Getting the "G" Right: Managing ESG Litigation Risk

Key Take-aways

1. ESG regulation in Switzerland remains in flux, increasing legal uncertainty and risk exposure for Swiss companies.
2. ESG litigation has emerged as a material and multifaceted risk under Swiss law.
3. Robust corporate governance is key to effectively mitigating ESG litigation risks and safeguarding corporate value.

1. Introduction

Environmental, social and governance ("**ESG**") litigation has emerged as a material risk factor for companies, with tangible financial, reputational, and strategic implications. ESG actions, omissions and statements (such as those included in annual or sustainability reports as well as in mandatory non-financial disclosures) are increasingly exposed to **public scrutiny**. ESG litigation (particularly where pursued strategically) is often coupled with communication strategies, giving rise to significant **reputational risks**. These eventually translate into **financial exposure**, in the same way as damages and fines for non-compliance with ESG regulation.

Effective management of such ESG litigation risk starts with **corporate governance**. While governance ("G") is commonly described as the third pillar of ESG – covering issues such as corruption and money laundering – it is first and foremost the structural backbone underpinning effective environmental ("E") and social ("S") compliance.

Given that ESG-related litigation risks remain significant, they must be taken seriously. A preventive, forward-looking approach based on effective governance, rather than a purely reactive one, is key to identifying potential exposure early and mitigating legal, regulatory, and reputational risks before they materialize. Against this background, this newsletter provides an overview of selected ESG regulation and ongoing reforms in the European Union ("**EU**") and in Switzerland, before outlining key ESG-related risks for Swiss companies and discussing defense strategies, focusing on good governance.

2. ESG regulation: not in retreat – but in flux

According to the Allianz Risk Barometer 2025, changes in legislation and regulation pertaining to new ESG requirements are perceived as the third highest corporate risk in Switzerland, only surpassed by cyber incidents and natural catastrophes. The risk posed by changes in legislation and regulation stems both from legislation passed in the EU and Switzerland.

After months of intense negotiations, the EU formally signed off on the final text of the "Omnibus I" package in mid-December 2025. This package significantly reshapes the Corporate Sustainability Reporting Directive and the Corporate Sustainability Due Diligence Directive ("**CSDDD**"). The approved text, which will enter into force twenty days after its publication in the Official Journal of the EU, introduces sweeping changes, including a narrower scope of application for EU and non-EU companies; simplified and reduced reporting obligations; a risk-based due diligence approach; the removal of mandatory climate transition plans; and the abolition of a harmonized civil liability regime.

Thus, although the so-called "Omnibus I" package is new legislation and introduces far-reaching regulatory changes, it also represents, to some extent, a move toward deregulation whose implications extend well beyond the EU. Swiss companies within scope will be directly affected, and the revised EU framework is likely to shape future amendments to Swiss ESG regulation. Nevertheless, ESG regulation overall at EU level is here to stay and will continue to impact Swiss companies going forward.

As outlined in more detail in a previous newsletter, Art. 964a et seq. of the Swiss Code of Obligations ("**CO**") impose reporting and due diligence obligations on in-scope companies across three areas:

- **Reporting obligations on non-financial matters** (Art. 964a-c CO; further specified by the Climate Reporting Ordinance), i.e., environment, social issues, human rights, anti-corruption;
- **Reporting obligations for commodity companies** (Art. 964d-i CO) regarding payments made to government agencies in connection with the extraction of minerals, crude oil, natural gas, or timber from primary forests;
- **Due diligence and reporting obligations regarding conflict minerals and child labor** throughout the supply chain (Art. 964j-l CO, as further detailed in the Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labor).

False reporting or a failure to report may lead to **criminal sanctions** and **substantial fines** (Art. 152, Art. 325bis and Art. 325ter of the Swiss Criminal Code; Art. 3 Para. 1 lit. x in connection with Art. 23 of the Swiss Unfair Competition Act).

Previously announced **revisions** to the reporting and due diligence provisions in Art. 964a et seq. CO and the Climate Reporting Ordinance – temporarily paused to ensure coherence with reforms at EU level – are now expected to be finalized by spring 2026 and January 2027, respectively.

At the same time, in January 2025, the so-called "Coalition for Corporate Responsibility" launched a **new Responsible Business Initiative**, following the narrow rejection of the original initiative in 2020 and the subsequent adoption of an indirect counterproposal introducing the above-mentioned reporting and due diligence obligations under the CO. The new Responsible Business Initiative is largely inspired by the CSDDD – the scope of which has since been significantly curtailed by the Omnibus reform – and would, if adopted, impose more stringent rules on Swiss companies than those currently applicable at EU level. The Swiss Federal Council is expected to present an indirect counterproposal by the end of March 2026.

Taken together, these developments underscore that ESG regulation in Switzerland is not receding, but remains in a **state of flux**, with the new Responsible Business Initiative in particular introducing additional regulatory pressure points for Swiss companies and leaving them exposed to ESG-related risks.

3. ESG litigation: a multifaceted risk landscape

ESG litigation is characterized by its complex and **heterogeneous nature**, including with respect to:

- **Legal bases**: civil, administrative and criminal law, as well as non-binding standards, guidelines and principles such as the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct and the United Nations Guiding Principles on Business and Human Rights;
- **Substantive scope**: environmental and climate, human rights and labor rights as well as corruption, money laundering, and broader corporate governance claims;
- **Litigants**: for example, shareholders, employees, consumers, NGOs, governments;
- **Dispute resolution mechanisms**: judicial state-based enforcement and non-judicial, quasi-judicial and company-specific grievance procedures.

