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Market Intelligence

ESG ENGAGEMENT & LITIGATION 2023

Global interview panel led by Woodsford

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by Woodsford, this *ESG Engagement & Litigation* volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide

Minority shareholders
Greenwashing
Dispute resolution
2023 outlook

START READING

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Switzerland

Prof Dr Isabelle Romy is a renowned environmental lawyer. Her experience includes advising on a large array of environmental legal issues with a strong focus on contaminated land and groundwater pollution. She represents clients in environmental regulatory, administrative and civil proceedings. Her experience as a board member of global companies has provided her deep insights into the governance issues around mastering the opportunities and challenges of ESG topics for businesses. Isabelle is the co-head of the sustainability and ESG desk Kellerhals Carrard launched in July 2022.

As a corporate lawyer, Ines Pöschel has many years of experience in the areas of mergers and acquisitions and specialises in corporate and capital markets law. She has a particular focus on governance issues and more broadly ESG. She regularly advises executives and boards of directors on governance, compensation and liability issues. Ines Pöschel is a non-executive member of the board of directors of companies such as Alcon, Reichle Holding and Graubündner Kantonalbank. Social commitment is also important to her: she supports Smiling Gecko in Cambodia as Co-President and is Vice-President of the Lotti Latrous Foundation in sub-Saharan Africa.

Dr Denise Wohlwend's practice focuses on national and international dispute resolution. She is also a specialist in public international law and advises clients on the international dimensions of ESG and sustainability law. Denise is the author of *The International Rule of Law* (Edward Elgar Publishing 2021) and a lecturer at the Faculty of Law of the University of Fribourg (Switzerland), where she has taught public international law (autumn 2022) and global theories of justice (spring 2023).

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1 Which companies have ESG obligations in your jurisdiction, and to whom do they owe these obligations? What is the source and nature of these obligations?

Switzerland does not have a specific ESG general legal framework. However, several aspects of the 'E', 'S' and 'G' (environment, social, governance) are governed by various statutes, such as environmental law, labour law or anti-corruption law, that provide for related obligations for companies. Specifically on climate change, the Federal Act on the Reduction of CO_2 Emissions (the CO_2 Act) intends to reduce greenhouse gas emissions and especially CO_2 emissions that are attributable to the use of fossil fuels as energy sources with the aim of contributing to limiting the global rise in temperature to less than 2 degrees Celsius (article 1). To implement Switzerland's obligations under the Paris Agreement adopted on 12 December 2015, the CO_2 Act is currently being revised and the Swiss government presented a new draft of the revised CO_2 Act in September 2022. Moreover, the legislative landscape evolves rapidly, and specific ESG legislation has been adopted recently to impose new reporting obligations on companies and increase transparency on ESG matters.

Statutory provisions on transparency and disclosure

On 1 January 2022, the following reporting obligations entered into force.

Transparency on non-financial matters (article 964a et seq of the Swiss Code of Obligations (CO))

Public interest companies; companies that together with their Swiss and foreign affiliates have at least 500 full-time equivalent positions on annual average in two successive financial years; and companies that together with their Swiss and foreign affiliates exceed at least a balance sheet total of 20 million francs or sales revenues of 40 million francs in two successive financial years must now prepare a yearly

Isabelle Romy

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"Companies having their seat … in Switzerland must comply with due diligence obligations."

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QUESTIONS

"Since 1 July 2020, employers with 100 or more employees must conduct an internal equal pay analysis every four years."

report on non-financial matters. The report shall cover environmental matters, in particular CO_2 goals, social issues, employee-related issues, respect for human rights and what the company is doing to combat corruption. It shall describe in particular the company's business model, the policies adopted in relation to the non-financial matters including the due diligence applied, the measures taken to implement these policies and an assessment of their effectiveness, the main risks (in particular those arising from its own business and where relevant from its business relationships, products or services) related to the non-financial matters and the way the company is dealing with these risks and the main performance indicators for the company in relation to the non-financial matters. The report on non-financial matters must be approved and signed by the supreme management or governing body (which, in a corporation, would be the board of directors) as well as approved by the governing body responsible for the approval of the annual accounts (in a corporation, the general meeting of shareholders). The report shall be published online immediately following approval and must remain publicly accessible for at least 10 years. The first reporting on non-financial matters is required for the first full business year as of 1 January 2023, published and submitted for approval in 2024.

