1 INTRODUCTION
Under international law, the primary obligation to protect human rights is on states. However, in recent years, civil society has increasingly called for companies to be held to human rights standards. The debate on this issue led to the adoption, in 2011, of the United Nations Guiding Principles on Business and Human Rights (UNGPs, see section 2.1 below). This marked a turning point in the attitude of stakeholders towards the issue of corporate social responsibility for human rights violations.

More and more states have started implementing business and human rights policies and discussing legislative and regulatory measures in that area. Businesses themselves are increasingly aware that showing respect for human rights, and implementing robust policies and processes to identify, prevent or mitigate adverse human rights impacts, are relevant to investor relations, brand management, access to finance, and may help avoid exposure to the risk of litigation and reputational damage.

2 INTERNATIONAL STANDARDS
2.1 UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS
The UNGPs were developed by the UN Special Representative John Ruggie and unanimously endorsed by the UN Human Rights Council in June 2011. While the
UNGPs are not legally binding, they are recognised as the authoritative global standard on business and human rights. They consist of 31 principles implementing a “three pillars” framework, according to which: (i) the state has a duty to protect against human rights abuses by third parties; (ii) businesses have a responsibility to respect human rights in their activities; and (iii) victims are entitled to access to effective remedy.

According to the UNGPs, businesses can discharge their responsibility to respect human rights by:

> conducting due diligence to identify actual and potential adverse human rights impacts;

> embedding a policy commitment to respect human rights into business operations; and

> having processes in place to remedy human rights issues which arise.

To date, 19 states (of which 15 within Europe, including Switzerland) have published national action plans on business and human rights (NAPs) setting out their policies for implementing the UNGPs. NAPs may include proposals for legislative and other regulatory measures, but may also consist of non-binding guidance, recommendations and initiatives.

2.2 OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES
In 2011, the OECD added a new dedicated chapter on human rights to its Guidelines for Multinational Enterprises, which are recommendations by governments to multinational enterprises operating in or from adhering countries. The new chapter on human rights explicitly adopted the due diligence process of the UNGPs as its standard for what companies should do to avoid and mitigate involvement in human rights impacts, both for their own activities and in their business relationships.

2.3 FURTHER TRENDS
There have been a number of further developments at the international level with the aim to encourage and assist States and enterprises in developing and implementing corporate social and human rights strategies, e.g. the UN Global Compact, the Global Reporting Initiative, and the Council of Europe Recommendation CM/Rec(2016)3, to name but a few.

In 2014, the UN Human Rights Council adopted a resolution calling for the elaboration of a legally binding treaty on Business and Human Rights. The process towards adoption of such an international treaty may take several years yet.

“The UNGPs are recognised as the authoritative global standard on business and human rights.”

3 DEVELOPMENTS IN THE EU AND ABROAD
3.1 EU NON-FINANCIAL REPORTING DIRECTIVE
In 2014, the European Parliament adopted Directive 2014/95/EU which lays down the rules on disclosure of non-financial and diversity information. Relevant companies will be required from 2018 onwards to include non-financial statements in their annual reports. These statements must address, inter alia, the companies’ human rights impacts and policies. With a view to facilitating implementation, the European Commission published guidelines on non-financial reporting in June 2017.

The rules apply only to public-interest companies with more than 500 employees. About 6,000 companies and groups across the EU currently meet those criteria. The Directive may also be relevant for large Swiss public-interest entities (such as insurance companies or banks) whose subsidiaries operate in the EU.

Most Member States have already enacted legislation to implement the Directive. Some laws provide for the possibility of monetary sanctions in case of a failure to comply with the non-financial reporting requirements.

3.2 NATIONAL LEGISLATION
A few States have adopted further specific legislation in relation to business and human rights:

> The UK Modern Slavery Act 2015 requires certain large UK and non-UK businesses to release reports on steps taken to consider the risks associated with suspected human trafficking or coerced labour in their businesses and throughout their supply chains.

> The French Loi de vigilance adopted on 27 March 2017 requires large French companies to establish an annual “vigilance plan” setting out the measures that they will take to prevent, inter alia, the violation of human rights in their own activities as well as in those of their subsidiaries and throughout their supply chains. The French law goes farther than the EU Directive, imposing a compulsory duty of care and compelling companies to plan for and carry out affirmative action. Companies that fail to publish plans and comply with them may be ordered to do so by courts in decisions that can be made public. They may also be required to compensate victims who have suffered as a result of non-compliance.

Swiss companies with subsidiaries or activities in the UK and France should be mindful of the new legislation, even if they are not directly subjected to it, as it is indicative of the standards applicable in those countries.

4 MAIN DEVELOPMENTS IN SWITZERLAND
4.1 NAP
The Swiss Federal Council issued a NAP for the implementation of the UNGPs on 9 December 2016.

