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Due Diligence and Supply Chain Regulation for Swiss Gold

A Stocktaking with a Perspective on
Possible Implications for
Artisanal and Small-Scale Gold Mining

Judith Schäli, Martina Burger, Elisabeth Bürgi Bonanomi

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Wyss Academy for Nature at the University of Bern, Kochergasse 4, 3011 Bern, Switzerland. info@wyssacademy.org

Centre for Development and Environment, University of Bern, Mittelstrasse 43, 3014 Bern, Switzerland. info.cde@unibe.ch

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Authors' Affiliations

Judith Schäli¹, Martina Burger², Elisabeth Bürgi Bonanomi¹

¹ Centre for Development and Environment, University of Bern
Mittelstrasse 43, 3014 Bern, Switzerland

² Wyss Academy for Nature, University of Bern
Kochergasse 4, 3011 Bern, Switzerland

Corresponding author: Judith Schäli

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Executive Summary

This report explores current regulatory developments in Switzerland and the EU in the area of gold production and trade. Specifically, the report focuses on supply-chain related due diligence obligations of Swiss-based companies and their potential effect on the artisanal and small-scale gold mining sector.

Key findings:

- When it comes to sustainability, supply chain due diligence and responsible sourcing, the narratives told by civil society on the one hand and the industry on the other differ significantly.
- To know whether their gold comes from conflict-affected or high-risk areas ('conflict gold') or has been produced involving child labour, 'downstream companies', such as refineries, must know the source of the gold they process and thus be able to trace the supply chain back to the gold extraction site. This *traceability* is provided via a so-called *chain of custody*, in which upstream companies pass information on to downstream companies (business-to-business), while maintaining commercial confidentiality.
- While supply chain due diligence and corresponding documentation must be audited independently, not all data must be *publicly accessible*. There is, however, an increasing demand for *transparency*, particularly with regard to the source of the gold and investigations into the mining conditions. There is currently no consensus on the extent to which international standards require disclosure in this regard.
- Traceability requirements have political implications, as they bear the risk of *excluding small producers from formal production and trade*.
- In Swiss law, but also within the gold industry in general, terms such as *country of origin* or *recycled gold* are used inconsistently, which complicates the collection and comparison of data and contributes to a conceptual vagueness. Traceability in relation to recycled gold is generally considered a particular challenge. There is a risk that gold that has not been responsibly sourced can be relabelled by additional refining or blending and marketed as recycled gold. A harmonised definition of recycled gold, which is linked to specific due diligence obligations, is expected to create more clarity and transparency in this area.
- In Switzerland, due diligence and documentation obligations arise on the one hand from the precious metals control and anti-money laundering legislations, and on the other hand from corporate law. Under the former, due diligence obligations of melters and traders are aimed at ensuring the legal origin of the gold, but do not require any clarification of environmental or human rights impacts of gold mining or trade. Under the latter, environmental and human rights related due diligence and reporting obligations are not subject to state control and provide for numerous exceptions.

- Stringent supply chain due diligence requirements bear the risk that companies may satisfy the criteria by abandoning high-risk suppliers or regions. The *ASGM sector is the most vulnerable* in this respect. While the problem is being addressed in various standards and initiatives, for example through the concept of continual improvement in performance, it seems clear that the route for ASGM gold sourced from illegal or unformalized mines into the international market is becoming more difficult with increasingly stricter due diligence obligations.
- While most laws and standards are based on compliance with national legislation, the EU has adopted a new generation of regulations that also take account of non-prohibited impacts such as deforestation.

List of abbreviations

AMLA	Anti-Money Laundering Act of 10 October 1997 (SR 955.0)
AMLO	Anti-Money Laundering Ordinance of 11 November 2015 (SR 955.01)
ASFCMP	Swiss Association of Manufacturers and Traders in Precious Metals
ASGM	Artisanal and Small-scale Gold Mining
ASGM DPP	Artisanal and Small-Scale Gold Mining Domestic Purchase Programme
BBl	Federal Gazette (<i>Bundesblatt</i>)
CDA	Customs Duties Act
CDE	Centre for Development and Environment
CGMF	Interdepartmental coordinating group on combating money laundering and the financing of terrorism
CMR	Conflict Minerals Regulation
CO	Swiss Code of Obligations (SR 220)
CoC	Chain of Custody
CoP	Code of Practices
CRMA	Critical Raw Materials Act
CSDDD	Corporate Sustainability Due Diligence Directive
CSRD	Corporate Sustainability Reporting Directive
CTA	Customs Tariff Act of 9 October 1986, SR 632.10
DDTrO	Ordinance of 3 December 2021 on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour (SR 221.433)
EPA	Federal Act of 7 October 1983 on the Protection of the Environment (SR 814.01)
ESRS	European Sustainability Reporting Standards
EU	European Union
EUDR	Regulation on Deforestation-free Products
FATF	Financial Action Task Force
FDF	Federal Department of Finance
FINMASA	Federal Act of 22 June 2007 on the Swiss Financial Market Supervisory Authority (SR 956.1).
FLR	Forced Labour Regulation
FOCBS	Swiss Federal Office for Customs and Border Security
FoIA	Federal Act of 17 December 2004 on Freedom of Information in the Administration (SR 152.3)
GDL	LBMA Good Delivery List
HS	Harmonized System
ILO	International Labour Organization
IOE	International Organisation of Employers

ISO	International Organization for Standardization
KYP	Know Your Counterparty
LBMA	London Bullion Market Association
LSM	Large-Scale Mining
NGO	Non-Governmental Organization
OEC	Observatory of Economic Complexity
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
PMCA	Precious Metals Control Act of 20 June 1933 (SR 941.31)
PMCO	Precious Metals Control Ordinance of 8 May 1934 (SR 941.311)
RJC	Responsible Jewellery Council
RGG	LBMA Responsible Gold Guidance
SCC	Swiss Criminal Code of 21 December 1937 (SR 311.0)
SECO	Swiss State Secretariat for Economic Affairs
SR	Classified Compilation of Swiss Federal Law (<i>Systematische Rechtssammlung</i>)
STP	Society for Threatened Peoples
UN	United Nations
VAT	Value Added Tax
WCO	World Customs Organisation
WEEE	Waste Electrical and Electronic Equipment

Introduction

While the mining and trading of gold provides a livelihood for millions of people,¹ it is often associated with the risk of human rights abuses, serious environmental damage, conflict financing, money laundering or other illegal activities.² Various countries and the EU have therefore adapted their legislation and increasingly require companies involved in gold trading to scrutinise their supply chains and identify and address the risks. The downstream industry itself is striving to improve its image and has introduced sustainability-oriented standards, some of which require full traceability of the processed gold and aim to minimise social, environmental, human rights and governance risks in the supply chain.