Due diligence and transparency in relation to minerals and metals from conflict-affected areas and child labour (article 964j et seq CO)

Companies having their seat, head office or principal place of business in Switzerland must comply with due diligence obligations in the supply chain and report thereon if they place in free circulation or process in Switzerland certain types of minerals or metals from conflict-affected and high-risk areas or if they offer products or services in relation to which there is a reasonable suspicion that they have been manufactured or provided using child labour. Small and medium-sized companies are exempt from the due diligence and reporting obligations. The companies having due diligence and reporting obligations must, among other things, maintain a management system stipulating the supply chain policy and a system by which the supply chain can be traced. The supreme management or governing body must prepare a yearly report on compliance with the due diligence obligations and ensure that the report is published online within six months of the end of the financial year and remains publicly accessible for at least 10 years.

On 1 January 2021, new provisions on transparency in raw material companies entered into force (article 964d et seq CO)

They provide that companies subject to ordinary audit, and which are either themselves or through an affiliate company involved in the extraction of minerals, oil or natural gas or in the harvesting of timber in primary forests, have to produce a yearly report on the payments related to business operations in these areas they have made to state bodies. The report covers any payments of 100,000 francs or more in any financial year made to state bodies and must be approved by the highest management or administrative body. It must be published online within six months of the end of the financial year and remain publicly accessible for at least 10 years.

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Equal pay analysis (article 13a et seq of the Gender Equality Act)

Since 1 July 2020, employers with 100 or more employees must conduct an internal equal pay analysis every four years. Employers who are subject to the CO must have their equal pay analysis audited by an independent body. The employees must be informed of the result of the equal pay analysis within one year of the conclusion of the audit. Listed companies must publish the result of the equal pay analysis in the annex of their annual accounts. Public sector employers must publish the individual results of the equal pay analysis and the audit. The first results are due by 30 June 2023.

Gender quota reporting

Since 1 January 2021, a quota of 30 per cent for boards and 20 per cent for executive management for each gender applies for listed companies, with a delay period for implementing the quotas until 2026 for boards and 2031 for executive management. As of 1 January 2023, companies not meeting these quotas have to explain in the compensation report why they have not complied and what measures they have taken to improve the gender representation.

Disclosure of climate-related financial risks

On 1 July 2021, Circulars 2016/01 and 2016/02 of the Swiss Financial Market Supervisory Authority FINMA entered into force, setting out disclosure obligations regarding climate-related financial risks for the largest banks and insurance companies. These disclosure requirements are based on the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD).

Opting in (article 9 of the Directive on Information relating to Corporate Governance)

Companies listed at SIX Swiss Exchange have the opportunity to 'opt in' and commit to publishing an annual sustainability report. The report must be produced according to an internationally recognised

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standard (such as GRI, SASB Standard,etc), be published on the issuer's website within eight months of the balance sheet date for the annual financial statements and remain available thereon for five years.

Other obligations

Furthermore, general provisions that were not specifically enacted to address ESG issues are applicable to such issues as well. For instance, the prohibition of greenwashing or bluewashing can be based on article 12 of the Federal Act on Collective Investment Schemes on protection against confusion or deception in the context of collective investment schemes; on article 3(1)(b) of the Swiss Federal Act against Unfair Competition (FUCA) that prohibits incorrect or misleading statements about, among other things, a company's business name, goods, works or services or business relationships in companies' advertising and sales methods; or on article 146 of the Swiss Penal Code prohibiting fraud.

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> "The Swiss state has standing to bring actions under FUCA and could under specific conditions sue companies for greenwashing and bluewashing."

Besides the above-mentioned statutory obligations, companies may voluntarily submit to so-called soft-law ESG commitments that arise from instruments adopted by international or Swiss public or private bodies. Examples include the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy; the UN Guiding Principles on Business and Human Rights; the UN Principles for Responsible Investment; the UN Principles for Responsible Banking; the OECD Guidelines for Multinational Enterprises; the OECD Due Diligence Guidance for Responsible Business Conduct; the OECD Responsible Business Conduct for Institutional Investors; the Montreux Document on pertinent international legal obligations and good practices for states related to operations of private military and security companies during armed conflict; the Swiss Climate Scores for climate transparency in financial investments of the Swiss government; the Guidelines for the financial service providers on the integration of ESG-preferences and ESG-risks into investment advice and portfolio management of the Swiss Bankers Association; and the ESG Guidance for Swiss Pension Funds of the Swiss Pension Fund Association.

