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DOSSIER POLITIK

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Solutions rather than Litigation

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Executive summary

The Responsible Business Initiative was launched by a broad alliance of more than 60 non-governmental organisations (NGOs) in April 2015. It calls for the world's strictest liability regulations for businesses to control non-compliance with human rights and international environmental standards. The new liability provisions would be unprecedented worldwide and result in a counterproductive "juridification" of the discussion around human rights violations and environmental protection. This would lead to far-reaching legal, political and economic problems. The Initiative is not the right instrument to address the social and ecological concerns of the people in the business cycle who are directly affected. The solution to social challenges lies in the mutual cooperation between companies, the government and NGOs, and in the establishment of "good governance" structures in newly industrialised and developing countries.

Positions of economiesuisse

- Companies and their management bodies are already accountable for their actions to national legislators and by reason of international obligations. Moreover, an established process to solve possible irregularities already exists: the NCP (National Contact Point) procedure at SECO (State Secretariat for Economic Affairs).
- With its extensive duties of care and rigid new liability standards, the Initiative also seriously impacts Swiss SMEs, both directly and indirectly.
- Developments in the field of human rights and environmental standards must be internationally consistent. A Swiss solo effort would damage the interest of the cause and be very detrimental to the attractiveness of Switzerland as an economic centre.
- An excessive extension of liability clauses would harm the "smart mix", transfer the constructive discussion about corporate responsibility to the courtrooms and stifle positive developments. This would be of little benefit to people and the environment.

Costly and Harmful Bogus Claims

→ The Responsible Business Initiative demands additional liability clauses for companies to include violations of human rights and environmental standards.

The Responsible Business Initiative was launched by a broad alliance of more than 60 non-governmental organisations and ecclesiastical institutions in April 2015. The Initiative demands additional liability regulations for companies in cases where human rights and international environmental standards are violated.

→ Companies and the government already have numerous instruments and processes to deal with social and ecological challenges.

The topics addressed by the Initiative – human rights and environmental standards – are noble and also in the interest of the business community. The publication "Corporate Social Responsibility from a Business Perspective" provides an overview of the existing measures adopted by companies, the instruments of the Swiss government, and current political developments at the national and international level.

→ Companies rely on a constructive dialogue with all stakeholders. The Responsible Business Initiative would harm this dialogue and result in a counterproductive "juridification".

Companies want a constructive dialogue and closer cooperation between all players – a goal that is also promoted by the UN. But this very approach is called into question by the people's Initiative. This is because the Initiative backs the wrong instruments to achieve genuine improvements benefitting humans and the environment.

SMEs are also affected

The name of the Initiative suggests that it is only directed against large group companies [1] . This is wrong for three reasons.

→ The Responsible Business Initiative affects large companies and SMEs. SMEs are directly included in the Initiative and not exempted from liability. The proposed relief for SMEs in the Initiative is of no relevance in practice. Supplier companies are also included indirectly because the duties of care are broadly formulated and encompass the whole value chain.

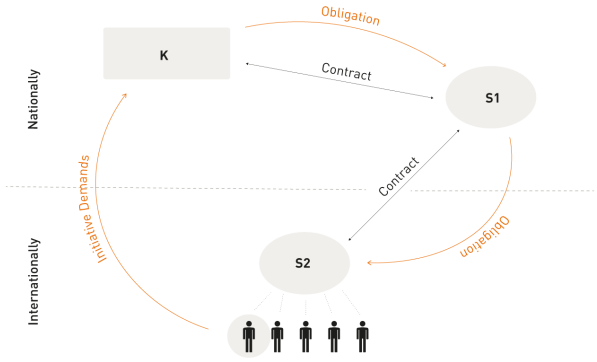
1. All companies, also small to medium-sized enterprises (SMEs), would be affected by the Initiative. It is true that the text of the Initiative says that the legislator would take into consideration the needs of small and medium-sized enterprises when regulating due diligence obligations. But SMEs are clearly also included in the liability obligations. For example, a Swiss SME might have an important supplier abroad that is dependent on it. The provisions of the Initiative would then apply directly to the SME.

2. The proposed relief should not detract from the fact that in practice it is destined to be dead letter. The broad wording of the duties of care ensures that smaller companies cannot afford to apply a less stringent liability standard than that of large companies, when considering the risk.

3. Even more comprehensive are the indirect consequences for SMEs that act as suppliers of international companies. A multinational company would have to pass the obligations it is subject to on to its suppliers in other countries and in Switzerland. This is because the Initiative stipulates a far-reaching duty of care that not only extends to the company itself but also to all its business partners in the value chain. A large company would hedge its liability risk with "back-to-back" [2] contracts. This ensures that the statutory "liability for consequences" is passed on to the supplier by way of contract. For SMEs the Initiative entails higher risk and a significantly higher administrative outlay. Numerous additional attestations of conformity would have to be provided, and clients would most probably have to monitor the new duties of care more strictly.