We aim to better understand how current regulatory developments in key consumer markets such as Switzerland *affect artisanal and small-scale gold mining (ASGM) and the access of respective producers to these markets*. To this end, this paper provides an overview of current regulations in Switzerland, seeking to assess whether they *enable or hinder* the sourcing of *responsibly mined ASGM gold* in the producing countries.

In the first Section, we look at Switzerland's role in the international gold trade and the role of gold in Swiss foreign trade. We analyse what data is collected by the customs authorities and is publicly available. The handling of *recycled gold* poses a particular regulatory challenge, which is why we address it specifically. As a stocktaking exercise, we then present the most important regulations in the areas of precious metals control legislation and anti-money laundering, as well as value chain-related environmental and human rights due diligence obligations (Section 2). To contextualise the regulations described, Section 3 adds a perspective on regulatory developments in the European Union (EU). In Section 4, we examine the role of private standards before summarising our key findings in a concluding section.

The *traceability* of gold from the consumer or investor back to the source, as well as the *transparency* of the value chain are two important elements in the ongoing debate about 'clean' or 'dirty' gold. The paper thus examines the extent to which regulations and standards require gold to be traced back to its source, and analyses transparency obligations under Swiss law, i.e. which data must be disclosed to whom.

The stocktaking is part of an inter- and transdisciplinary research project by the Wyss Academy for Nature and the Centre for Development and Environment (CDE) at the University of Bern on

¹ UNITAR and UN Environment, 'Handbook for Developing National ASGM Formalization Strategies within National Action Plans' (UNITAR and UN Environment 2018) 10.

² There have been numerous reports in the past about the problematic origin of 'legally' traded gold, including cases with a direct link to Switzerland. See, for example, Kathi Lynn Austin, 'The Pillage of Eastern Congo Gold: A Case for the Prosecution of Corporate War Crimes' (2013) Conflict Awareness Project Briefing Interim Report <https://www.stop-pillage.org/wp-content/uploads/2013/11/4-Nov-2013_Interim-CAP_Pillage-Report.pdf> accessed 8 December 2024; FATF and APG, 'Money Laundering and Terrorist Financing Risks and Vulnerabilities Associated with Gold' (2015) <<https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/ML-TF-risks-vulnerabilities-associated-with-gold.pdf.coredownload.pdf>> accessed 11 December 2024; François Mercier, 'Goldimport in die Schweiz: Mehr Transparenz und eine bessere Kontrolle sind gefragt' (Fastenofper 2023) <https://fastenaktion.ch/content/uploads/2023/03/2023-09-Rapport-or-MINEROS-ARGOR-HERAEUS-FINAL_de.pdf>.

ASGM. The research team seeks to find ways to foster the transition towards a more responsible model of ASGM, especially in the region of Madre de Dios in Peru. The aim is to ensure that miners and their communities achieve economic and social benefits, while negative impacts on the environment are minimized. We acknowledge that gold mining and trading plays an important economic role in regions such as Madre de Dios and can help to meet the basic needs of the local population. However, we assume that structural adjustments can significantly improve the protection of people and their health, as well as the environment, especially water bodies and forests.³ This working paper contributes to a better understanding of the structural adjustments required for long-term market access of ASGM gold as well as the *opportunities and risks that current regulatory developments entail* in this respect.

This legal stocktaking focuses on Switzerland and does not cover regulations in other markets such as the United States, China, India or the United Arab Emirates. It has moreover been carried out as a desk exercise. Current laws and regulations have been compiled and explained. However, their actual impact in practice has not been scientifically evaluated.

³ In the project, the terms ‘*responsible gold*’ and ‘*clean gold*’ are used in this sense. On the use of terms, see Martina Burger and others, ‘Are the Markets Ready for Responsible Gold from Artisanal and Small-Scale Miners? An Investigation with a Focus on the Swiss Market and Gold from the Amazon’ (Wyss Academy for Nature and Centre for Development and Environment, University of Bern 2025) Wyss Academy and CDE Report No 15 f.

1 The Swiss gold market

1.1 Switzerland's role in the global gold trade

Switzerland is a leading centre for international **gold trading** and was the world's largest gold importer and exporter in 2023 (see Figure 1).⁴ In the same period, gold was Switzerland's main import and export commodity by value and thus one of the major pillars of the country's foreign trade. The exact figures may vary depending on the source, and the different use of terminology or the comparison of different modalities (e.g. mixing of different tariff positions, gross and net weight, shares by weight or value) may lead to data inconsistencies.⁵ In the following, we rely on figures from the Federal Office for Customs and Border Security (FOCBS).

In 2023, Switzerland **imported** 2,372 tonnes of gold worth CHF 91 billion, which corresponds to 28% of total imports by value. Swiss gold **exports** amounted to 1,564 tonnes by weight and CHF 88 billion by value, which corresponds to 26% of total exports by value.⁶ The considerable price difference between imported gold (average price of CHF 38,460 per kilo in 2023) and exported gold (average price of CHF 56,217 per kilo in 2023) shows that a high level of value creation takes place in Switzerland. This can be attributed to Swiss **refining** activities: imports often comprise unrefined gold (doré bars) and bars with a lower purity, which are (further) refined by Swiss-based refineries and often exported as bars of highest purity.⁷ As home to four of the largest gold refineries in the world (i.e. Argor-Heraeus; MKS PAMP; Metalor; Valcambi Suisse), Switzerland plays an important role in global gold refining: According to the Swiss State Secretariat for Economic Affairs (SECO), about 34% of global gold production was refined or further refined in Switzerland in 2023, i.e. around 1,600 tonnes of approximately 4,700 tonnes.⁸ The proportion of total mined gold that was smelted in Switzerland is estimated at 11-16%.⁹

⁴ 'UN Comtrade' <<https://comtradeplus.un.org/>> accessed 14 December 2024; OrSuisse, 'Importing Gold into Switzerland' (21 July 2022) <<https://www.orsuisse.ch/en/further-information/gold-import-switzerland/>> accessed 14 December 2024.

⁵ See, for instance, SECO, 'Goldraffination in der Schweiz – Korrektur des in den Medien häufig falsch genannten Anteils der Schweiz' (*Stellungnahmen zu Medienbeiträgen*) <https://www.seco.admin.ch/seco/de/home/seco/stellungnahmen_medienbeitraege.html> accessed 16 December 2024.

