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Switzerland: Law & Practice

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Law and Practice

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Kellerhals Carrard

Kellerhals Carrard is one of the largest Swiss business law firms. Through its Sustainability & ESG Desk, the firm offers comprehensive advice on the full range of ESG-related matters. Kellerhals Carrard is one of Switzerland's thought leaders in ESG matters, actively shaping the legislative process and contributing to the development of law and practice. It is the executive legal partner to Sustainable Switzerland through NZZ (environmental), co-founder and partner of Swiss Venture Club (social) and founding member of idée cooperative (governance). Kellerhals Carrard's ESG practice – ad-

visory as well as litigious – has significantly expanded over the past five years. The firm currently advises listed companies on ESG strategy and reporting obligations; corporations as well as public entities on a wide range of ESG topics, eg, environmental law, energy law, supply chain, and waste management; and banks on ESG-related investment funds, financing, and capital market transactions. The firm also advises on ESG-related disputes, for example, in environmental litigation and public procurement proceedings.

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ESG Framework

Sustainable development is anchored in the Swiss Federal Constitution as one of the aims that the Swiss Confederation will expressly promote. It is the responsibility of the Confederation and the cantons to achieve a balanced and sustainable relationship between nature and its capacity to renew itself. There is no specific ESG general legal framework in Switzerland. However, numerous aspects of “E”, “S” and “G” (environmental, social and corporate governance) are the subject of various international treaties and statutes, including environmental regulations, labour laws, and anti-corruption legislation, which establish corresponding obligations for individuals, corporations, and public entities in Switzerland. As in other jurisdictions, the legal framework in Switzerland is evolving rapidly. Here are the most significant developments.

Climate Change

Switzerland ratified the Paris Agreement in 2017. Its nationally determined contribution (NDC) “is to reduce its greenhouse gas emissions by at least 50 percent by 2030 compared with 1990 levels, corresponding to an average reduction of greenhouse gas emissions by at least 35 percent over the period 2021–2030.” Long term, Switzerland aims to reduce its greenhouse gas (GHG) emissions to net zero by 2050.

Switzerland has implemented its climate policy and international commitments in several statutes:

Federal Act on Climate Protection Goals, Innovation and Strengthening Energy Security (the “Climate Act”)

The Climate Act was adopted by the Swiss electorate on 18 June 2023 and will come into force

on 1 January 2025. The statute has three major objectives:

- the reduction of GHG emissions and the use of negative emission technologies;
- adaptation to and protection from the effects of climate change; and
- directing financial resources towards low-emission development that is resilient to climate change.

The Confederation must ensure that Switzerland achieves its net zero GHG emissions target by 2050 by reducing emissions, and using negative emission technologies in Switzerland and abroad to offset any remaining emissions. In other words, after 2050, the amount of CO₂ removed and stored must exceed the remaining emissions. The Climate Act sets forth the first post-2030 targets for GHG emissions reduction as follows:

- over the years 2031–2040: by at least 64% on average;
- by 2040: by at least 75%; and
- over the years 2041–2050: by at least 89% on average.

The Climate Act provides for reduction benchmarks for the building, transport and industry sectors, and allows the Federal Council to set specific reduction benchmarks for other sectors, for GHGs and for emissions from fossil energy sources. The Federal Council must consider the latest scientific findings, technological advancements and EU developments. The reduction targets must be technically feasible and economically viable. As far as possible, they must be achieved through emission reductions in Switzerland. The Climate Act further stipulates that all companies must achieve net zero emissions by 2050, considering at least direct and indi-

rect emissions. Finally, the Confederation must ensure that the Swiss financial centre makes an effective contribution to low-emission, climate-resilient development.

Federal Act on the Reduction of CO₂ Emissions (the “CO₂ Act”)

The first CO₂ Act was enacted in 1999 and revised in 2011 (the “second CO₂ Act”) to implement Switzerland’s GHG emission reduction commitments under the Kyoto Protocol for the first and second commitment periods (2008–2012 and 2013–2020).

On 16 September 2022, the Swiss government adopted the dispatch on the third CO₂ Act to implement Switzerland’s obligations and voluntary commitments (NDC) under the Paris Agreement for 2025–2030. The Swiss parliament is currently debating the bill. To avoid regulatory gaps until it comes into force, the Swiss parliament extended the validity of certain measures from the second CO₂ Act.