Furthermore, ESG litigation does not necessarily derive from ESG-specific regulation as such. Rather, litigants seek to leverage pre-existing legal pathways to address perceived gaps in corporate accountability. ESG regulation may, however, reshape and reinforce these pre-existing legal pathways.

ESG litigation is pursued globally, and **Switzerland is no exception**. Under Swiss law, companies face **a broad range of liability risks** arising from ESG-related communications, actions or omissions. These risks are illustrated by the following (non-exhaustive) cases that have recently attracted significant attention and media coverage:

- **Exposure to criminal liability ("E")**: criminal complaint filed by the Foundation for Consumer Protection against a helicopter flights provider for advertising its helicopter flights as "environmentally friendly" (outcome unknown);
- **Exposure to civil liability ("E")**: civil lawsuit filed by several inhabitants of the Indonesian island of Pari against the Swiss cement manufacturer Holcim for the company's climate impacts, which the competent court of first instance has already declared procedurally admissible;
- **Exposure to administrative or regulatory action ("E")**: Complaints filed with the Swiss Commission for Fairness against FIFA in response to its 2022 World Cup carbon neutrality claims (upheld);
- **Exposure to quasi-judicial procedures ("S")**: Complaint with the Swiss OECD National Contact Point filed by over 50 farmers against the Swiss agrochemical company Syngenta for alleged poisoning caused by the pesticide "Polo" requesting financial compensation and prevention measures to avoid futures cases (mediation conducted; no mediated solution achieved).

These examples underscore that ESG litigation risks extend well beyond isolated cases and can target any business or company. Legal tactics are increasingly shared across jurisdictions which further amplifies these risks, underscoring the need for companies to monitor developments not only domestically but also internationally.

In addition, a particularly relevant trend to watch out for concerns liability risks for false or misleading environmental claims, commonly referred to as **greenwashing**. As of 1 January 2025, Art. 3 para. 1 lit. x of the Swiss Unfair Competition Act provides that a person acts unfairly if they make environmental impact claims about themselves, their goods, works or services that cannot be substantiated on the basis of objective and verifiable criteria.

Finally, much attention is currently focused on "E"-related litigation, and in particular, "holy grail" cases. However, the net should be cast wider: "**G"-related litigation**, including, prosecutions of companies on grounds of corruption or money laundering, as well as shareholder disputes, by far predate environmental (and social) claims and continue to represent a significant source of risk for companies.

4. Governance: "G" as the third pillar of ESG and the backbone of "E" and "S"

4.1 Embedding ESG across the organization

To be effective, ESG considerations must be embedded across corporate structures, processes and decision-making powers. This is precisely where governance comes into the spotlight and provides solutions. Effective governance includes allocating clear responsibilities, ensuring appropriate expertise at all relevant levels, and establishing internal reporting and escalation channels. ESG risks cannot be managed in isolation or confined to individual functions; avoiding organizational bottlenecks is essential.

Only on this basis can a company meaningfully map its ESG litigation risk landscape and consolidate relevant information, including reporting and due diligence obligations, within a coherent reporting architecture. Avoiding organizational silos where ESG-relevant information is fragmented or not escalated is critical.

4.2 Governance as litigation risk mitigation

Well-designed governance systems do not only support the realization of ESG objectives; from a litigation perspective, robust governance frameworks serve a dual function. First, they reduce the likelihood of ESG-related breaches by embedding compliance, escalation and oversight mechanisms across the organization. Second, where disputes arise, governance systems can provide critical evidence that a company acted with the required due diligence. To be effective, however, such systems must not only exist on paper but be properly implemented, monitored, and enforced across the entire group and supply chain. Swiss parent companies should therefore exercise reasonable care in appointing, instructing, and supervising subsidiaries and other entities within their global value chain, and to ensure compliance with applicable ESG standards.

4.3 Key governance measures for non-financial reporting

In the context of non-financial reporting obligations, the following governance elements are particularly relevant:

- **Documented data collection and aggregation processes**, with built-in quality controls and plausibility checks;
- **Clear allocation of responsibilities**, supported by documented sign-off requirements at relevant levels;
- **Independent verification** by external auditors provides additional quality checks;
- **Defined materiality thresholds**, aligned with the statutory scope under Art. 964a et seq. CO;
- **Clear delimitation of scope**, e.g., through concordance tables distinguishing statutory from voluntary disclosure;
- **ESG speak-up and whistleblowing mechanisms**, enabling early identification and remediation of ESG-related concerns;
- **Structured approval processes**, ensuring sufficient time and oversight at management, Board and shareholder level;
- **Informed decision-making by the Board**, on the basis of documented explanations of the quality assurance measures applied.

Footed on a risk-based approach, i.e., prioritizing measures according to risks, and implemented consistently, these measures can significantly reduce litigation exposure under Swiss non-financial reporting rules.

Ultimately, it is the board that is best placed – and indeed required – to drive this integration. In that sense, it is good governance (the "G" in ESG) that remains the most credible and effective safeguard against ESG litigation risk.

We will provide further guidance on how to implement effective governance measures in further newsletters.