Figure 1

Assignment of Claims with Back-to-Back Contracts



Legend: The responsible business initiative obliges both large as well as small to medium enterprises, since every company would pass on all obligations it is subject to – nationally and internationally – to its suppliers to limit its own liability risk. Thus the statutory liability is contractually transferred to the supplier.

Source: own diagram 2017
www.economiesuisse.ch

Example 1: Company K obtains goods in Switzerland from Supplier 1 (S1). Supplier 1 in turn has a supplier (S2) in another country. K has no direct influence on the procurement procedures of S1. Based on the Initiative a claimant would now be able to sue K directly in Switzerland. To protect itself from this risk, K would pass on liability to S1 with a "back-to-back" contract. S1 would do the same in its relationship with S2, so that the latter legally assumes the entire liability of K, which is measured according to Swiss standards (court costs, lawyers' costs, and compensation). It is even questionable whether S2 can accept liability to such a degree.

Example 2: S2 is a small independent family firm with local production that solely supplies S1. The family at S2 works hard and similarly requires their staff to work with them under precarious working conditions. S1 has repeatedly asked S2 to improve the hazardous conditions, but it cannot do anything but threaten S2 that it would no longer procure the goods from them. K determines that procuring the goods from S2 has become too risky due to the associated liability risk, and decides to buy up S1 and S2, integrating the two suppliers inside the group (horizontal integration). The family receives compensation and the enterprise S2 becomes part of a large group company. As a result, monitoring throughout the whole supply chain is ensured in line with the spirit of the Initiative, but at the cost of ending the existence of small family-owned enterprises.

Principles of liability

→ **In Switzerland, a person is only liable when he/she causes damage intentionally or through gross negligence (principle of fault-based liability).**

Normally: no liability without fault

Swiss law follows the basic principle of "fault-based liability". This means that a person who unlawfully and culpably causes loss or damage to another shall bear liability [3] . Therefore the basic idea is that liability only exists when a wrongdoer him-/herself acts wilfully or negligently.

→ **An exception is "liability for consequences", which is not subject to fault.**

Exception: liability for consequences

There are exceptions to this principle. In some cases, no fault on the part of the person liable to pay damages is required, but there has to be a certain legal relationship between the liable party and the damage. The following examples show cases where this "liability based on causality" (strict liability) is applied.

In the case of **liability for animals** [4] , the keeper of the animal is liable for loss or damage caused by the animal unless he/she proves that he/she took all necessary care in keeping and supervising the animal. The type of proof depends on the specific circumstances.

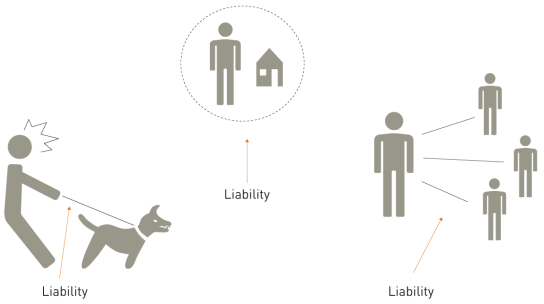
With **property owner's liability** [5] , the owner of a structure or property (e.g. a road or a house) is liable for damage caused by a defect in the property. The owner is only exempt from this liability if he/she proves that there was no defect.

In the case of **employer's liability** [6] , the employer or ordering party is liable for its ancillary staff. This applies even if he/she was not personally at fault. Generally, however, if the entity is an independent company, staff cannot be classified as "ancillary staff".

The employer may be released from liability if he/she proves that he/she took the care that was appropriate under the circumstances to avoid loss or damage. Duties of due care may include the necessary care in selecting ancillary staff, care in giving instructions and directives, care in the supervision, monitoring and control of the ancillary staff, and care in organising the work and the company.

Figure 2

Liability for consequences as exception



Swiss law follows the basic principle of «fault-based liability». In a few exceptional cases there is a liability independent of fault, but a certain legal relationship between the liable party and the damage is required.

Source: own diagram 2017
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→ **In these exceptional cases, the liable party has a realistic chance of preventing the damage or demonstrating that it is not at fault.**

All these types of liability for consequences are already obvious exceptions to the principle of fault-based liability. They all have in common that the loss or damage event entered the sphere of the person liable: The liable party realistically could have prevented the damage, or could gain relief if it can show that no fault can be attributed to the party itself.