In areas with thus far little to no statutory legislation directly forcing corporations to consider ESG in their reporting (and hence in their strategic planning), investors, proxy advisers and financing institutions increasingly put pressure on companies to disclose specific commitments, submit to broader standards such as TCFD and CDP and include ESG targets in short-term as well as long-term variable compensation.

2 Which regulators and other public bodies in your jurisdiction take an interest in ESG and related collective engagement and litigation? What is the extent of their involvement in ESG issues?

The Swiss government participates in various international forums and standard-setting bodies relating to ESG (both hard and soft law), such as the United Nations and the OECD and at the domestic level, it adopts high-level strategic policy papers on ESG. For instance, on 23 June 2021, the Swiss government adopted the 2030 Sustainable Development Strategy (the 2030 SDS) and the associated 2021–2023 Action Plan. The 2030 SDS sets out guidelines for the Swiss government's sustainability policy and outlines the priorities the Swiss government intends to set to implement the UN 2030 Agenda and the Sustainable Development Goals (SDGs). The priorities include sustainable consumption and production; climate, energy and biodiversity; and equal opportunities and social cohesion. The Swiss government also adopts ESG strategies and action plans in specific domains. Mention can be made of the Swiss Federal Council's report and guidelines on sustainability in the financial sector (adopted on 24 June 2020), its report 'The Swiss National Bank and Switzerland's sustainability goals' (adopted on 26 October 2022) and its Long-term

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climate strategy to 2050 (adopted on 21 January 2021) relating to sustainable finance and climate change.

The Swiss government's policy instruments, which define the main lines of the Swiss ESG policy in general as well as in specific areas, are to be specified, implemented, applied and enforced through the ordinary instruments and mechanisms of the Swiss legal system.

With regard to sustainable finance, besides the previously mentioned circulars, FINMA published its Guidance 05/2021 on preventing and combating greenwashing in the fund segment including rules of conduct at the point of sale on 3 November 2021. Furthermore, in autumn 2021, FINMA adopted its strategic goals 2021–2024, according to which FINMA aims to contribute to the sustainable development of the Swiss financial centre by pursuing four medium-term priorities: integrating climate risks into supervisory practice; transparency about climate risks, combating greenwashing (investor/client protection); and other potential sustainability risks. FINMA has a wide variety of enforcement tools at its disposal to apply and enforce supervisory law, including provisional measures, measures aimed at restoring compliance with the law, declaratory rulings, industry bans, cease and desist orders and activity bans, publication of rulings, disgorgement of profits, withdrawal of authorisation, liquidation and bankruptcy (article 24 et seq of the Federal Act on the Swiss Financial Market Supervisory Authority).

In the area of environmental law, federal or cantonal bodies are competent to implement the requirements imposed on companies by the relevant legislation (eg, implementation of regulatory requirements, environmental risk assessment, protection against noise, protection against industrial hazards, air and water pollution, remediation of polluted soil and ground water or waste disposal and recycling) and may initiate enforcement proceedings to that end.

ESG topics are also becoming increasingly important in public procurement proceedings and may give rise to challenges in court.

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Finally, the Swiss state has standing to bring actions under FUCA and could under specific conditions sue companies for greenwashing and bluewashing, based on article 10(3) FUCA.

3 How do minority shareholders engage with public companies to ensure that they comply with their ESG obligations?

Minority shareholders may use the ordinary instruments of corporate law to urge the company to implement ESG measures internally (eg, governance) or externally (business practices). Available instruments include the right to information and inspection (article 697 et seq CO), the right to instigate a special audit (article 697a et seq CO), the right to convene a shareholders' meeting and to propose items on the agenda (article 699(3) CO), the right to request an ordinary audit (article 727(3) CO) and the right to challenge the resolutions of the shareholders' meeting (article 706 et seq CO).

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As of 1 January 2023, Swiss corporate law will lower the thresholds for minority shareholders of listed companies to call an extraordinary shareholders' meeting (5 per cent of capital and votes) and to put an item on the agenda of a shareholders' meeting (0.5 per cent of capital and votes); there is a two-year interim period to adopt these rules.

