. Moreover, where the subsidiary is abroad, this will raise conflict of laws issues.

In each case, the remedy available is damages.

The RBI would have introduced an express cause of action against parent companies for human rights abuses committed by their Swiss or foreign subsidiaries, in Switzerland or abroad. The counterproposal to the RBI, which was adopted into law on 1 January 2022, does not provide for such a cause of action.

Law stated - 25 January 2023

Secondary liability

In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

A principal may be held liable for loss or damage caused by its auxiliaries in the course of business (article 55 of the CO). Employees are deemed auxiliaries for the purpose of this provision. Subsidiaries or third parties, such as suppliers or contractors, could potentially qualify as auxiliaries to the extent that their relationship with the principal is

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comparable to that of an employee to its employer (ie, if they are the principal's subordinates). However, there is no settled authority in this respect.

Article 55 of the CO provides for strict liability. The principal is liable irrespective of actual negligence or intent to harm, but may be exonerated from liability if it can show that it exercised due care in choosing, instructing and supervising its auxiliaries, and – where the principal is a business – due care in organising the business, or if it can show that there is no causation between the loss or damage and its failure to exercise due care. The remedy under article 55 of the CO is damages.

In discussions surrounding the RBI and the parliamentary counterproposal, article 55 of the CO was seen as the starting point to introduce an explicit liability of companies for environmental and human rights-related abuses committed by entities or subsidiaries over which they have actual control. Some authors consider that such a liability already exists under the current legal regime, to the extent that the subsidiary is fully subordinated to the parent company, but this is a matter for debate.

Law stated - 25 January 2023

Shareholder liability

In what circumstances can shareholders be held liable for involvement or complicity inhuman rights abuses?

There is no legal basis for holding shareholders liable for human rights abuses committed by a business, unless they were directly involved in the offence (in which case, article 41 of the CO would apply) or acted as de facto directors of the business (in which case, article 754 of the CO would apply).

Law stated - 25 January 2023

JUDICIAL REDRESS

Jurisdiction

Under what criteria do the criminal or civil courts have jurisdiction to entertain human rights claims against a business in your jurisdiction?

As regards criminal liability, the main criterion for establishing jurisdiction of the Swiss courts is the place where the crime was committed. Article 8(1) of the Criminal Code (CC) provides that an offence is deemed to have been committed at the place where the perpetrator acted or omitted to act, or the offence has taken effect.

There is some debate as to how this applies in the context of corporate criminal liability. One view is that the location of the business is not the place where the criminal offence is committed, meaning that Swiss courts would not have jurisdiction over a Swiss business if the human rights violation occurred abroad. Another view is that article 8 of the CC must be interpreted in connection with article 102 of the CC and that the place of commission of the offence may, therefore, also be the place where the business failed to take appropriate organisational measures, which, as a rule, would be the place where the business has its seat.

In its first ever conviction of a (domestic) company in December 2021, the Federal Criminal Court held that in cases of primary liability (ie, where a business is held liable irrespective of the criminal liability of any individual acting within the business – article 102(2) of the CC), jurisdiction is based on the place where the underlying offence (eg, the human rights violation) was committed.

Concerning civil law claims, if the human rights abuses were committed abroad, the rules of applicable international treaties on jurisdiction or the rules of the Federal Act on Private International Law (PILA) determine whether Swiss

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courts have jurisdiction to entertain a claim against a Swiss business. For extra-contractual claims, a business may, as a rule, be sued at the place where it has its registered office, or where the harmful event occurred or may occur. A Swiss business can, therefore, be sued before Swiss courts for human rights abuses committed abroad. If the human rights abuses were committed in Switzerland, the Code of Civil Procedure (CPC) governs the issue of jurisdiction and provides that the courts at the place where the victim is domiciled, where the business has its registered office or where the abuses produced their effects have jurisdiction.

Law stated - 25 January 2023

What jurisdictional principles do the courts apply to accept or reject claims against businesses based on acts or omissions that have taken place overseas and parties that are domiciled or located overseas?

