

Zeitschrift: Swiss review : the magazine for the Swiss abroad
Herausgeber: Organisation of the Swiss Abroad
Band: 47 (2020)
Heft: 5

Artikel: An uncomfortable issue for multinationals
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DOI: <https://doi.org/10.5169/seals-1033038>

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An uncomfortable issue for multinationals

Should Swiss companies be liable for human rights abuses or environmental violations that they have caused in other countries? Yes, according to the Responsible Business Initiative that was submitted in 2016. After years of political horse-trading, voters will give their verdict on 29 November.

THEODORA PETER

In Zambia, sulphur fumes at a copper mine cause respiratory diseases among the local population. A quarter of all children in the Australian mining town of Mount Isa have excessively high levels of lead in their blood. In both cases, responsibility for the harmful emissions lies with businesses in which the Swiss mining company Glencore has a majority stake. At times, emissions at the Zambian copper mine have been significantly above the accepted levels set by the World Health Organization (WHO). One of the smelters in need of upgrade has now been shut down by the Glencore-owned company operating the plant. Glencore say that they have already done a lot to cut pollution overall. In Australia, the company also paid for television adverts showing the local population how to clean contaminated dust from their homes. Critics

say that Glencore are merely treating the symptoms, not the cause.

Other Swiss mining companies also regularly come under fire for their business models. For example, raw gold processed at Swiss refineries may potentially come from dubious mines where working conditions violate human rights (see "Swiss Review" 3/2019 for more details).

The initiative "for responsible companies – protecting human rights and the environment" (Responsible Business Initiative) is backed by an alliance comprising 120 relief agencies as well as churches, trade unions, and environmental and human rights organisations, all of whom want Swiss-based multinationals – potentially around 1,500 companies – to be held more accountable.

They say that companies should not only be bound by due diligence, but should also be liable for damage

that they or any of their subsidiaries have caused as a result of human rights abuses or environmental violations. Specifically, victims should be able to seek redress in the Swiss civil courts. To escape liability, defendants would have to prove that they did everything within their power to exercise due diligence.

Hard bargaining in parliament

The initiative has alarmed businesses that see it as a threat to their global operations and commercial freedom. Yet polls show that the idea has significant public support. Parliament's search for a compromise proposal involved a considerable degree of horse-trading. The National Council wanted to meet the authors of the initiative halfway – satisfying their core demands by proposing new corporate liability requirements in company law.

But the Council of States blocked this, a majority of its members viewing the regulation as unnecessary and damaging for Swiss business. Ultimately, both parliamentary chambers agreed on a watered-down indirect counterproposal to impose reporting obligations, whereby companies would merely have to include details in their annual reports of how they carry out their duty of care. This arrangement is equivalent to the EU's accountability principle (see box). It would automatically come into effect if the initiative was rejected.

"Token counterproposal"

Dick Marty, co-chair of the Responsible Business Initiative, has called it a

Daily life in the Zambian town of Kankoyo, where people live directly adjacent to the Mopani copper mines.

Archive photo 2015: Keystone





Dick Marty believes that companies will only conform when human rights violations have consequences. Photo: parliament.ch

Andrea Gmür: the initiative tars all companies with the same brush and will lead to "extortionate lawsuits".

Photo: parliament.ch

"toothless token counterproposal". "As we all know, the worst culprits tend to be the ones with glossy company brochures," says the former state prosecutor of the canton of Ticino and former FDP member of the Council of States. Marty, who made a name for himself outside Switzerland as the Council of Europe's special rapporteur on human rights, believes that companies will only conform when human rights violations have consequences.

Opponents from the business community and the centre-right parties say that the initiative clearly overshoots the mark. Andrea Gmür, CVP member of the Council of States for the canton of Lucerne, is particularly concerned that the proposed changes would "reverse the burden of proof". Obliging companies to prove their innocence "contradicts the principles of

A banner supporting the initiative. The referendum campaign is sure to heat up on both sides of the argument. Photo: Keystone



the rule of law" and will lead to "extortionate international lawsuits". Tarring all companies with the same brush is unacceptable, says Gmür, who sits on the board of the Central Switzerland Chamber of Commerce and Industry.

The heat is on this autumn

The referendum campaign should heat up at the beginning of October, as soon as Switzerland's associations and political parties have digested the mammoth round of votes on 27 September (see "Swiss Review" 4/2020). In addition to support from the SP and the Greens, the initiative is backed by a civic committee consisting of members of all political parties. Volunteers from civil society have also established committees at local grassroots level to assist with the campaign effort.

Wealthy business federation Economiesuisse is running the No campaign. It wants to rectify the "unscrupulous" image of multinationals and highlight positive factors such as job creation in developing countries.

Due diligence in other countries

Since 2018, companies in the EU have been held accountable for how they exercise human rights and environmental due diligence. However, the European Commission is now looking to tighten the EU's applicable directive. There are also growing calls for the introduction of a law on supply chains, which would require a stronger commitment by companies to avoid contingent risk. At the end of 2019, the German government held out the prospect of a supply chain law after a voluntary action plan met with limited success. A "duty of vigilance" law has been in effect in France since 2017, establishing civil liability for the consequences of due diligence failures. Other European countries are planning legislation that would require companies to perform due diligence in accordance with the EU directive. In 2019, the UK Supreme Court decided to allow claims to be heard against companies with regard to human rights violations committed by subsidiaries of these companies abroad. (TP)

Responsible Business Initiative website: www.corporatejustice.ch

The No campaign: www.leere-versprechen-nein.ch