Further, companies subject to non-financial disclosure have to submit their non-financial report to a vote at their shareholders' meeting annually. Hence, minority shareholders could refuse to approve the report, oppose the re-elections of members of a sustainability/ESG committee or cast a no-vote on say-on-pay votes to express their views.

4 When significant breakdowns in ESG cause loss to a company's investors, what regulatory, litigation and other mechanisms are available to the investors to hold the company to account?

There are no class-action like mechanisms in Switzerland, but procedural laws allow for the joinder of claims or other collective actions under specific conditions.

Furthermore, general (ie, non-ESG specific) statutes provide for various causes of action that are applicable to ESG matters.

For instance, any person (client, competitor, investor) whose economic interests are harmed by an act of unfair competition could bring an action for violation of article 3(1)(b) FUCA for alleged greenwashing or bluewashing in a company's advertisement and sales methods concerning the ESG qualities of a given product; the plaintiff may petition the court for an injunction or file a request for damages and satisfaction in accordance with the provisions of the CO as well as for disgorgement of profit (article 9 FUCA). Anyone who is entitled to bring a civil action pursuant to article 9 FUCA may also bring a criminal charge (article 23 FUCA). Similarly, the purchaser of a

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financial instrument may sue any person (organs and employees of the issuer, but also other persons such as consultants or rating agencies) for the losses resulting from an alleged greenwashing or bluewashing in the provision of information in prospectuses, key information documents or similar communications (article 69 of the Federal Act on Financial Services, FinSA). They may also bring criminal charges (article 90 FinSA).

Theoretically, shareholders of a company could sue the members of the board and the executive management based on article 754 CO for loss incurred to the company as a consequence of breach of the duty of care (ie, to act in the best interest of the company), for example, for inaction or inappropriate action in relation to ESG risks. However, the burden of proof in such an action is high and if the plaintiffs prevail, the action can only lead to repayment of damages to the company itself and not to the plaintiffs. These very restrictive conditions explain why there is a paucity of cases and none, yet, to our knowledge, in the ESG field.

Further, there is a debate among legal scholars as to whether a Swiss-based holding could be made liable for the misconduct of its foreign subsidiaries based on article 55 CO and whether investors, customers or third parties could sue the holding for damages. No case law, ESG related or not, is known to date.

Finally, activist investors may use the ordinary corporate law instruments to put pressure on a company and its board to compel them to adapt their ESG plans, to change the company's strategy to better integrate ESG, to replace board members, etc.

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5 When significant breakdowns in ESG cause loss to a company's customers, what regulatory, litigation and other mechanisms are available to the customers to hold the company to account?

Consumers have different mechanisms at their disposal to act against greenwashing or bluewashing. They may file actions under FUCA for unfair competition. Pursuant to article 10 FUCA, actions in accordance with article 9 FUCA are also available to customers whose economic interests are threatened or harmed by unfair competition. Some of these actions may also be brought by professional and trade associations, which are authorised by their articles of association to protect the economic interests of their members and organisations of national or regional importance that are dedicated to consumer protection in accordance with their articles of association and, under certain conditions, the Swiss state (article 10(3) FUCA).

Based thereon, on 2 November 2022, Climate Alliance Switzerland filed a complaint with the Swiss Fair Trading Commission against FIFA

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for misleading statements in relation to the carbon neutrality of the World Cup in Qatar in violation of FUCA, the ICC Code and the Rules on Fairness.

Ordinary mechanisms of contract law could also be relevant. For instance, there is currently a debate among scholars as to whether production processes advertised as ethical or green can be considered as representations made by the seller on the characteristics of the products, which, if proven untrue, could trigger the buyer's warranty rights under the law on sales against the seller (article 197 et seq CO). Moreover, the remedial actions for defect in consent (article 23 et seq and article 28 CO) may also be available to counter greenwashing or bluewashing practices. So far, however, these remain theoretical discussions, and no cases are known.

6 What developments are there likely to be in ESG collective engagement and litigation in your jurisdiction in the next five years?

In recent times, Switzerland has seen an increase in climate change litigation. Different types of cases can be distinguished.