⁶ FOCBS, 'Annual Report: Swiss Foreign Trade in 2023' (2024) 30. The figures only include gold in unwrought forms (for example gold bars) for non-monetary purposes (tariff number 7108.1200), but not jewellery or watch cases.

⁷ *ibid.*

⁸ Global gold production in 2023 comprised about 3,500 tonnes of legally mined gold and 1,200 tonnes of gold already refined, including bars and recycled gold: SECO (n 5).

⁹ *ibid.* cf CGMF, 'Report on the National Evaluation of the Risks of Money Laundering and Terrorist Financing in Switzerland' (2015) 98.

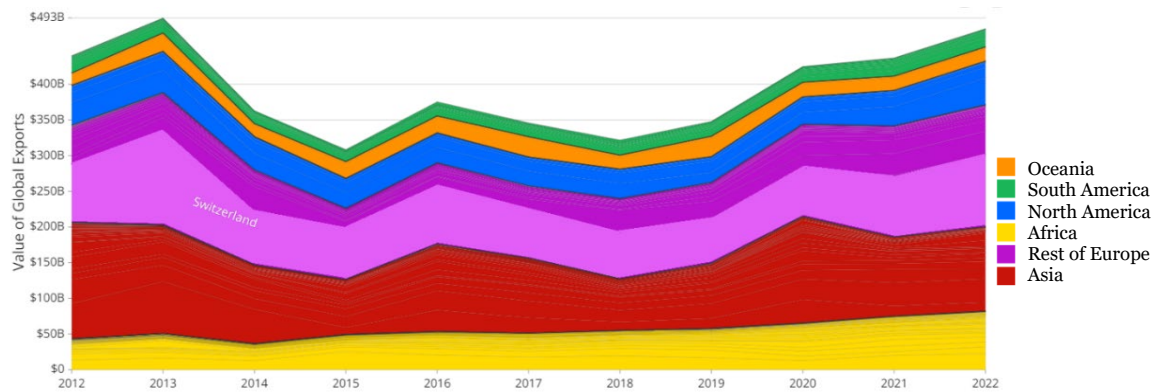


Figure 1: Value of global exports in gold. This chart by the Observatory of Economic Complexity (OEC) shows the development of market concentration in gold exports. The Swiss share is shown in light purple. The data is provided by the international trade database BACI, drawing on data from the United Nations Statistical Division (Comtrade dataset). *Source:* OEC, ‘Gold (HS: 7108) Product Trade, Exporters and Importers’ <<https://oec.world/en/profile/hs/gold%23market-dynamics>> accessed 15 December 2024.

1.2 Data collection by the customs authorities

Tariff lines

Gold is traded under different tariff headings.¹⁰ From a quantitative perspective, the most important tariff number is 7108.1200 for **gold in unwrought forms** (for example gold bars) for non-monetary purposes, which is traded by companies and private individuals. Further tariff headings of minor importance (not included in the statistics above) include those for gold powder (7108.1100); gold in semi-manufactured forms, including gold strips, sheets, wires, foils or tubes (7108.1300); **gold waste** and scrap used for recovery (7112.9100); and **monetary gold** (7108.2000), referring to gold traded among national banks or international monetary authorities and used as a financial asset within the framework of national monetary policy.¹¹ Gold can also be traded in the form of coins (7118.9000); watch cases (9111.1000) or straps (9113.1000); jewellery (7113.1900); or other goldsmith’s wares, including cutlery, tableware or jewellery boxes (7114.1900). **Gold ore** is traded under tariff heading 2616.9000.

To make the origin of gold more transparent, the FOCBS created import subdivisions for imports of the 7108.1200 category (i.e. gold bars etc. for non-monetary purposes) by means of statistical keys, which have been in use since January 2021. The subdivisions distinguish between **mined gold** and **refined gold** with varying degrees of fineness.¹²

Switzerland also advocated a corresponding amendment to the international customs duty classification, the so-called Harmonized System (HS), which will ensure a statistical distinction between mined gold and refined gold worldwide. It submitted a corresponding proposal to the

¹⁰ Annexes 1 and 2 of the Customs Tariff Act of 9 October 1986 (CTA, SR 632.10), accessible via <<https://xtares.admin.ch/tares/login/loginFormFiller.do>> accessed 2 December 2024.

¹¹ See FOCBS (n 6) 29.

¹² Key 911 for mined gold; keys 912/913 for refined gold with a fineness of at least 99.5%; key 914 for refined gold with a fineness of less than 99.5%.

World Customs Organisation (WCO) in September 2020, which is expected to be adopted in June 2025.¹³

The tariff lines distinguish between gold or gold products solely on the basis of physical properties, but not on the basis of the (il-)legality of their **source** or the way in which the gold was mined, produced or traded. Tariff data therefore cannot – so far – be used to collect statistical data on the exact source of the gold and the associated environmental, social and human rights impacts. This is also true for differentiation between gold from large-scale mining (LSM) and ASGM gold.

Traceability: country of origin vs. country of extraction

The distinction between mined gold and refined gold increases the transparency of gold imports to Switzerland.¹⁴ However, if one seeks to trace the origins of gold based on customs data, results remain limited. For *mined gold* that was not further processed in a third country, the country of extraction can be identified, but the precise location of extraction cannot be determined. In the case of *refined gold*, the **country of origin** as included in the customs data gives no indication of where the actual gold extraction took place. The term rather refers to the country in which the gold was last refined.¹⁵ This legal definition of the term ‘country of origin’ is based on an international standard and is common practice.¹⁶ For imports, the **country of dispatch**,¹⁷ which may be different from the country of origin, must be specified in the customs declaration, but is not shown in the Swiss-Impex database, which is publicly accessible.

In response to a corresponding interpellation of 15 June 2022, the Federal Council replied that it is not aiming at recording data on the **country of extraction** of imported gold, as this would distort Swiss foreign trade statistics compared to international statistics and would require a specific legal

¹³ The proposal was provisionally adopted by the HS Committee in 2022. According to information by the FOCBS of 4 December 2024, it will be submitted to the WCO Council in March 2025. Final adoption is expected in June 2025. In case of adoption, the changes of the HS will enter into force in January 2028. See SECO, ‘Raw Materials: Switzerland Calls for Greater Transparency in International Gold Trade’ <<https://www.bazg.admin.ch/bazg/en/home/news/media-information/press-releases.msg-id-80500.html>> accessed 14 December 2024.