In the dispatch, the Federal Council expressed its intentions to implement reforms of the EU emissions trading system (ETS) into the Swiss ETS. However, with regard to the EU CO₂ border adjustment mechanism (“CBAM”), the Federal Council decided in June 2023 that for the time being, it would not introduce such mechanism, due to foreign trade risks and the uncertain cost-benefit ratios. The Federal Council plans to closely monitor the introduction and implementation of the EU CBAM and reassess the situation in mid-2026.

Energy Act

The strategy to decarbonise the energy supply, which was initiated more than a decade ago, is making very slow progress in Switzerland. The main challenge is the medium- to long-term

phasing out of nuclear energy, which currently still accounts for a good third of Switzerland’s electricity production. The increase in new capacities – in the form of photovoltaics, wind power and hydropower – required to replace nuclear energy is not happening at the required pace. In particular, this is also due to the excessively long approval procedures.

All of this results in a hectic legislative pace. On 26 September 2023, the Swiss parliament passed the Federal Act on a Secure Power Supply with Renewable Energies, which, among other things, provides for new subsidies, but is also intended to favour the expansion of photovoltaics outside the building zone and the rapid implementation of selected large-scale hydropower projects. Furthermore, the Federal Council submitted a proposal to parliament in July 2003 to speed up approval procedures, which parliament will now discuss in the coming months.

Federal Environmental Protection Act (The EPA)

The EPA of 7 October 1983 aims to protect people, animals and plants, their biological communities and habitats, against harmful effects or nuisances, and to preserve the natural foundations of life sustainably, especially biological diversity and the fertility of the soil. Air pollution, noise, vibrations and radiation are limited by measures taken at their source (limitation of emissions as much as technology and operating conditions allow, provided that this is economically acceptable). The issue as to whether GHG emissions also qualify as harmful effects or nuisances within the meaning of the EPA, and are hence subject to reduction obligations, is being debated among legal scholars and has not yet been adjudicated by the courts.

The EPA also provides for incentive taxes on volatile organic compounds, the sulphur content of extra-light heating oil, and the sulphur content of diesel and petrol. The revenue from these taxes is distributed to the population through reduction of health insurance premiums.

2030 Agenda

Switzerland has aligned its sustainable development strategy with the United Nations 2030 Agenda for Sustainable Development (the “2030 Agenda”) adopted on 25 September 2015, and regularly reports to the UN on the implementation of the Sustainable Development Goals (SDGs).

In 2018, the federal government carried out a comprehensive baseline assessment of the status of implementation in Switzerland of the 17 SDGs and the 169 sub-targets of the 2030 Agenda, covering all federal policy areas and taking into account both Switzerland’s domestic and foreign policy contributions.

The Federal Council has adopted several action plans to implement the 2030 Agenda in all areas of the SDGs, set forth priority topics, formulate guidelines for federal policy and establish targets for the period up to 2030.

The cantons and municipalities have adopted their own sustainable development strategies in their areas of competence.

Diligence and Reporting Obligations

In recent years, several new transparency and diligence obligations have been enacted:

Reporting on non-financial matters (Article 964a et seq of the Swiss Code of Obligations, the “CO”)

Companies that meet certain criteria must prepare a report on non-financial matters, covering environmental matters (in particular, but not exclusively, CO₂ goals), social issues, employee-related issues, respect for human rights, and measures to combat corruption. The first report for the first full business year of 2023 must be published and submitted for approval in 2024.

Listed companies and institutions supervised by the Swiss Financial Market Supervisory Authority (“FINMA”) are subject to said obligation provided they have, in two successive financial years, together with their Swiss and foreign affiliates, at least 500 full-time equivalent positions on annual average and exceed at least a balance sheet total of CHF20 million, or sales revenues of CHF40 million.

The report must describe in particular the company’s business model; its policies relating to non-financial matters including the due diligence it follows; the measures taken to implement these policies and their effectiveness; the main risks (especially those related to its own business and, where relevant, to its business relationships, products or services) concerning non-financial matters and how the company addresses these risks; and the key performance indicators for the company’s activities relating to non-financial matters. The report must specify if it relies on national, European or international regulations, such as the OECD principles.

On 1 January 2024, the Ordinance on Reporting on Climate-Related Matters will come into force. It specifies the reporting obligations on climate-related matters as part of environmental matters, pursuant to Article 964b CO. The ordinance

implements the recommendations of the Task Force on Climate-Related Financial Disclosures (“TCFD”).