As regards criminal liability, the main criterion for establishing jurisdiction of the Swiss courts is the place where the offence was committed. Article 8(1) of the CC provides that an offence is deemed to have been committed at the place where the perpetrator acted or omitted to act, or the offence has taken effect. Therefore, if the offence occurred in Switzerland, Swiss courts would have jurisdiction over perpetrators even if they were located abroad.

In addition, articles 5 (offences against minors abroad), 6 (subsidiary jurisdiction in relation to international crimes committed abroad) and 7 (active and passive personality principles) of the CC may be relevant to establish the criminal jurisdiction of Swiss courts over human rights abuses committed abroad.

Concerning civil law claims, if the human rights abuses were committed abroad, the rules of applicable international treaties on jurisdiction or the rules of the PILA determine whether Swiss courts have jurisdiction to entertain a claim against a Swiss business. For extra-contractual claims, a business may, as a rule, be sued at the place where it has its registered office, or where the harmful event occurred or may occur. A Swiss business can, therefore, be sued before Swiss courts for human rights abuses committed abroad and a foreign party can be sued in Switzerland for acts or omissions that took place in Switzerland.

If the human rights abuses were committed in Switzerland, the CPC governs the issue of local jurisdiction and provides that the courts at the place where the victim is domiciled, where the business has its registered office or where the abuses produced their effects have jurisdiction.

To the extent that the relevant rules provide for jurisdiction over acts that took place abroad or over parties located abroad, Swiss courts cannot decline jurisdiction over extra-contractual claims on the basis that another forum would be more appropriate.

If a foreign court has already been seized with the same claim, Swiss courts must stay the proceedings, provided that the foreign court can be expected to render, within a reasonable time frame, a decision capable of recognition in Switzerland (article 9(1) of the PILA).

Article 3 of the PILA provides for a forum necessitatis , allowing Swiss courts to accept jurisdiction in cases where the law does not otherwise provide for jurisdiction if the claim cannot be brought abroad (because it is impossible or cannot reasonably be required of the claimant) and the case has a sufficient connection to Switzerland. This provision could, for example, be relied on to bring a claim against the foreign subsidiary of a Swiss company where there is otherwise no basis for jurisdiction over the subsidiary.

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Class and collective actions

Is it possible to bring class-based claims or other collective redress procedures against businesses for human rights abuses?

There are no class actions under Swiss law.

However, article 89 of the CPC provides for group actions by regional or national associations or organisations. The associations may assert a claim in their own name for an infringement of the personality rights of specific groups of persons whose interests they are entitled to represent by virtue of their by-laws. This is particularly relevant for labour disputes, which may have a human rights component.

Article 71 of the CPC allows parties to act jointly if their claims arise out of similar circumstances or legal grounds, and article 125 of the CPC provides that the court may consolidate proceedings in those circumstances.

Law stated - 25 January 2023

Public interest litigation

Are any public interest litigation mechanisms available for human rights cases against businesses?

There are no specific public interest litigation mechanisms available for human rights cases against business enterprises.

Law stated - 25 January 2023

STATE-BASED NON-JUDICIAL GRIEVANCE MECHANISMS

Available mechanisms

What state-based non-judicial grievance mechanisms are available to hear business-related human rights complaints? Which bodies administer these mechanisms?

As a member state of the Organisation for Economic Co-operation and Development (OECD), Switzerland has a National Contact Point that promotes the observance of the OECD Guidelines for Multinational Enterprises (the OECD Guidelines) and is affiliated to the State Secretariat of Economic Affairs.

Law stated - 25 January 2023

Filing complaints

What is the procedure for filing complaints under these mechanisms?

Individuals and organisations may submit a specific instance to the National Contact Point if they believe that a multinational enterprise has acted contrary to the OECD Guidelines. Since 2007, 25 complaints have been filed.

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Remedies

What remedies are provided under these mechanisms?

The National Contact Point offers mediation services to parties, publishes the result of the specific instance procedure (ie, whether the parties were able to reach an agreement) and may make recommendations.