Corporate responsibility in Switzerland for large companies

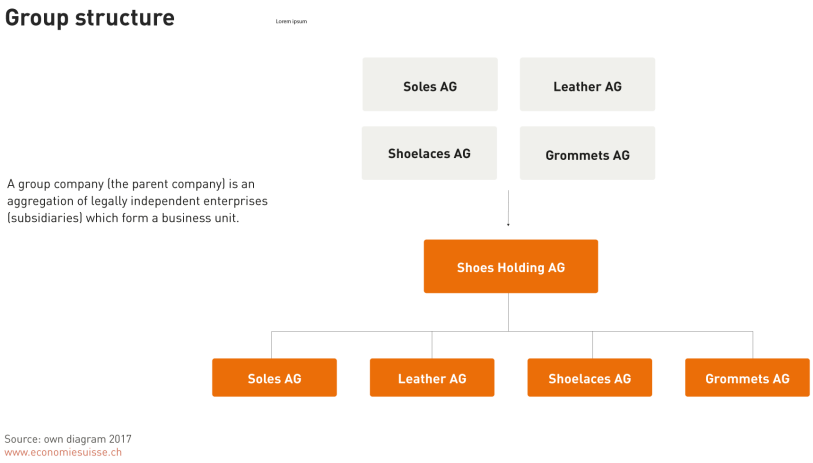
→ **Group companies consist of various legally independent enterprises.**

Definition of a large group company

From a legal standpoint, a group company is an aggregation of enterprises that form a business unit, where the entities retain their legal independence.

The Swiss Code of Obligations (SCO) describes the group company (indirectly) as a company that controls another undertaking [7] . In colloquial terms, one refers to a group as a parent company.

Figure 3



Source: own diagram 2017
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→ **In principle, a group is not liable for its subsidiaries.**

Well-developed solutions for liability in group structures

A group itself, i.e. the totality of its undertakings, cannot be liable [8] . Only the individual enterprises in the group and their administrative bodies (e.g. the board of directors) can assume liability. The parent company, as shareholder of its subsidiaries, in principle is not liable for their obligations [9] . In certain circumstances, however, the parent company may have to accept liability for the obligations of its subsidiary or subsidiaries in Switzerland.

→ **Exceptions to this rule may emerge in three types of cases, when administrative bodies of the group act unlawfully or raise false expectations.**

Liability based on a de facto role as administrative body: If the parent company performs tasks that lie within the responsibility of the management organs of the subsidiaries, it may be deemed to be a de facto administrative body and might thus have to accept liability.

Liability arising from "piercing the corporate veil": If the principles of corporate law are violated, the legal separation between individual independent companies within the group may exceptionally be pierced. This "piercing" occurs when the appeal to the presumed legal independence of the subsidiary seems abusive (known as "piercing the corporate veil" [10]).

Liability resulting from trust in the group company: The parent company may have to accept liability if it gave rise to certain expectations concerning the responsibility of the group that it did not live up to [11] .

→ **Companies are already liable and can be held responsible for damage. The parent company's duty of care also extends to the subsidiaries and applies throughout the group.**

Applicable due diligence provisions on human rights and the environment

Already today, the management bodies of Swiss companies are obliged to observe the provisions regulating human rights and the environment. Therefore, the parent company's duty of care also extends to the business transactions carried out by the subsidiary. If a Swiss parent company has de facto control over the business transactions of its subsidiary, it can already be sued and sentenced to pay damages in Switzerland.

The obligations of the topmost corporate management already apply to the whole group.

- The obligation to observe the strict standard of care prescribed by the Federal Court [12] .
- The duty to intervene [13] in the event of human rights violations in specific cases, and take countermeasures without delay.
- The obligation to identify the risk of infringements against the law and to set up a group-wide Internal Control System (ICS).
- The obligation to monitor the concrete management of business transactions throughout the group [14] . The companies are required to ensure Corporate Governance in general, and specifically compliance with the new Section 20 of the "Swiss Code" 2014.

→ **An expert report of the Swiss Federal Council confirms that the current Swiss corporate law is one of the strictest in the world.**

A report recently commissioned by the Federal Council [15] shows that no legal system comparable to that of Switzerland (particularly among the OECD countries) provides for a more thorough duty of care of the board of directors than that anchored in existing Swiss law. Yet the Initiative aims to go much further.

There are established procedures in case of abuse

The National Contact Point (NCP) is a platform that promotes the application of OECD guiding principles for multinational companies. An important function of the NCP is conciliating problems that arise between affected parties. In such cases, the NCP invites the parties to a round-table meeting, and also offers mediation services. This NCP procedure has many advantages compared to the use of purely legal instruments. For example, the parties involved can apply it without any financial risk or the need for extensive specialist knowledge. The procedure helps to avoid conflicts over jurisdiction. In Switzerland, the NCP has been placed within the SECO.