The report must be prepared in one of Switzerland’s national languages or in English. It must be approved and signed by the company’s supreme management or governing body (in a corporation: the board of directors) and be approved by the company’s governing body responsible for approving the annual accounts (in a corporation: the general meeting of the shareholders). The report must be published online immediately following such approval and must remain publicly accessible for at least ten years.

Deliberate false reporting, according to Article 964a and b CO, deliberate failure to create the required reports, and deliberate non-compliance with record-keeping obligations can lead to criminal prosecution and the imposition of a fine of up to CHF100,000. In the case of negligence, a fine of up to CHF50,000 is possible (Article 325ter of the Swiss Criminal Code, the “SCC”).

Due diligence and transparency obligations in the supply chain (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 minerals containing tin, tantalum, tungsten or gold or metals from conflict-affected and high-risk areas; or
- 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 these obligations. The companies subject to the due diligence and reporting obligations must, among other things, maintain a management system stipulating the supply chain policy and a supply chain tracing system, and publish an annual due diligence obligations compliance report. The supreme management or governing body must ensure that the report is published online within six months of the end of the financial year and that it remains publicly accessible for at least ten years. The first report, as per Article 964j et seq CO, applies to the business year starting on 1 January 2023, and must be published in 2024.

The sanctions under Article 325ter SCC mentioned above also apply to violations of reporting obligations according to Article 964j CO.

Alignment With EU Law

The personal and material scope of the due diligence and transparency duties under Swiss law is currently more limited than the new EU Corporate Sustainability Reporting Directive (CSRD) and the proposed EU Corporate Sustainability Due Diligence Directive (CSDDD). Swiss companies operating within the EU must conform to these EU regulations under certain conditions. In September 2023, the Federal Council defined key parameters in order to align Swiss law with EU developments. As in the EU, companies with 250 employees will need to report on non-financial matters, and external audits will be required. Unlike in the EU, companies in Switzerland will have the option to choose their reporting standards and may opt for standards other than the European Sustainability Reporting Standards (ESRS).

Transparency obligations in raw material companies (Article 964d et seq CO)

According to Article 964d et seq CO, companies subject to an 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, must prepare a yearly report on the payments they have made to state bodies. The report covers any payments of CHF100,000 or more in any financial year made to state bodies in relation to business operations in the mineral, petroleum, or natural gas extraction industry, or to the harvesting of timber in primary forests. The report must be written in a Swiss national language or in English and be approved by the company's highest management or administrative body. The report must be published online within six months of the end of the financial year and must remain publicly accessible for at least ten years. Wilful violation of these obligations is subject to criminal prosecution (Article 325bis SCC).

Further transparency obligations

Further transparency and disclosure norms include:

- an equal pay analysis reporting obligation for public sector employers and listed companies with 100 or more employees (Article 13a et seq of the Gender Equality Act);
- a gender-quota reporting obligation for listed companies (Article 734f CO);
- transparency obligations regarding climate-related financial risks for the largest banks and insurance companies (FINMA Circulars 2016/01 and 2016/02); and
- an “opt-in” opportunity to publish an annual sustainability report for companies listed at SIX Swiss Exchange (Article 9 of the Directive

on Information Relating to Corporate Governance).

Companies may also voluntarily submit to so-called soft-law ESG commitments that arise from instruments adopted by international or Swiss public or private bodies (eg, the UN Guiding Principles on Business and Human Rights; the OECD Guidelines for Multinational Enterprises; 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).

Sustainable Finance

The financial sector plays a crucial role in promoting the integration of ESG factors globally, and “making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development” is one of the Paris Agreement’s goals. The Swiss government has increasingly focused on sustainable finance in recent years and has published various reports and action plans on this topic.

The report “Sustainable Finance in Switzerland: Areas for Action for a Leading Sustainable Financial Centre, 2022–2025” (16 December 2022) outlines 15 measures to strengthen Switzerland’s position as a global leader in sustainable finance for the period 2022 to 2025. These measures span four action areas: sustainability data from all sectors of the economy; financial sector transparency; impact investments and green bonds; and pricing pollution.

Sustainable Enterprises

In May 2023, B Lab Switzerland released a white paper entitled “Sustainable Entrepreneurship in

Switzerland: the Opportunity for a New Legal Framework”. It proposes to create a voluntary “sustainable enterprise” status, open to businesses that commit to adhering to a comprehensive and recognised set of focus areas, ranging from environmental and climate management to equal opportunities and health and well-being.

