Corporate ESG Disclosure : duties and challenges

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ESG Disclosure Swiss Framework

General:

- CO 734f (big listed companies)
 women on board
- CO 964a-c (listed companies)
 extra-financial reporting

Industry-specific rules:

- 2016/01 FINMA Circular « Disclosure-Banks »; 2016/02 FINMA Circular « Disclosure- insurers », with FINMA Guidance 03/2022 (banks and insurers)
 - climate-related financial risks reporting
- CO 964d-I (raw material companies undergoing ordinary audit)
 - payments to government
- CO 964j-I (3TG and metal industry companies; companies industries with risks of child labour in the supply chain)
 adverse impacts on human rights and child labour reporting
- CO 964a-c (companies under FINMA's supervision) extra-financial reporting



CO 964a-l

CO 964a-c

Extra-financial reporting

ESG in a broad sense 01.01.2022 FY 2023

Source of inspiration: NFRD

CO 964d-i

Transparency in raw material companies

BRIBERY 01.01.2021 FY 2022

Source of inspiration: Dodd-Frank Act, Art. 1504

CO 964j-l

Due Diligence and transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour

HUMAN RIGHTS 01.01.2022 FY 2023

Source of inspiration: EU Directive 2017/821 and Dutch Child Labour Due Diligence Act



CO 964a-c: Extra-financial reporting

Public interest companies (AOA 2 (c)) that

Together with Swiss or foreign undertakings that they control

- (i) have at least 500 FTE; and
- (ii) Exceed at least one of the following amounts in two successive financial years:
- A balance sheet total of CHF 20 mio
 - Sales revenue of CHF 40 mio?

_ = yes = no Exemption from controlled by another one that meets the

Exemption from reporting

Company controlled by a company that must prepare an equivalent report under foreign law?

reporting

Documentation recommanded

Report

Listed companies

Entities under FINMA supervision (FINMASA 3)

- Persons and entities that under the financial market acts require to be licensed, recognised, or registered by the Financial Market Supervisory Authority, i.e. notably

reporting

Company

criteria of

preceding

question?

- Insurance intermediaries
- Self-regulatory organisations (SROs)
- Credit rating agencies
- Supervisory organisations (Sos)
- Insurances
- Banking establishment as per Act on Banks and Savings Banks
- Financial institutions within meaning of Financial Institutions Act (FinIA)
- Collective capital investments
- SICAV, SICAF etc.
- Collective capital Investments

Exemption from

COMPLY or EXPLAIN

combating corruption;

hoc ordinance),

description of the business model;

description of the policies, including the due

environmental matters, in particular the CO₂ goals and climate-related risks (see ad

social issues, employee-related issues,

Content of the report:

diligence applied, on

presentation of the measures taken to implement these policies and an assessment of the effectiveness of these measures;

respect for human rights, and

- description of the main risks and how the company is dealing with these risks; in particular it shall cover risks:
 - that arise from the company's own business operations, and
 - provided this is relevant and proportionate, that arise from its business relationships, products or services;
- the main performance indicators for the company's activities

Form of the report:

- Annual written report, in a national language or English;
- Electronic publication immediatly after its approval;
- Report on climate-related aspects in a human and machine-readable format and publication on Internet;
- Accessibility during 10 years;
- Approved and signed by the board (or equivalent body);
- Approved by the body competent for approval of the financial statements (GM) (nature of the vote?)

CO 964d-i: Transparency in raw material companies

Enterprises undergoing an ordinary audit,

which are, directly or through a company that they control involved in the extraction of minerals, oil or natural gas or harvesting of timber in primary forests?

Exemption of reporting

Payment to state

bodies?

Exemption of reporting

Payment amounting to min. CHF 100'000.- in a financial year?

In one or several sums

reporting

recommanded

Company as part of a group that draws up consolidated annual accounts?

Exemption of

Documentation

No report

the financial year;

project);

Mention of all payments (indication of the

National language or in English;

Accessibility during 10 years

amount of the payments made in total and by type of service to each state body and each

Approval by the board (or equivalent body); Publication within 6 months from the end of

Report replaced by the group report

Reference to group report in the annex to financial statements

(CO 964d II and III)

Extraction includes all activities carried out by the company in the areas of exploration, prospecting, discovery, development and extraction of minerals, oil and natural gas deposits and the harvesting of timber in primary forests (CO 964d IV)

State bodies = national, regional or local authorities in a third country together with the departments and businesses controlled by such authorities (CO 964d V)

- Payment = payments in cash or in kind, notably those listed at CO 964e I
- In the case of a payment in kind, the subject matter, value, method of valuation and if applicable the extent must be indicated (CO 964e II)

Company covered by foreign company's report as per equivalent regulation?