Additional information: https://www.seco.admin.ch/nkp

Weak points of the Initiative

→ **Companies contribute to the compliance with human rights and environmental standards. The companies are not the problem; they are rather part of the solution.**

Illusory notions of the initiators

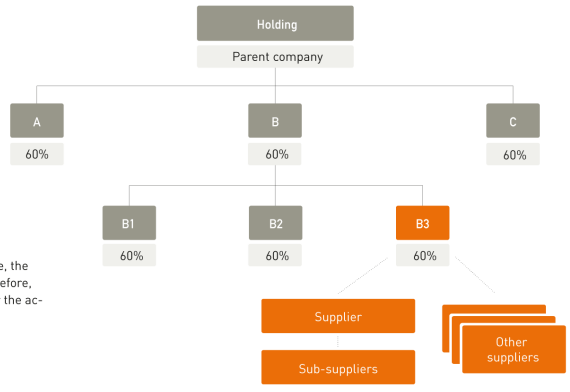
Swiss companies do not wilfully violate human rights and environmental standards. On the contrary: they do not only comply with the applicable laws but also follow European standards when operating in newly industrialised and developing countries. In doing so, they do not only create jobs, pay taxes and invest in local infrastructure but also indirectly convey values and standards in dealing with people and nature. This does not only take place via export, but also through their local presence and direct investments in those countries. Therefore, the business activities of group companies are not the problem, but are rather part of the solution for social and economic challenges (see box).

→ **Companies cannot replace the government. Their scope of action is limited. The idea that all abuses – including those outside the group organisation – can be prevented is illusory. If abuses are detected in the supply chain, companies try to stop them.**

Nonetheless, it has to be clear that it is primarily the duty of governments to ensure that human and environmental rights are respected [16] . The companies have no sovereign powers and no instruments of enforcement. Their scope of action is limited. It is also quixotic to assume that globally active companies – even those with the highest CSR standards – succeed in preventing all abuses at their suppliers. Their ability to influence suppliers and subcontractors is limited or entirely non-existent. Suppliers are independent companies under their own management. So they cannot be controlled in the same way as a business department that is fully integrated within the company (see illustration). Companies already take action against critical incidents in their supply chain and endeavour to prevent them. However, this may prove very difficult, especially in companies that operate outside the group structure.

Figure 4

Limited possibilities of influence



Legend: Outside the corporate structure, the companies' influence is restricted. Therefore, only limited liability can be assumed for the actions of suppliers and sub-suppliers.

Quelle: eigene Darstellung, economiesuisse
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Globalisation as opportunity

Switzerland's trading partners also benefit from globalisation and international exchange. The companies create jobs in developing countries, and invest in the

local economy. Knowledge and know-how is shared. Thus, Swiss companies contribute to the prosperity and welfare of other countries, and secure a livelihood for millions of people. This in turn significantly improves the living conditions in the countries in question. In this context, the former UN General Secretary Kofi Annan remarked: "It is the absence and not the presence of wide-ranging economic activities which is responsible for the suffering of a considerable portion of humanity." In a joint publication1 with SwissHoldings, economiesuisse has shown just how seriously Swiss businesses take their responsibility even now. They go to great lengths to ensure full implementation of Corporate Social Responsibility (CSR); for example, by striving to ensure that group companies and business partners (suppliers) act lawfully and with integrity. Swiss companies enjoy a very good international reputation in these areas in particular.

To the online dossier of economiesuisse
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→ **A "juridification" as stipulated in the Initiative would reduce corporate responsibility to purely formalistic and legal questions, and do a disservice to humans and the environment. Possible consequences are a withdrawal of companies from individual countries, or company buyouts.**

Objective with a counterproductive effect

The Initiative takes a one-sided approach in enforcing penalties for abuses, causing more harm than good for humans and the environment in the process. Implementing the Initiative would lead to a juridification of Corporate Social Responsibility. Today's innovative means of cooperation with NGOs and local groups (communities) would be reduced to purely formalistic and legal questions by the forcefully imposed new risk assessments. This means the Initiative would result in a decline of CSR measures, and may force some companies to withdraw from newly industrialised and developing countries under certain circumstances. It is also likely that local companies would have to be excluded from the value chain, forcing companies to resort to vertical integration. Multilateral companies would become more dominant in the medium term.

→ **An international solo action would weaken the country as a centre of business and be detrimental to its welfare. The Initiative would lead to legal imperialism, deprive other countries of their decision-making capacity, and undermine international cooperation.**

Dangerous international solo action

Legislative activities in Switzerland must always be seen in the international context. With regard to the competitiveness of companies in Switzerland the consequences are clear: the appeal of the country as a business centre would drop and significant economic costs would arise. International cooperation within the framework of the UN, the EU and OECD would also be affected. Efforts to create a global uniform standard would be undermined. Even more serious is the fact that the Initiative also prescribes instruments that to some extent reduce the decision-making capacity of other countries in the matters (similar to a form of legal imperialism).