The NAP focuses on the duty of the state to protect human rights and provide access to remedy. It contains a “smart mix” of instruments aimed at ensuring that Swiss companies operating in Switzerland and abroad respect human rights, but does not foresee the establishment of any legally binding requirements for companies. The Federal Council has indicated that it expects Swiss companies to implement human rights due diligence and non-financial reporting processes even in the absence of a legal obligation to that effect.
4.2 RESPONSIBLE BUSINESS INITIATIVE

On 11 March 2015, the Swiss National Council, by a narrow margin, rejected a parliamentary motion that sought to establish a legally binding human rights and environmental due diligence requirement for Swiss businesses. One month later, a coalition of NGOs launched the Responsible Business Initiative (RBI). The required signatures were collected and the RBI was submitted to the federal authorities on 10 October 2016.

The Federal Council published its official message on the RBI on 15 September 2017, recommending that the initiative be put to the vote without any direct or indirect counter-proposal. It recognised the fundamental goals of the RBI, but considered that the initiative goes too far.

In essence, the RBI would require Swiss companies to respect human rights not only in their activities in Switzerland, but also in their activities abroad and to ensure that companies under their control do the same, the notion of “control” being a factual rather than legal one.

The RBI would also introduce a mandatory due diligence requirement in relation to both human rights and environmental risks. Companies would have to identify impacts, take measures to prevent or put an end to violations and include these issues in their annual reports. The due diligence requirement would apply not only in relation to the companies’ own activities and those of controlled entities, but also to all business relationships in their supply chain. The interests of small to medium enterprises would be taken into account when implementing the due diligence requirement.

A further critical aspect of the RBI is that is proposes to hold companies liable for damages caused by a company within their control, unless they can show that they fulfilled their due diligence duty.

The initiative is currently being examined by the Parliament, which will decide whether it wishes to agree to or reject the RBI, and/or make a counter-proposal. The initiative will then be put to popular vote. Irrespective of the outcome, it is advisable for Swiss multinationals to consider the potential exposure that this and the further developments outlined above could bring.

“The Responsible Business Initiative would introduce a mandatory due diligence requirement in relation to both human rights and environmental risks.”

5 REQUIREMENTS AND EXPOSURE FOR SWISS BUSINESSES

5.1 NON-FINANCIAL REPORTING

As yet, Swiss law does not provide for any binding obligations to report on human rights impacts and related issues, but Swiss companies may nevertheless be required to disclose non-financial information based on existing legislation [e.g. art. 961cd(d) of the Code of Obligations, “CO”] or due to their activities abroad. Moreover, the Swiss government has stated its intention to propose legislation that would align with the EU Directive.

For companies seeking to voluntarily comply with the UNGPs reporting standards, there are a number of initiatives and tools available that can be of assistance, in particular the Global Reporting Initiative and the UNGPs Reporting Framework.

5.2 DUE DILIGENCE

There is no specific duty of due diligence in relation to human rights risks under Swiss law. However, the existing duty of care of company directors [art. 717(1) CO] could be held to encompass a corporate social responsibility component requiring multinational enterprises to consider human rights impacts. The RBI, if adopted, would introduce a specific human rights due diligence duty for companies as such.

5.3 CIVIL LIABILITY

As there is no explicit due diligence duty of companies in relation to human rights risks under Swiss law, there is also no specific civil liability on that basis. However, that is not to say that such a liability could not be construed based on existing legal principles and tort provisions.

Swiss companies should also be aware of the potential extraterritorial reach of foreign legislation. In some cases, victims of corporate human rights abuses can seek redress in a jurisdiction that is neither the place where the wrongdoing occurred nor the seat of the defendant.

5.4 CRIMINAL LIABILITY

In recent years, there have been several criminal investigations, both in Switzerland and elsewhere, launched against companies for failure to respect human rights in their international activities – e.g. for alleged sourcing of raw materials plundered from a conflict zone.

Companies whose activities bring them into contact with areas of armed conflict are particularly at risk of being the target of criminal investigations and may wish to consider implementing measures to ensure compliance with international standards and thus minimise their exposure.

5.5 REPUTATIONAL RISK

Companies often view reputational damage as the biggest risk related to human rights issues. Experience shows that it can be difficult to restore a company’s reputation once it has been tarnished by allegations of human rights violations (irrespective of whether they prove true).

Again, a simple awareness of the issues related to human rights impacts, and the implementation of policies when risks are identified, can go a long way to preventing such situations from occurring.

6 CONCLUSION

There is a clear trend towards increased transparency and accountability for businesses in relation to the human rights impacts of their international activities. This is mirrored in a growing body of soft law, but also in initiatives aiming to introduce binding due diligence and reporting obligations.

Swiss companies that operate in a complex and multinational context should seek guidance as to the rules
and standards that might apply, both in Switzerland and abroad, and should not underestimate the **risk of exposure** in case of non-compliance. They may also benefit from voluntarily implementing pro-active human rights policies – and indeed many of the largest companies worldwide have already done so.

The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please contact your Schellenberg Wittmer liaison or any of the following persons:

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