First, numerous criminal law cases are currently being brought by Swiss public prosecutors against climate activists who, through various kinds of allegedly illegal actions (such as road blockades, sit-ins, occupations, etc) carried out in cities throughout Switzerland, attempt to bring about the implementation by the Swiss state of its obligations under the Paris Agreement adopted on 12 December 2015. The protest actions have targeted both public and private actors. For example, protest actions have targeted large Swiss banks to draw attention on their offer of investment opportunities in fossil fuel sources. In the criminal proceedings, the activists – who often understand themselves as engaging in civil disobedience – usually plead not guilty, invoking different justificatory defences such as

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necessity, available under the Swiss Penal Code. So far, the Swiss Federal Supreme Court has rejected such defences. Applications have been filed before the European Court of Human Rights (ECtHR) against these decisions and they are currently being examined in Strasbourg. There have been acquittals before lower courts based on diverse reasons.

Second, on 25 October 2016, the association KlimaSeniorinnen Schweiz and others sued the Swiss government, the Federal Department of the Environment, Transport, Energy and Communications, the Federal Office for the Environment and the Federal Office of Energy for failure to take measures to abate climate change. The plaintiff requested that the federal authorities take all necessary measures to ensure that Switzerland makes its contribution to achieving the goal of the 2015 Paris Agreement (in essence: reduction of greenhouse gas emissions by 2020 by 25 to 40 per cent and by 2030 by at least 50 per cent from 1990 levels; triggering of preliminary legislative procedures for the purpose of anchoring the two emission reduction targets in legislation and proposal and recommendations of the measures required to reach these targets; taking the necessary emission reduction measures, such as, for example, promotion of electric mobility, introduction of CO_2 tax on fuels, etc; consistent implementation of emission reduction measures already provided for by law). This climate change action was based on the Swiss Federal Constitution and on articles 2 and 8 of the European Convention on Human Rights (right to life and right to respect for private and family life). The action was declared by all instances as non-admissible for lack of standing. The case is currently pending in the ECtHR, after a corresponding application has been made by the plaintiffs. In spring 2021, the case was granted priority status and will be heard by the Grand Chamber. Together with *Duarte Agostinho and others v Portugal and others*, *KlimaSeniorinnen Schweiz and others v Switzerland* is one of the first climate change cases before the ECtHR and will attract a lot of attention.

Third, on 11 July 2022, four residents of the Indonesian island Pari sued the Swiss cement company Holcim having its seat in Zug, Switzerland, and requested proportional compensation for climate-induced damages as well as a contribution to climate change adaption measures on Pari island. They also requested that Holcim reduce its CO_2 emissions by 43 per cent by 2030, and by 69 per cent by 2040. The action is based on article 28 et seq of the Swiss Civil Code (violation of personality rights) and articles 41 and 49 CO (tort). The climate change action against Holcim is the first suit of the sort filed against a carbon major in Switzerland and it directionally follows lawsuits introduced for instance against RWE in Germany and Royal Dutch Shell in the Netherlands, UK and Canada.

An increase of climate change actions of the different types, especially against companies, is to be expected in the coming years.

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The Inside Track

How has your work in relation to ESG, collective engagement and litigation developed over the past five years?

Our ESG practice – advisory as well as litigious – has significantly expanded over the past five years. We are particularly pleased with the breadth and diversity of our ESG-related mandates. Among others, we have advised:

- the board and executive management of listed companies on ESG strategy and reporting;
- corporates as well as public entities on a wide range of ESG-related topics (eg, on environmental law as well as on their supply chain and waste management); and
- banks on ESG-related investment funds, financing and capital market transactions.

Furthermore, we have represented companies and public entities in ESG-related disputes, for example, environmental litigation and public procurement proceedings.

What was the most noteworthy ESG matter that you have worked on recently and what features were of key interest?

What sets Kellerhals Carrard's ESG practice apart is its breadth and the diversity of our client work. A selection of recent stand-out cases:

- Kellerhals Carrard advised Moderna on ESG-related matters in connection with its Swiss business and supply chain.
- Kellerhals Carrard provided an expert opinion on the Swiss Federal Council's proposal to accelerate procedures for the expansion of renewable energies.
- Kellerhals Carrard is currently advising Switzerland's largest retailer on legal matters related to waste management and disposal.
- Kellerhals Carrard advised the Canton of Bern on the sustainable procurement of wood for its new €200 million University campus.
- Kellerhals Carrard advised the Canton of Neuchâtel on legislative competence related to ban of pesticides.

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About Market Intelligence

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Market Intelligence offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

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