→ **A tightening of the law to such a degree is not under discussion in any other country.**

Various states are currently issuing new legal provisions in the field of CSR. New CSR legislation has been passed in the EU and in some other countries. However, such far-reaching liability clauses and interventions in the legal system as found in the Initiative have not been proposed anywhere. The foreign regulations basically require the same actions as recommended by the voluntary agreements that are widely accepted in Switzerland [17] . But none of these legislative measures propose specific liability of companies in the event of violations of human and environmental

rights. Not even the revised recommendation of the Council of Europe goes beyond the UN Guidelines [18] .

Standards in the field of responsible corporate management
Governments, international organisations, NGOs and companies have developed various instruments in the area of CSR with the substantial involvement of Switzerland; for example, instruments relating to the duty of care and to reporting in the field of human rights and environmental protection. These instruments propose a combination of voluntarily assumed duties of the companies and directives issued by the government.

UN Guiding Principles on Business and Human Rights
The UN Guiding Principles provide an internationally recognised reference framework on how nations can guard against human rights violations in business activities, and how companies should respect human rights. They also regulate access to an institutionalised procedure before the National Contact Points (NCP).

Link to Guiding Principles on Business and Human Rights

The UN Global Compact
The UN Global Compact is a voluntary platform of companies and organisations initiated by the UN that supports their commitment in the field of sustainability and responsible corporate management. Businesses in Switzerland in collaboration with the SDC (Swiss Agency for Development and Cooperation) have recently expanded the National Contact Point to form a public private partnership.

Link to the Global Compact Network Switzerland
Link to the National Contact Point

OECD Guidelines for Multinational Enterprises
The OECD Guidelines contain recommendations from governments to companies; whereby the governments have undertaken to promote the same recommendations. To resolve disputes, a National Contact Point (NCP) was established in Switzerland and is managed by the State Secretariat of Economic Affairs (SECO).

Link to the OECD Guidelines for Multinational Enterprises

Numerous additional international instruments have been updated or newly created in the past few years. The tripartite declaration of principles concerning multinational enterprises and social policy of the international labour organisation (ILO) was updated; the standards of the International Organization for Standardization (ISO) were updated (in the field of environmental management, monitoring of greenhouse gases, and in reporting and eco-design); and the guidelines of the United Nations Conference on Trade and Development (UNCTAD/CNUCED) of 2008 were adopted as indicators of responsible corporate management in annual reports. Finally, the Global Reporting Initiative (GRI) developed guidelines for reporting sustainability, and makes them available to

large companies, small and medium-sized enterprises (SMEs), governments and non-governmental organisations (NGOs).

The regulation enjoys a high level of acceptance without requiring any compulsory enforcement, and despite the absence of legally binding effect it is directly applied in particular by companies in Switzerland, not least due to international "peer pressure".

→ **The competitiveness of Switzerland as a business centre for large group companies would be called into question, and the economic damage would be enormous.**

Enormous economic damage

Acceptance of the Initiative would be another blow to Switzerland as a business centre, with possibly serious consequences. Besides the legal uncertainty for all companies – also SMEs – it would call Switzerland's status as a business location for large group companies into question. If the Initiative were accepted, big companies could circumvent it quite easily by shifting their business activities to other countries. Everyone would then be affected since the group companies have a great economic impact that is often underestimated. About one third of all workplaces, tax revenue and the gross domestic product is generated from group companies with international operations [19] . This does not include the interactions between group companies and SMEs serving as suppliers and depending on their local orders.

→ **Die Initiative ist ein Etikettenschwindel, denn sie fordert weit mehr wie lediglich neue Sorgfaltspflichten.**

Insurmountable legal shortcomings

The Initiative demands the most massive intervention in the existing legal system and disregards fundamental principles of company, liability and private international law. Legally it goes far beyond anything found in the world today [20] . The Initiative demands much more than new duties of care:

- The Initiative demands that companies check and monitor human rights and international environmental standards ("Standards") throughout the entire value chain, which means down to every supplier. Although this aspect is of paramount importance to the Initiative's design, it is unclear which standards the Initiative actually refers to.
- The Initiative demands far-reaching liability provisions for companies if the Standards are not met. This liability extends to all companies that are "controlled" by a parent company in any manner, and here again it is not at all clear how far such controls would go.
- The Initiative proposes unconditional liability to the disadvantage of companies in Switzerland. They would be liable in all cases if they cannot prove that they monitor and implement the Standards throughout the whole international value chain (reversal of the burden of proof).
- Swiss courts would have mandatory jurisdiction over the legal enforcement, and Swiss law would stringently apply, not only for court proceedings, but also for contracts, encompassing the whole value chain (legal imperialism).

Juridification is an "own goal"

The Initiative is a feast for lawyers. Massive interventions in established company law, the extension of liability standards and unclear references to international

standards for finding mitigating evidence, as well as changes in relation to private international law create many uncertainties, which, at best, can be settled in long drawn-out legal disputes.