¹⁴ Total import and export data are publicly accessible. Monthly imports and exports by commodity and country are available in the Swiss-Impex database: ‘Swiss-Impex’ <<https://www.gate.ezv.admin.ch/swissimpex/>> accessed 14 December 2024. Gold imports by subdivision (keys 911–14) and country are available on a separate website: ‘Imports by Gold Subdivision (from 01.01.2021)’ <https://www.bazg.admin.ch/bazg/en/home/themen/schweizerische-aussenhandelsstatistik/daten/waren/gold.spa.gold.app/gold_en.html> accessed 14 December 2024.

¹⁵ The country of origin is the country in which the goods were wholly obtained or manufactured or in which the last significant processing was carried out: see art 10(2) of the Ordinance of 12 October 2011 on Foreign Trade Statistics (SR 632.14).

¹⁶ See UN Department of International Economic and Social Affairs, ‘International Merchandise Trade Statistics: Concepts and Definitions 2010’ (United Nations 2011) Statistical papers Series M 52, ST/ESA/STAT/SER.M/52/Rev. 3 ch 6.6 p 48; Eurostat, *European Business Statistics Compilers’ Manual for International Trade in Goods Statistics - Detailed Data, 2024 Edition* (European Union 2024) <<https://data.europa.eu/doi/10.2785/603096>> accessed 4 December 2024 chs 8.4.2.3 and 8.4.3.3.

¹⁷ The country of dispatch is the country from which the goods were dispatched to the Swiss customs territory: see art. 10(3) of the Ordinance of 12 October 2011 on Foreign Trade Statistics.

basis.¹⁸ The supervisory authorities may, however, request further data within the scope of their responsibilities to ensure public governance (see Section 2). Such data is not necessarily accessible to the public. For instance, customs data on imports and exports *by specific companies* are subject to **tax secrecy** and may not be disclosed by the FOCBS pursuant to a Federal Supreme Court ruling (see Box 1 below).

Import and export data

In 2023, **mined gold** accounted for 27% of Swiss gold imports by value. By weight, most of the mined gold was imported from Argentina, Peru and Chile, while most gold by value was imported from Ghana and Burkina Faso. The average value per kilo varies depending on the degree of impurities. Mined gold from Africa usually has fewer impurities than gold from Latin America, which explains the price difference.

While the quantity of **refined gold** imported in 2023 is comparable to the gross weight¹⁹ of the imported mined gold, the imported refined gold makes up a larger proportion in terms of value: Refined gold with at least 99.5% of pure gold accounted for 70% of Swiss gold imports by value and mainly stemmed from the United Arab Emirates (CHF 8.7 billion),²⁰ the United States (CHF 12 billion) and Russia (CHF 3.5 billion). Gold with less than 99.5% pure gold accounted for 3%.

The data show that Switzerland imports significant quantities of gold from countries where no or very little gold is extracted, such as the United Arab Emirates. As the extracting country is not recorded in the customs data, the traceability of such gold is not apparent to the public, whether or not the refineries are in possession of the relevant data. Such imports have been criticised due to concerns that a potentially problematic origin of the gold could be concealed in this way, while the re-exported gold bears a Swiss quality label.²¹

Main **export destinations** include China, India, Turkey and Hong Kong. Exported gold is usually more refined, has a higher degree of purity and is significantly more expensive than imported gold.²²

Specific **trade data on ASGM gold** is not collected by customs. However, such data is sometimes compiled by private organisations as part of their certificate programmes (see Section 4 below) or by the refineries. The London Bullion Market Association (LBMA) reports 1% ASGM gold share of

¹⁸ See the Federal Council's response to Interpellation 22.3617 (Molina) of 15 June 2022 'Does Russian Gold Reach Switzerland on a Large Scale via Dubai?' <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20223617>> accessed 14 December 2024. cf Motion 19.4165 (Molina) of 25 September 2019 'Obligation to Declare the Origin of Gold' <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20194165>> accessed 14 December 2024.

¹⁹ Switzerland imported about 1,170 tonnes of mined gold in 2023 (gross weight, including impurities), which corresponds to an estimated net weight of about 400–550 tonnes: see SECO (n 5).

²⁰ Gold from the United Arab Emirates is imported for 'refining or other processing' (key 912).

²¹ See, for instance, Jorgos Brouzos, 'Die Schweizer Gesetzgebung reicht nicht aus' [2023] *Der Bund* 10; Swiss Federal Council, 'Goldhandel und Verletzung der Menschenrechte: Bericht Des Bundesrates in Erfüllung des Postulats Recordon 15.3877, 21.9.2015' 6 and 8 <<https://www.news.admin.ch/newsd/message/attachments/54473.pdf>> accessed 8 December 2024; Motion 19.4165 (Molina) of 25 September 2019 'Obligation to Declare the Origin of Gold' (n 18); Letter from the UN Office of the High Commissioner for Human Rights to the Swiss Government (2023) AL CHE 1/2023 <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27894>> accessed 20 January 2025.

²² FOCBS (n 6) 30 ff.

total production sourced by *Good Delivery List* (GDL) refiners in 2022. The biggest contributor of ASGM gold is Peru with 16,936 kg in 2022.²³

Box 1: Confidentiality of import data

In its ruling 1C_272/2022 of 15 November 2023, the Federal Supreme Court confirmed that the FOCBS may not provide the Society for Threatened Peoples (STP) with information on individual gold imports by the seven largest gold importers in the years 2014 to 2017. This information falls under the tax secrecy stipulated in the Value Added Tax Act²⁴ and is therefore excluded from the right to information under the Freedom of Information Act.²⁵

The STP wished to obtain full statistics on gold imports, with an indication of the quantities, broken down according to the name of the exporter and the name of the Swiss importer to whom the gold had been delivered, for the years 2014 to 2017. It invoked, among other things, a public interest in human rights, the environment, health and working conditions, and the denunciation of dubious and illegal activities.