According to B Lab Switzerland, this proposal would help Switzerland achieve its 2030 Agenda goals and strengthen Switzerland as a primary location for sustainable entrepreneurship and sustainable finance. This proposal has gained momentum within the Swiss parliament and the Federal Council considers it an interesting approach that deserves attention. It will be comprehensively assessed when specific details are available, focusing on legal and economic implications.

ESG Litigation and Enforcement

In recent years, Switzerland has seen an increase in ESG litigation and enforcement cases related to climate issues. These cases are based on various legal grounds and span different areas of the law.

Landmark cases

In 2016, the association KlimaSeniorinnen Schweiz, which regroups elderly women, and four women who complain of health problems that worsen during heatwaves, undermining their living conditions and overall health, submitted a request to the Federal Council and federal agencies highlighting various deficiencies in climate protection. They urged the authorities to take all necessary actions to meet the 2030 goals set by the 2015 Paris Agreement. The request was based on the Swiss Federal Constitution and Articles 2 and 8 of the European Convention on Human Rights (ECHR). All instances ruled that the action was inadmissible due to the plain-

tiffs’ lack of standing. On 26 November 2020, the plaintiffs filed an application against Switzerland before the European Court of Human Rights (ECtHR), alleging a violation of Articles 2, 6, 8 and 13 ECHR. In spring 2021, the case was granted priority status, and it was heard by the Grand Chamber on 29 March 2023. Other climate cases were heard during the same week. They deserve special attention, as for the first time in the context of climate change, the ECtHR was asked to rule, among other things, on the standing to bring a complaint (who is a victim of climate change?), the protection offered by Article 2 ECHR (right to life), and what positive obligations states must fulfil to protect human rights in relation to climate change.

Another landmark case is the one pending in the Zug courts against Holcim AG. Four inhabitants of the Indonesian island of Pari, supported by three NGOs – HEKS/EPER (Switzerland), the European Center for Constitutional and Human Rights (ECCHR), and WALHI (Indonesia) – sued Holcim AG in July 2022. The plaintiffs argued that Holcim is the largest cement producer in the world, that cement production worldwide contributes 17% of direct industrial GHG emissions, that Holcim contributes (for its part) 0.42% of the global CO₂ emissions and that, according to Holcim’s own sustainability report, its CO₂ emissions have increased. They alleged further that climate change contributes to the rising sea level that threatens their existence and economic prosperity. Based on Article 28 CC (protection of personality rights), and Articles 41 and 49 CO (liability for tort), the plaintiffs request Holcim to pay proportional compensation for climate change-related damages on Pari; to reduce its CO₂ emissions by 43% by 2030, and by 69% by 2040, compared to 2019 levels (or according to findings of climate science, in order to limit

global warming to 1.5°C); and to make a financial contribution to adaptation measures on Paris.

Greenwashing cases

Greenwashing cases have been on the rise over the last two years. They are based primarily on the Federal Act on Unfair Competition (the “FUCA”). The most prominent case at this stage is the one against FIFA. On 5 June 2023, upholding complaints filed in 2022 by various NGOs, the Swiss Commission for Fair Trading (SCFT) considered that FIFA violated various regulations, including Article 3(1)(b) FUCA – which prohibits inaccurate or misleading information – by alleging that the 2022 Football World Cup in Qatar was climate neutral when it could not prove it.

Following the ruling against FIFA, in July 2023, the Consumer Protection Foundation filed 11 complaints against eight companies, including Coca-Cola Switzerland, Hipp, and Swisscom for making alleged misleading “green” claims in their advertisement. Three complaints were filed with the SCFT, and eight with the State Secretariat for Economic Affairs (“SECO”).

Although the SCFT cannot issue sanctions but only recommendations, the naming and shaming effect of its decisions cannot be underestimated.

Criminal prosecutions and court rulings

Finally, climate-related acts of civil disobedience have led to criminal prosecutions and court rulings. Swiss public prosecutors have initiated criminal proceedings against climate activists who, through various kinds of actions (such as road blockades, sit-ins, occupations, etc), aimed to urge the Swiss government to meet its commitments under the 2015 Paris Agreement. The protest actions have also targeted private entities, such as large Swiss banks, to draw attention to the banks’ investments in fossil fuel sources. The activists, who often consider themselves “civil disobedients”, typically plead not guilty and invoke justificatory defences such as the necessity defence, available under the SCC. So far, the Swiss Federal Supreme Court has rejected such defences. Some activists have filed applications to the ECtHR against these decisions. The applications are currently being examined in Strasbourg.

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