Numerous companies have expanded their CSR departments in the past few years. The purpose of these departments is to ensure that the company acts like a responsible enterprise. The persons in charge of CSR in the company keep a critical eye on the actions of their colleagues, advise the management and propose appropriate measures. If problems arise, they try to find solutions – often also in dialogue with NGOs or government offices.

The introduction of new liability provisions and the juridification of the subject of Corporate Social Responsibility would inevitably lead to a transfer of the topic from the CSR department to the corporate lawyers. The prevention of risk pushes out the effective search for solutions; dialogue is stifled. The corporate lawyers would examine whether there were untenable legal risks for the company in Switzerland. If these existed, it would be recommended that local factories be closed down or sold.

Deeper legal analysis

→ **Central provisions in the text of the Initiative are formulated in legally imprecise terms.**

Vague basis

The Initiative demands that companies be obliged to incorporate the protection of "internationally recognised human rights" and "international environmental standards" into all business procedures. In the field of human rights, there are a large number of international standards and agreements. The problem here is that these – when they actually refer to companies – are often formulated as recommendations, so there is an absence of legally precise language. When it comes to environmental standards, the legal fuzziness is even more apparent. There is no indication of which international standards the Initiative actually refers to.

→ **It is not clear how far the duty of care goes. This leads to an automatic liability within the whole supply chain – right down to the suppliers outside the group structure.**

Furthermore, the Initiative demands that the duty of care should also apply to "enterprises controlled by the company" in Switzerland and abroad [21] . It is completely unclear in legal terms how far such controls and duties of care would go, partly due to the differences in wording in the Initiative text [22] . This regulation results in an automatic de facto liability of the parent company for incidents along the supply chain. It is highly problematic that the duties of care extend beyond the enterprises controlled by the parent company, even to subcontractors that may be unknown to it.

The big sham: Companies must de facto assume liability always and for everything.

→ **Because it is impossible to control the entire supply chain, the Initiative would result in an extreme "liability without fault" for the parent company.**

Extreme liability without fault

The Initiative demands automatic liability without fault of the company, and creates new rights to file an action [23] . Companies are expected to assume liability for loss or damage that is caused by an enterprise under their control abroad "in the course of executing business transactions [24] ". Exoneration is not possible in practical terms because no company can prove that far-distant suppliers also comply with all the relevant standards. It is not possible to ensure control of the entire supply chain right down to the remote supplier of a supplier. Such an extension of liability would have far-reaching consequences and is tantamount to a paradigm shift in liability law. It would overturn the tried-and-tested Swiss company law and the liability of the group companies described above.

→ **The consequences are a paradigm shift in liability law, and in the duties of the tried-and-tested Swiss company law.**

The claims of the Initiative could even be interpreted to mean that the individual members of the board of directors of the parent company are made personally liable guarantors of the whole enterprise. According to this interpretation, they would even be liable if infringements of human rights or environmental protection occurred outside the group company's own controllable area.

→ **Exclusion of liability is only possible if companies set up a comprehensive system of monitoring and analysis, and issue instructions to suppliers.**

The companies are only free of liability if they can prove that they have considered the following points for all their controlled companies or suppliers with which they have some form of business relationship:

- The companies have to determine the actual and potential effects of the actions of the subordinate company on internationally recognised human rights and environmental protection.
- The companies must take suitable measures to prevent violations of internationally recognised human rights and international environmental standards (regardless of whether they are even allowed to impose such directives on their suppliers).
- The companies must end existing violations and report on the measures taken (again, regardless of whether they are even allowed to impose such instructions on their suppliers).

→ **Proof of compliance with the duties of care is not possible in practice. Therefore, a company is always liable, regardless of whether the duties of care were complied with, or not.**

In practice it is almost impossible to produce such evidence in relation to a company that is not directly controlled. With the lack of authority to impose instructions, there is also a lack of means to obtain the required information. However, the Initiative hazards the consequences that these uncertainties may disadvantage the company and benefit the claimant in litigations. The parent company in Switzerland would have to provide evidence on something for which there are no applicable standards, with regard to one of its suppliers abroad over which it cannot exert any influence in practice. This can only mean that the proof of exoneration is doomed to fail, so the parent company is always liable, whether it has complied with the duties of care, or not.

→ **The Initiative would replace the jurisdiction of the courts. Swiss law would take precedence. Compensation would no longer be obtained from the place where the loss or damage occurs.**

Legal imperialism and interference in the sovereignty of other countries

The Initiative asks that Swiss companies be sued in Switzerland for everything that happens anywhere in the world and has some remote connection to them. This would mean that the competence of courts in other countries has to be called into question by the courts in Switzerland. Legal actions would no longer be initiated at the place where the loss or damage occurs.