In its ruling, the Federal Supreme Court takes the following points into consideration:

- The aim of the Public Information Act is to make the administration's decision-making process more transparent in order to strengthen the democratic nature of public institutions and public confidence in the authorities, while at the same time improving scrutiny of the administration (para 3). Access to data of private companies that are not closely related to an official activity is not the actual aim of the law (para 4).
- The public interest in transparency must be weighed against the protective purpose of special regulations on a case-by-case basis (para 3.1). Tax secrecy serves the public interest in the proper fulfilment of tax and reporting obligations and is a qualified secret (para 3.3). Within the scope of application of tax secrecy, there is no room for a balancing of interests as proposed by the complainant (para 3.6).
- Swiss foreign trade statistics on gold have been available via the Swiss-Impex database since 2012. They are broken down by year, country of origin for imports and country of destination for exports with values and quantities (para 3.6).
- With the revision of the Swiss Code of Obligations of 19 June 2020 by way of the counterproposal to the Responsible Business Initiative (see Section 2.2 below), new transparency regulations were introduced, the effectiveness of which and conformity with developments in EU law are the subject of a political debate. It is up to the legislator – and not the Federal Supreme Court – to make the necessary legal adjustments (para 3.6).
- In view of the very limited number of companies concerned, it is unlikely that redaction would ensure sufficient anonymity (para 3.7).

²³ LBMA, 'Sustainability & Responsible Sourcing Report 2024' (2024) 29 ff. <<https://cdn.lbma.org.uk/downloads/LBMA-SRS-Report-2024-Final.pdf>> accessed 8 December 2024.

²⁴ Federal Act of 12 June 2009 on Value Added Tax (VAT Act, SR 641.20).

²⁵ Federal Act of 17 December 2004 on Freedom of Information in the Administration (FoIA, SR 152.3).

1.3 The particular case of recycled gold

Recycled gold poses a particular challenge in terms of data collection as well as traceability of gold back to its source and associated due diligence obligations. Neither the term **'recycled gold'** nor the **concept of origin** in relation to recycled gold are used consistently, which is why data on recycled gold is sometimes difficult to interpret and cannot be easily compared with each other.

Customs do not collect data on the share of recycled gold in total traded gold. According to statistics by the World Gold Council, about 25% of the 2023 annual gold demand was supplied by recycled gold and 75% by mining.²⁶ Switzerland is a major source of recycled gold, especially for unprocessed recyclable gold (e.g. bullion bars, jewellery) and melted recyclable gold (i.e. rudimentary bars or other forms with varying levels of purity).²⁷ Some of the major Swiss refineries use up to 50% recycled materials.²⁸

As the recycling of gold, especially from high-value gold scrap, has considerably lower environmental impact than gold mining,²⁹ recycled gold is often **marketed as 'green' gold**. On the other hand, gold recycling is sometimes associated with an increased risk of greenwashing.³⁰ The *'origin'* of the recycled gold is often considered to be the point in the gold supply chain at which the gold is returned to the refinery or another downstream intermediate processor or recycler.³¹ This means that the original **source of the gold is usually unknown** and it can often not be ruled out that the recycled material may also contain gold from problematic sources, including conflict gold. Certificates for recycled gold therefore generally require full traceability (see Section 4 below).

The World Gold Council defines recycled gold as 'gold recovered from fabricated products, including unused trade stocks, which is refined back into bullion [...].'³² Jewellery – often referred to as high-value gold recycling – accounts for roughly 90% of the total supply of recycled gold. 10% of recycled gold stems from industrial recycling, primarily referring to gold found in waste electrical and electronic equipment (WEEE), such as computers, tablets and mobile phones. Investment bars and coins do not tend to be recycled. Jewellery and industrial recycling have different value chains. Gold recycling fluctuates with gold prices and economic conditions. According to the World Gold Council, recycling is a large, diffuse and **opaque market**. Estimates in this category come with more uncertainty and are more likely to be revised.³³

²⁶ See World Gold Council, 'Gold Demand Trends Full Year 2023' (31 January 2024) <<https://www.gold.org/goldhub/research/gold-demand-trends/gold-demand-trends-full-year-2023>> accessed 3 December 2024. See also Benjamin Fritz, Carin Aichele and Mario Schmidt, 'Environmental Impact of High-Value Gold Scrap Recycling' (2020) 25 *The International Journal of Life Cycle Assessment* 1930.

²⁷ LBMA, 'SRS Report 2024' (n 23) 32.

²⁸ See, for example, <<https://argor-heraeus.com/process>> accessed 15 December 2024.

²⁹ For a detailed description, see Fritz, Aichele and Schmidt (n 26).

³⁰ See for example Peter Oakley, 'Green Issues: Reflections on Ethical Gold' [2012] *The Goldsmiths' Company Technical Bulletin* 32.

³¹ LBMA, 'LBMA Responsible Gold Guidance Version 9' (2021) 6 <<https://cdn.lbma.org.uk/downloads/responsible-sourcing/Responsible-Gold-Guidance-Version-9-Final.pdf>> accessed 5 December 2024.

³² *ibid.*

³³ World Gold Council, 'Gold Market Primer: Gold Recycling' (2018) <<https://www.gold.org/download/file/9541/market-primer-gold-recycling.pdf>>; <<https://www.gold.org/download/file/8256/supply-and-demand-data-methodology-note.pdf>>.

The importance of recycled gold is likely to grow in the future: Since gold does not decay, nearly all the gold ever mined still exists in some form. Estimates suggest that the above-ground stock amounts to around 212,582 tonnes (end-2023). This stock comprises jewellery (~96,487t, 45%), investment (~47,454t, 22%), central bank holdings (~36,699t, 17%), and other fabrications (~31,943t, 15%, including unaccounted gold). The proven below-ground reserves only amount to about 59,000 tonnes.³⁴

³⁴ World Gold Council, 'How Much Gold Has Been Mined?' (2024) <<https://www.gold.org/goldhub/data/how-much-gold>> accessed 15 December 2024.

2 Swiss due diligence and supply chain regulation

The following section aims to highlight the due diligence obligations to which Swiss refineries and other companies involved in gold production and trading are subject. Due diligence and documentation obligations arise on the one hand from the precious metals control and anti-money laundering legislations, and on the other hand from corporate law.

2.1 Precious Metals Control and anti-money laundering regulation

Gold is subject to the Precious Metals Control Act (PMCA)³⁵ and the corresponding implementing ordinance (PMCO)³⁶. The PMCA contains quality requirements for gold and other precious metals and regulates trade in finished gold and plated articles as well as melt products and melt material. It also defines due diligence and documentation obligations for different actors involved in gold production and trade. Swiss precious metals legislation ensures that Swiss refineries do not process gold of fraudulent origin, but it does not contain explicit provisions on respect for human rights in production and along the supply chain.³⁷

Product-related marking and due diligence requirements

Regarding **finished articles**, the PMCA prescribes the use and registration of responsibility marks stamped together with indications on the fineness and serving to identify the **manufacturer** of a gold or gold plated article (arts. 7 and 9 ff. PMCA; arts. 46 and 58 ff. PMCO). Requirements as defined in the PMCA also apply to articles manufactured abroad that are placed on the Swiss market, provided that no state treaty provides for deviating regulations (art. 20 PMCA; art. 126 PMCO). Owners of gold articles can have the accuracy of the fineness and responsibility marks officially verified by an Assay Office and certified by its official hallmark (arts. 13 ff. PMCA; arts. 81 ff. and 108 ff. PMCO).

