

Vote on Responsible Business Initiative: A No to a risky experiment and a Yes to modern ESG regulation

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At a glance

By rejecting the responsible business initiative, the cantons have prevented Switzerland from a risky regulatory stand-alone approach. This means that the indirect counter proposal of the Federal Council and parliament will enter into force. The new law is far going, however internationally aligned and combines the world's most advanced corporate responsibility instruments.

On November 29th, 2020 Switzerland has rejected in a referendum the Responsible Business Initiative (RBI). While the initiative was accepted by a narrow majority of the population of 50.7%, it only reached a majority in 8 of 26 cantons. However, a popular initiative must reach both the popular majority and a majority of the cantons in order to be able to amend the constitution. The RBI was mainly supported in the big cities whereas the rural areas voted against it.

If approved, the RBI would have mandated the government to propose a bill obliging companies not only to conduct vast due diligence in the area of human and environmental rights throughout their whole supply chain. It would also have included a new legal liability before Swiss courts and under Swiss law for the Swiss parent company for any violation abroad. The Swiss company could have been held liable even if only economically controlled third parties, i.e. business partners had been involved. The Parliament as well as the government were opposed to the initiative. Instead, Parliament

adopted an indirect counterproposal that took on board the broad strokes of the initiative while limiting its scope and refraining from introducing untested liability provisions.

Adoption of a far reaching, internationally aligned counterproposal

The counterproposal implements the "Due Diligence" requirement of the UN guidelines on national level and refers to the standards of the OECD and UN. Some states that go beyond this (in particular France and the Netherlands) differ in crucial points from the RBI: The relevant legal catalogue in the Netherlands, for example, refers to one specific aspect ("child labour") and not an entire legal catalogue. And both countries have introduced a "safe haven" clause in case companies provide satisfactory risk reporting. The counterproposal now in place gives companies legal certainty. Particularly the regulation in the EU and the Netherlands served as a blueprint for the new regulatory framework. A closer look shows its extent:

1. Firstly, a broad non-financial reporting duty in line with the EU Directive 2014/95 on non-financial reporting is introduced. The standards have been adapted to the conditions in Switzerland.
2. Secondly, a mandatory due diligence requirement specific to risks associated with trading of conflict minerals in the value chain in line with the EU Regulation 2017/821 was introduced.
3. And thirdly, a mandatory due diligence requirement specific to risks associated with child labour in the value chain was introduced. The Dutch Child Labour Act served as a model.

In case company representatives do not comply with these new obligations, the new law provides for criminal sanctions.

Swiss CSR regulation among most progressive worldwide

By rejecting the original initiative at the ballot box, parliament's amendment to law will enter into force immediately. It puts Switzerland in the class of the most progressive countries regarding CSR regulation worldwide.

As far as liability is concerned, the Counterproposal adheres to the existing and internationally recognized liability provisions. It refrains, however, from introducing new, unclear and counter effective liability provision with a reversal of the burden of proof such as the RBI requires. In any event, Swiss companies that operate in a complex and multinational context should seek guidance as to the new rules and standards that will apply, both in Switzerland and abroad and should not underestimate the risk of exposure in case of noncompliance.



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