This would undermine international developments that aim to counteract precisely the propensity of jurisdiction and the place of loss or damage to drift apart. In the past few years, the jurisdiction of courts for global incidents has been limited in many countries (including Spain, Belgium and even the USA).

→ **The sovereignty of foreign states would be attacked, and their competence doubted (imperialism in court proceedings).**

The political message is also highly detrimental. The country that is actually competent would be told that its law is invalid and its courts do not have capacity to act. This is not only an affront but also represents a serious interference in the sovereignty of the nations in question. Instead of denying them jurisdiction to take up civil proceedings and drawing such cases into Switzerland, it would be much more effective to develop the court systems in the respective countries. Not only the people in developing countries, but also the international companies investing in them have a significant interest in maintaining a properly functioning, local legal system. Such a new type of imperialism in court disputes would result in a forced export of jurisdiction.

→ **The priority of Swiss law is not always in the interest of the foreign supplier.**

Precedence of Swiss law

The Initiative finally requires that the Swiss court must apply Swiss law in all cases [25] . But this is not always in the best interests of the local contracting party. At

present, the parties partly have a choice of law, since different legal systems may be applied. The parties therefore have to decide which legal system they want to use. If contracting parties intentionally or unintentionally fail to use the possibility of choosing a legal system, the law of the country which shows the closest connections to the contract, applies by default. This is usually the country where the seller or supplier has its registered office. This form of facilitation that normally benefits the supplier abroad, would also no longer be available to them according to the Initiative.

→ **It is forbidden to conduct official activities without authorisation on foreign territory. This would make it extremely difficult to obtain and evaluate evidence.**

Impossible expectations from international legal assistance

If a company domiciled in Switzerland could be sued for an incident at the other end of the world, this would create great difficulties for a court in Switzerland. Even now it is difficult to obtain and evaluate evidence in cross-border proceedings. A Swiss court is not permitted to undertake any evidence-collecting measures on foreign territory, because it is forbidden to conduct official activities outside Switzerland. Thus, for example, Swiss judges are not permitted to travel abroad for a legal inspection or interrogations [26] .

→ **International legal assistance would have to appoint precisely those foreign authorities who have been deprived of their decision-making ability and whose capacity has been called into question.**

It is true that the law of international civil proceedings offers two possible solutions for this situation. The judge in Switzerland can request the help of authorities abroad via the instruments of international legal assistance (letters of request). They can be asked to carry out legal proceedings or other official activities within their territory and communicate the results to the court in Switzerland. But this authority abroad would generally be the very court that is actually competent for the case, and the Swiss judge submitting the request would have to inform this court that it is not sufficiently competent to handle the case itself. It is easy to imagine how reluctant this court would then be to support the requesting court in Switzerland in the complex enquiries related to a case.

→ **Without the support of NGOs, a claimant in another country has almost no possibility of initiating legal proceedings.**

From the standpoint of the foreign claimant, as well, a lawsuit would be a great challenge. The claimant would have to submit a written complaint to the court in Switzerland, name all the evidence in detail, and provide proof of the damages in numbered sections. The claimant would hardly be in a position to do so – for linguistic or financial reasons. An NGO based in Switzerland would most probably have to step in.

The emphasis is on the spectacle before the court and its effect on the media

The "image of the enemy" evoked by the Initiative is based on the easily refutable charge that companies in Switzerland intentionally violate the principles of ethical business management. On closer inspection, it is clear that the Initiative does not focus on due diligence of companies in relation to human and environmental rights; that is at most a pretence. Instead, NGOs in Switzerland are given a means to hold proceedings in Switzerland against Swiss companies in the name of selected victims abroad with high-profile media results, thanks to an extension of the liability clause that would be unprecedented in the world.

The standpoint of economiesuisse

→ The Initiative does not benefit humans and the environment at all – quite the contrary. It is superfluous, counterproductive and dangerous.

The (Responsible) Business Initiative does not provide better protection for humans and the environment in any way, shape or form – quite the contrary. The Initiative not only focuses on the wrong place but also applies the wrong instruments. It is already possible for companies to be sued for damages. There are also established procedures to solve any abuses by means of dialogue. Additionally, the Initiative fails to recognise the great contribution that Swiss companies are already making to development and welfare. It is superfluous, counterproductive for human rights and environmental issues, and dangerous for Swiss business.

→ The Initiative makes multiple bogus claims and would lead to the extreme automatic liability of group companies as well as SMEs.

The Initiative makes multiple bogus claims. It alleges that companies are intentionally violating human rights and environmental standards. It also pretends to merely establish duties of due diligence and only affect group companies. None of this is true. The Initiative essentially demands an extreme, automatic liability without fault for all activities abroad, which would be unprecedented in the world. SMEs are also not exempt from such liability.

→ The Initiative violates fundamental principles of our legal system and leads to a form of legal imperialism.