The commercial production of gold bars and other **melt products**, both from extracted and refined gold as well as from recycled (old) gold, is subject to authorisation (art. 24 PMCA). A prerequisite for a **melter's** licence is that the persons responsible be of good standing and offer proof of irreproachable business operations (art. 25 PMCA; arts. 165 ff. PMCO). Each melt product must bear the licence holder's mark (art. 31 PMCA; art. 169 PMCO). Melt products destined for resale

³⁵ Federal Act of 20 June 1933 on the Control of the Trade in Precious Metals and Precious Metal Articles (PMCA, SR 941.31).

³⁶ Ordinance of 8 May 1934 on the Control of Trade in Precious Metals and Articles of Precious Metals (PMCO, SR 941.311). See also Directive R-243: Instructions on the application of the Precious Metals Control Legislation (PMCI) 2024.

³⁷ Swiss Federal Council, 'Gold Report 2018' (n 21).

must be tested for their fineness, which must be indicated on each tested piece, and bear the stamp of an Assay Office or a trade assayer (art. 32 PMCA; 173 ff. PMCO).

Holders of a melter's licence are subject to **due diligence and documentation requirements** to ensure the legal origin of the melt material (arts. 168a ff. PMCO). Melt material may only be accepted from persons who can prove its lawful acquisition. Buyers must verify the identity of the customer, request information from the seller on the legitimate origin of the melt material and report any offences or suspicious transactions. To fulfil the required corporate due diligence, the Central Office recommends the creation of a five-step internal control system, which is based on the OECD Conflict Minerals Guidance (see Box 2 below).³⁸ Reference to international standards, such as the OECD Conflict Minerals Guidance, will be included in the PMCA with the ongoing total revision of the Customs Act,³⁹ provided that the current draft will be adopted by the parliament.⁴⁰

Marking requirements also apply to **imported gold**, even if a tightening of the requirements is currently envisaged to further impede trade in unmarked or inadequately labelled and untested melt products (e.g. raw gold, recycling bars).⁴¹ Determinations of the fineness made abroad are only recognised if they have been made by a recognised assayer/melter and if it can be proven that the same quality and due diligence requirements are met as apply to Swiss assayer/melters (art. 178 PMCO).

At present, only melt products from producers on the LBMA 'Good Delivery List' are accepted.⁴² If the planned draft revision is adopted, imported melt products will in future have to bear the hallmark of an assay office or the stamp of a trade assayer (or a recognized foreign assayer/melter) in addition to the licence holder's mark and indications on the fineness. Unlabelled melt products (e.g. doré bars) may only be imported by trade assayers subject to due diligence obligations under both the PMCA and the Anti-Money Laundering Act (AMLA)^{43, 44} Trade assayers must clarify the legal origin of the products as part of their due diligence obligations.

With the amendment to the AMLA⁴⁵ of 19 March 2021, a new control mechanism was introduced for the commercial purchase of old precious metals, such as **recycled gold**. To prevent monetisation of stolen goods through the trading of recycled gold and other melt material, persons who purchase such material on a commercial basis must comply with corresponding due diligence

³⁸ Directive R-247 of the Central Office for Precious Metals Control, Guideline relating to the application of the Precious Metal Control Act for holders of melter's and assayer licenses, 1 January 2023 ch 3.3.3; OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition* (OECD 2016) (cited as OECD Conflict Minerals Guidance).

³⁹ Customs Act of 18 March 2005 (SR 631.0).

⁴⁰ Art. 31(2) rev-PMCA as in Annex 2 of the Draft Federal Act on the General Part of the Levy and Control of the Cross-Border Movement of Goods and Persons by the Federal Office for Customs and Border Security (FOCBS Enforcement Tasks Act) and on the Total Revision of the Customs Act to the New Customs Duties Act (CDA), BBl 2022 2725. See also the respective Dispatch of 24 August 2022, BBl 2022 2724 362.

⁴¹ See art. 34a rev-PMCA as in Annex 2 to the Draft FOCBS Enforcement Tasks Act and Dispatch of 24 August 2022, 363 ff.

⁴² Directive R-247 ch 3.4.2.

⁴³ Federal Act of 10 October 1997 on Combating Money Laundering and Terrorist Financing (AMLA, SR 955.0).

⁴⁴ Directive R-247 (fn 38) ch 3.4.2. With the planned revision of the PMCA (see fn 40), this recommendation of the Central Office is to be explicitly included in the law (art. 34a rev-PMCA). The aim is to prevent actors who are not subject to state supervision from legally importing melt products.

⁴⁵ The amendment serves to implement a number of recommendations from the Financial Action Task Force's (FATF) mutual evaluation report on Switzerland.

and documentation requirements so as to ensure the legal origin of the purchased gold (art. 31a PMCA; arts. 172d f. PMCO).⁴⁶ The melting of recycled gold is subject to a melter's licence and respective due diligence obligations.

Commercial trading in **banking precious metals**⁴⁷ is only permitted for trade assayers and subject to a specific licence. To obtain a licence, trade assayers must provide prove of irreproachable business operations (art. 42^{bis} PMCA; arts. 29b ff. PMCO). Anyone who trades banking precious metals on a commercial basis is considered a financial intermediary (art. 2[2][g] AMLA)⁴⁸ and is subject to qualified due diligence obligations as defined in the AMLA and specified in a specific Ordinance by the FOCBS.⁴⁹ Depending on the level of risk of a specific business relationship or transaction, financial intermediaries must verify the customer's identity, establish the identity of the beneficial owner, clarify the economic background and the purpose of a transaction or of a business relationship, keep records of transactions and clarifications and take organisational measures to prevent money laundering and terrorist financing, including adequate training of staff (arts. 3–8 AMLA).