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Enforcement

What powers do these mechanisms have? Are the decisions rendered by the relevant bodies enforceable?

The National Contact Point's main role is to provide a platform for dialogue. It may act as a mediator or propose an external mediator to the parties. It publishes an initial assessment and a final statement setting out basic information in relation to the specific instance, but does not make any determination as to whether the OECD Guidelines were complied with. It may also issue recommendations, but these are not enforceable.

Law stated - 25 January 2023

Publication

Are these processes public and are decisions published?

The special instance procedure is not public, but the National Contact Point's final statement is published on its website. If an agreement is reached, information on the results is only included with the express consent of the parties involved. If no agreement is reached or one party is not willing to take part in proceedings, the final statement includes a summary of the reasons why no agreement was reached. Finally, if the National Contact Point decides the issues raised do not merit further examination, it publishes an explanation.

Law stated - 25 January 2023

NON-JUDICIAL NON-STATE-BASED GRIEVANCE MECHANISMS

Available mechanisms

Are any non-judicial non-state-based grievance mechanisms associated with your jurisdiction?

The International Code of Conduct Association (ICoCA) oversees the implementation of the International Code of Conduct for Private Security Service Providers (the Code of Conduct) and has put in place two complaints-handling procedures, one for victims of breaches of the Code of Conduct and one for complaints raised by whistle-blowers. The ICoCA may issue sanctions including suspension or termination of membership.

Switzerland has provided content and financial support for these complaints-handling mechanisms.

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UPDATE AND TRENDS

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Recent developments

What are the key recent developments, hot topics and future trends relating to business and human rights in your jurisdiction?

The key recent development in Switzerland was the entry into force of the counterproposal to the Responsible Business Initiative (RBI) on 1 January 2022, introducing non-financial reporting requirements for large 'companies of public interest', as well as due diligence and reporting obligations for Swiss companies whose operations involve conflict minerals and metals or a risk of child labour. Unlike the RBI, the counterproposal does not include any specific cause of action against Swiss companies for human rights violations.

The new reporting and due diligence requirements apply from the financial year beginning in 2023, which means that the first reports on non-financial matters and due diligence regarding conflict minerals and metals and child labour will have to be published in 2024.

On 23 November 2022, the Ordinance on Climate Disclosures was adopted, which details the reporting on environmental matters required of large 'companies of public interest' as part of the report on non-financial matters under article 964a et seq of the Code of Obligations (CO). Pursuant to articles 2 and 3 of the Ordinance on Climate Disclosures, companies making climate disclosures based on the recommendations of the Task Force on Climate-Related Financial Disclosures of June 2017 (supplemented with the Annex of October 2021) are deemed to have fulfilled their obligation to report on environmental matters as per article 964a et seq of the CO. If a company opts for other guidelines or does not follow any concept as regards climate issues, it must demonstrate – in the sense of 'comply or explain' – how it has fulfilled its disclosure obligations regarding environmental matters or why it does not pursue a concept for climate reporting, respectively. The Ordinance on Climate Disclosures will enter into force on 1 January 2024.

On 5 January 2023, the European Union's new directive on corporate sustainability reporting entered into force. The new directive aims to strengthen the EU non-financial reporting requirements introduced by the Directive 2014/95/EU on non-financial reporting by, among other things, expanding the applicability of non-financial reporting obligations to companies with 250 to 500 employees on an annual average basis and making it mandatory for companies to have an audit of their report. These changes will have a significant impact on Swiss companies with subsidiaries or branches in the EU. The Swiss government is therefore working on a further alignment of the Swiss non-financial reporting regime under the CO with the new directive on corporate sustainability reporting and plans to issue amendment proposals by July 2024 .

In addition, the Swiss government has indicated that it will closely follow developments at the EU level regarding human rights due diligence and analyse the effects of the future EU directive on corporate sustainability due diligence by the end of 2023 to ensure that Swiss companies will not suffer any competitive disadvantage.

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Jurisdictions

Italy	Legance
Switzerland	Schellenberg Wittmer
United Kingdom	Leigh Day

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