The Initiative is formulated in very broad legal terms and therefore conceals numerous dangers. It violates fundamental principles of company, liability and private international law. It revokes decision-making capacity from newly industrialised and developing countries, and blocks their legal development. What is more, this legal imperialism represents an explosive political issue and would obstruct delicate foreign relations. The Initiative creates great uncertainty in Switzerland and undermines the properly functioning system of addressing conflicts via conciliation proceedings before the government-supervised National Contact Points.

→ The Initiative harms the region as a business centre. A Swiss solo action would have significant economic consequences.

The Initiative would directly and seriously damage the Swiss economy. Switzerland would lose its appeal as a centre for international enterprises, because the world's strictest liability clauses would be introduced. The economic consequences of this Swiss solo venture would also be extensive. The administrative burden on companies of all sizes would grow substantially.

→ The Initiative reduces corporate responsibility to purely legal questions. Constructive dialogue to solve social and ecological challenges is destroyed.

The threatened juridification of the social responsibility of companies shifts the discussion from a constructive search for solutions to the confrontational – into the courtroom. This is of no benefit to anyone. The situation for humans and the environment in various regions would certainly not improve if investments are withheld or companies from countries with much lower standards replace Swiss companies. Therefore, the Initiative would ultimately harm just those whom it allegedly is supposed to protect.

1. A primary source of information about the Responsible Business Initiative is www.konzern-initiative.ch.
2. For information on this (in English) see for example http://www.lexology.com/library/detail.aspx?g=d75e0cf3-eb8d-4ce5-b39a-13e7b9b4ec4e.
3. See Art. 41 (1) Swiss Code of Obligations (SCO).
4. See Art. 56 SCO.
5. See Art. 58 SCO.
6. See Art. 55 SCO.
7. See. Art. 963 (1) SCO.
8. See Peter V. Kunz in ZBJV 2012, 358 et seq., with further references.
9. Compare Art. 620 (2) SCO.
10. For this to apply, however, a) creditors of the subsidiary must have suffered loss or damage, b) the subsidiary must be governed by the parent company as its main or sole shareholder, and c) some unlawful activity must have taken place (for example, intermingling the assets of the parent company with those of the subsidiary).
11. For the requirements, see the "Swissair Decision", Swiss Federal Court Decision (BGE) 120 II 331.
12. See Art. 717 SCO.
13. BGE 97 II 411 .
14. See Art. 716a (1) clause 5 SCO.
15. Report on comparison of legal systems. Due diligence regarding human rights and the environment in relation to the activities of Swiss group companies abroad, 2 May 2014, at http://www.ejpd.admin.ch/content/dam/data/bj/aktuell/news/2014/2014-05-28/ber-apk-nr-d.pdf
16. This principle is also declared as such in the 1st pillar of the UN Guiding Principles on Business and Human Rights (Ruggie Principles). See http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
17. For example, the OECD Guidelines for Multinational Enterprises http://www.oecd.org/daf/inv/mne/48004323.pdf
18. Recommendation CM/Rec(2016)3 of the Committee of Ministers dated 2 March 2016: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad4
19. Facts and figures for Switzerland as a business centre of group companies (SwissHoldings): http://www.swissholdings.ch/fileadmin/kundendaten/Dokumente/Konzerne_in_der_Schweiz/Deutsch/facts-figures-konzernstandortschweiz.pdf
20. Report on comparison of legal systems. Due diligence regarding human rights and the environment in relation to the activities of Swiss group companies abroad, 2 May 2014, at http://www.ejpd.admin.ch/content/dam/data/bj/aktuell/news/2014/2014-05-28/ber-apk-nr-d.pdf
21. See Art. 101a Para. 1 lit. a of the Initiative.
22. See Art. 101a Para. 1 lit. a and lit. c of the Initiative.
23. "Companies shall in future also bear liability for the faults of their subsidiaries and of the firms controlled by them abroad. Therefore, victims of human rights violations or environmental destruction by Swiss companies could be sued for reparations in Switzerland." Source: http://konzern-initiative.ch/die-initiative/initiativtext/
24. See Art. 101a Para. 2 lit. c of the Initiative.
25. See Art. 101a Para. 2 lit. d of the Initiative. The human rights and environmental standards that are referred to would have to be fixed and reformulated at the national level, particularly so that they could be applied directly to companies and not just to the government. These standards would be unprecedented internationally and only found in Swiss law.

26. According to Art. 299 (1) of the Swiss Criminal Code (StGB) "Any person who violates the territorial sovereignty of a foreign state, in particular by conducting official activities without authorisation on foreign territory", commits a punishable offence. This clause gives expression to the general principle of international law that the sovereign rights of each country only extend to their borders. This means that on principle the authorities of a state cannot perform any sovereign activities outside their territory.