(CO 964d III)

Annex to financial statements (reference to the other company)

Report

CO 964j-I: Minerals and Metals from **Conflict-Affected Areas**

Exemption from

Companies whose seat, central administration or main establishment in Switzerland that place in free circulation or process (in Switzerland) products or by-products containing tin, tantalum, tungsten or gold?

For-profit purpose and registration with the commercial

Processing on Swiss territory of the goods concerned

reporting (and Exemption from diligence)

Low volumes? (CO 964j II, DDTrO 4, Annex 1)

reporting (and diligence)

Extraction site located in a conflict-affected or high-risk area? (DDTrO 3 II)

- Areas in a state of armed conflict or fragile post-conflict, areas witnessing weak or non-existent governance and security, such as failed states, and in which there are widespread and systematic violations of international law, including human rights abuses (non exhaustive list)
- RAND Europe list as a source of information

Exemption from reporting

finding

Obligation to document the

(DDTrO 3 II)

National language or in English;

✓ Supply chain policy (DDTrO 10 et 12)

✓ Risk assessment (double materiality) X No risk management plan (DDTrO 15)

Publication within 6 months from the end of the financial year;

X No reporting procedure (DDTrO 14)

X No audit by an independent expert (DDTrO 16)

Accessibility during 10 years

Certified auditor role

Limited Diliaence

Limited diligence + report (DDTrO 12 III)

Metals that originate exclusively from

recycling?

Report and diligence as per equivalent regulations?

(CO 964j IV, DDTrO 9, Annex 2) Exemption Diligence

Report referring to equivalent regulations/Mention in the notes if control by a entity doing such a report

Diligence + Report/Notes to financial statements

Static references:

The OECD Guidance from 2016 (with annexes and supplements) or Regulation (EU) 2017/821 (version 19.05.2017))

Cobalt not covered

(even if imported by others)

register not required

Importation (declared or smuggled)

Art. 964j-I CO as lex specialis to Art. 154 PILA

Source: Giulia Neri-Castracane, Diligence and reporting duties under Art. 964j-l CO, GEsKR 1/23 (but in colour)

CO 964j-l: Child Labour

Companies whose seat, central administration or main establishment in Switzerland offering products or services?

Exemption Diligence/Report

SME?

(CO 964j III, DDTrO 6 I, II) Low Child labour risks?

(DDTrO 7 I, II)

(DDTrO 8) (exception to the exceptions

> Reasonable grounds to suspect child labour?

Evident use of

child labour?

(DDTrO 5 I)

For-profit purpose and registration with the commercial register not reauired

Art. 964i-I CO as lex specialis to Art. 145 PILA

No requirement that the end users be in Switzerland

Offer against payment or free of charge

Low risk is assumed if the company:

- purchases or manufactures products in accordance with the indication of origin
- primarily procures or provides services

from a place of (made in indication) rated as «Basic» by UNICEF Children's Rights in the Workplace Index

Not sufficient if rated «Fnhanced» or «Heightened» by UNICEF Children's Rights in the Workplace Index

Stac references:

Cumulatively (I) The ILO Conventions No. 138 and 182, and the ILO-IOE Child Labour Guidance tool for business adopted on 15 December 2015, as well as (II) The OECD Guidance adopted on 30 May 2018 or The Guiding Principles on Business and Human

Reasonable grounds are not enough Certainty from reliable, objective and independent sources required

Exemption Diligence/Report

Obligation to document the finding

(DDTrO 5 II, 7 III)

(DDTrO 9 I, III)

Report and diligence as per equivalent regulations?

> (CO 964i IV, DDTrO 9.

> > Annex 2)

Rights adopted on 16 June 2011

Exemption Diligence

Report referring to equivalent regulations

> Report by previous

operator?

(CO 964I V)

to the financial statements

Exemption

Diligence

+ Report/Notes

Diligence (DDTrO 11, 13, 14, 15)

> Report/Notes to the financial statements

Source: Giulia Neri-Castracane, Diligence and reporting duties under Art. 964j-I CO, GEsKR 1/23 (but in colour)

Challenges

Practical challenges – how to deal with suppliers? **Regulation-based challenges**

- Standard of evaluation? Reasonable efforts vs. Best efforts?
- Say on Sustainability
 - o Mandatory or consultative?
 - What if refusal? (impact on publication?)
- Concept of « responsible operators » only possession or also ownership is required?
- Concept of equivalent regulations
- Available sanctions/Consequences
 - Criminal Code 325bis and ter
 - O 754? Is it a duty of the board or of the company?
 - CO 41? are CO 964a-I norms protecting third parties?
 - UCA 3 I (b), 9 and 10 possible standing right for some stakeholders (customers, employees, shareholders, creditors)



Conclusion

Questions/Comments?

Thank you!