Compliance and enforcement

The Central Office for Precious Metals Control (Central Office), which is affiliated to the FOCBS, is the **licencing and supervisory authority** for trade in precious metals and precious metal articles under the PMCA (art. 36 PMCA; art. 4 PMCO). With the partial revision of the AMLA of 19 March 2021, which came into force in 2023, the anti-money laundering supervision of trade assayers was also transferred to the Central Office (art. 42^{ter} PMCA; art. 12[b^{ter}] AMLA). The Central Office must now ensure that trade in banking precious metals is not associated with money laundering and other forms of illicit financial flows.⁵⁰

To fulfil its supervisory duties and **monitor compliance** with due diligence and documentation requirements, the Central Office carries out sample testing of operations and business transactions via audits and material checks. The existence of an extraction licence can be an important element in the examination of a business case and may, along with other indicators, lead to a presumption

⁴⁶ Commercial purchasers of old gold who are entered in the Swiss commercial register must register with the Central Office. Those who are not registered in the Swiss commercial register require a purchase licence from the Central Office (art. 31a PMCA; art. 172a ff. PMCO).

⁴⁷ Banking precious metals are defined on the basis of their fineness and appearance (art. 178 PMCO). Regarding gold, they include ingots and granules with a minimum fineness of 995 parts per thousand. Ingots must comply with standard practice on the international precious metal market in terms of shape, size, weight and marks. Granules require packaging that is sealed by a recognised assayer or melter.

⁴⁸ cf art. 2(3)(c) AMLA in conjunction with art. 5(1)(a) and (e) of the Ordinance of 11 November 2015 on Combating Money Laundering and Terrorist Financing (AMLO, SR 955.01).

⁴⁹ FOCBS Ordinance of 11 October 2022 on Combating Money Laundering and Terrorist Financing in Banking Precious Metals Trading (AMLO-FOCBS, SR 955.023); Directive R-249 of the Central Office for Precious Metals Control, Guideline relating to the Anti-Money Laundering Ordinance-FOCBS including audit instructions, 1 May 2024.

⁵⁰ Commercial trading in *dorés* and other gold that is not of banking precious metal quality falls under art. 2(3) AMLA. In this case, the self-regulatory organisations are responsible for supervising compliance with the obligations under the AMLA.

of correct procedure.⁵¹ There is therefore **a risk** that melters, purchasers and trade assayers **will increasingly forego ASGM gold from non-formalised sources**, because they cannot produce the relevant licences for such gold.

For its supervising activities, the Central Office may obtain data from supervised persons (including their compliance dossiers), employers, or domestic and foreign authorities, among others. It may also use data that third parties bring to its attention (art. 34c PMCO). Special indications, such as relevant media reports, may trigger enquiries or investigations. The Central Office itself is supervised by the Federal Department of Finance (FDF) (art. 2 PMCO).

Violations of due diligence and documentation obligations related to the commercial purchase of old precious metals are **punishable** by a fine up to CHF 10,000 (art. 48 PMCA in conjunction with art. 106 [1] of the Swiss Criminal Code of 21 December 1937 [SCC, SR 311.0]). Placing non-conforming melt products on the market is punishable by a custodial sentence of up to three years or a monetary penalty (art. 47 PMCA). Intentional offences related to the trade in banking precious metals (such as commercial trading without the necessary licence or the provision of false information to the Central Office or investigating agents) are also punishable by a custodial sentence of up to three years or a monetary penalty; negligent offences are punishable by a fine of up to CHF 250,000 (arts. 56a–56d PMCA).⁵²

Regarding environmental and human rights due diligence in gold extraction, the Central Office has currently no direct competencies. According to the Dispatch on the Amendment to the Anti-Money Laundering Act of 26 June 2019, however, the gradual expansion of the duties of the Central Office is not excluded, for example in connection with human rights issues and possible future reforms in relation to the transparency of gold trading.⁵³

Interim conclusion

In a nutshell, it can be said that the due diligence obligations of producers (melters) and traders or trade assayers under both the PMCA and the AMLA are aimed at ensuring the legal origin of the gold, but **do not require any clarification of environmental or human rights impacts** of gold mining or trade. It is unclear to what extent the due diligence obligations stipulate traceability back to the exact source, i.e. the mine where the gold was extracted. Although a procedure in accordance with the five-step framework of the OECD Conflict Minerals Guidance (see Box 2 below) is recommended, it is not yet laid down in law. The framework calls for the establishment of a system of transparency and control over the gold supply chain (for mined gold and – to a more limited extent – also for recycled gold).

⁵¹ Interview by Martina Burger, Elisabeth Bürgi Bonanomi and Enea Kallulli with Thomas Brodmann, Head of Central Office for Precious Metals Control, and Roger Hafner, Head of Market Supervision Precious Metals Control, 25 April 2024.

⁵² *cf* arts. 44–52 of the Federal Act of 22 June 2007 on the Swiss Financial Market Supervisory Authority (FINMASA, SR 956.1). As part of the partial revision of the PMCA planned together with the total revision of the Customs Act, a partial tightening and extension of the penal provisions is envisaged. Furthermore, additional competences by the FOCBS in the area of precious metals control are envisaged, e.g. in relation to goods inspections and confiscations, risk analyses and the exchange of personal data: see arts. 22a ff. rev-PMCA (fn 40).

⁵³ Dispatch on the Amendment to the Anti-Money Laundering Act of 26 June 2019, BBl 2019 5503.

Depending on the manner in which the due diligence obligations are implemented by the Central Office, it may be **difficult for melters or trade assayers to demonstrate the legal origin of ASGM gold from non-formalised sources**. The lack of necessary authorisations, such as clearing or extraction permits, accurate indications of origin or the absence of on-site inspections can have an aggravating effect, unless the legality of the gold can be made credible by intermediaries or traceability obligations are diluted by a recycling process. The stricter requirements envisaged as part of the total revision of the Customs Act are increasing the pressure to formalise ASGM gold mines in order to guarantee access to the Swiss market.

Box 2: The OECD Conflict Minerals Guidance

The *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Conflict Minerals Guidance)* is the most essential international framework on responsible supply chains of minerals. The 3rd edition was published in April 2016 and contains a supplement on gold. The 37 OECD member countries as well as 9 other countries adhere to the Guidance. Some countries and the EU incorporate the guidelines to their legislations by reference. Many private standards also refer to the Guidance.

The Guidance recommends miners, local and international traders, smelters and refiners ('upstream companies') to establish a *chain of custody* or traceability, that is, a record of the sequence of entities which have custody of minerals as they move through a supply chain (p 65). The chain of custody is based on a system of internal control and on-the-ground assessment teams.

The OECD Guidance proposes a *five-step framework* endorsed by governments helping companies to meet their due diligence requirements:

1. establish strong company management systems;
2. identify and assess risks in the supply chain;
3. design and implement a strategy to respond to identified risks;
4. carry out an independent third-party audit of supply chain due diligence; and
5. report annually on supply chain due diligence.

Steps 1 and 2 apply to all companies in the gold supply chain, while steps 3–5 apply to companies sourcing gold from conflict-affected and high-risk areas (p 63). Step 1 includes, among other things, the establishment of a system of transparency and control over the gold supply chain, including transaction documentation of gold inputs and outputs with unique reference numbers for each input and output, as well as documentation on supplier details ("*know your counterparty*" [KYC] consistent with the Recommendations of the Financial Action Task Force). Under Step 2, refiners must determine the gold origin. For mined gold, it is the mine itself (p 86 f.).

For recycled gold, the origin is the point at which it becomes recyclable. The Guidance includes due diligence measures to be taken on recyclable gold (including previously refined gold!) only insofar as recycled material is a potential means of laundering gold that has been mined in conflict-affected and high-risk areas in order to hide its origin.

2.2 Environmental and human rights related due diligence and reporting obligations

The popular initiative ‘In favour of responsible companies for the protection of people and the environment’ (Responsible Business Initiative) called on the federal government to issue legal requirements for business to respect human rights and environmental protection in their activities abroad. The initiative also envisaged the introduction of new liability rules that were to go beyond the existing liability of employers.⁵⁴ Although a majority of voters were in favour of the popular initiative, it failed in the vote on 29 November 2020 because it did not reach the necessary majority of the cantons. With the indirect counterproposal to the initiative adopted by the parliament, new regulations were included in the Swiss Code of Obligations (CO),⁵⁵ which came into force on 1 January 2022. They take up the main concerns of the initiative but waive the proposed liability provisions. The new rules include:

- a reporting obligation for large companies⁵⁶ on non-financial matters (i.e. on environmental issues, including carbon emissions; social issues; working conditions; human rights; and the fight against corruption) (arts. 964a–964c CO); as well as
- due diligence and reporting obligations in the areas of ‘conflict minerals’ and ‘child labour’ (arts. 964j–964l CO and the corresponding implementing ordinance DDTrO⁵⁷).

In addition, an amendment to the Swiss Code of Obligations has been in force since January 2021, which provides for a transparency regulation derived from EU law:⁵⁸

- it requires extractive companies to disclose payments of CHF 100,000 or more that they have made to public administrations (arts. 964d–964i CO).

In their **reports on non-financial matters**, the companies must identify the social, environmental, human rights and governance risks associated to their activities and business relationships, including abroad. They must describe their policies and assess implementing measures on their effectiveness, including by setting main performance indicators. The provisions follow a *comply-or-explain* approach: if a company does not follow a policy in one of the fields

⁵⁴ On the application of the liability of employers (art. 55 CO) to groups of companies and cross-border situations, see Carina Fröhli, ‘Geschäftsherrenhaftung der Muttergesellschaft für Handlungen von Tochtergesellschaften’ (Universität St Gallen 2021) <<https://www.alexandria.unisg.ch/handle/20.500.14171/109908>> accessed 22 January 2025; Alex Gertschen and Elisabeth Bürgi Bonanomi, ‘Small State, Big Companies: Rules for Economic Globalization and the Role of Switzerland’ (2020) 15 Swiss Academies Factsheet 3 <<https://scnat.ch/en/id/qTsGB>> accessed 22 January 2025.

⁵⁵ Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) (CO, SR 220).

⁵⁶ Including companies that – together with the Swiss or foreign undertakings that they control – have at least 500 full-time equivalent positions, as well as a balance sheet total of CHF 20 million or sales revenue of CHF 40 million (art. 964a CO).

⁵⁷ Ordinance of 3 December 2021 on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour (DDTrO, SR 221.433).

⁵⁸ The amendment is based on a recommendation by the Swiss Federal Council, ‘Report in fulfilment of recommendation 8 of the report on commodities and postulate 13.3365 “More transparency in the Swiss commodities sector”’ (2014) ch 1.5.6. The US Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) also contains similar provisions in its Section 1504.

covered by the provisions, it must say so in the report and explain the reasons (art. 964b CO). Reports require the approval and signature of the supreme management or governing body and must be published online (art. 964c CO). Violation of the reporting obligations can be penalised with a fine of up to CHF 100,000 (art. 325^{ter} SCC).

The due diligence and reporting obligations in the areas of ‘**conflict minerals**’ and ‘**child labour**’ are based, among other things, on the EU Conflict Minerals Regulation (see Section 3 below). The scope of application includes companies that import or process a certain amount of ‘conflict minerals’ (that is, minerals containing tin, tantalum, tungsten or gold) or metals from conflict or high-risk areas,⁵⁹ as well as large companies that offer products or services that are reasonably suspected to have been produced or provided by children (art. 964j CO; arts. 2–9 DDTro).

Only gold under tariff heading 7108 (which includes bullions and bars but not waste scrap or jewellery) falls into the **scope** of the provisions on conflict minerals. Companies that import or process less than 100 kg gold per year are exempt from the due diligence and reporting obligations (art. 4 and Annex 1 DDTro).⁶⁰ The Swiss Association of Manufacturers and Traders in Precious Metals (ASFCMP), the umbrella organisation of the Swiss gold industry, has advocated lowering this threshold to zero.⁶¹

Covered companies must establish a system to trace the supply chain. The supply chain, in principle, includes the business activities of all upstream operators up to the extraction sites.⁶² Corresponding **traceability** systems include documentation of the type of material (tariff number); the supplier’s name and address; the names and addresses of the smelters and refineries in the supply chain; records of the reports of the inspections of smelters and refineries carried out by third parties or, if such reports are not available, the countries of extraction⁶³ of the minerals in the supply chain of the smelters and refineries. Only for minerals originating from conflict-affected or high-risk areas or for which a company has identified relevant supply chain risks, additional information has to be provided, including on the exact mines where the gold is extracted; the places where it is aggregated, traded and processed, and the taxes, duties and fees paid (art. 12[1] DDTro). The information must be documented in writing and be verifiable for auditors, but it does not have to be publicly accessible.

⁵⁹ A more detailed understanding of the term *conflict and high-risk areas* and individual key elements of the definition (armed conflicts, fragile post-conflict situation, failed states) is provided by Commission Recommendation (EU) 2018/1149 of 10 August 2018 on non-binding guidelines for the identification of conflict-affected and high-risk areas and other supply chain risks under Regulation (EU) 2017/821 of the European Parliament and of the Council, OJ L 208, 17.8.2018, 94.

⁶⁰ Import and processing volumes in corporate groups must be consolidated, corresponding to the combined volumes of all domestic and foreign subsidiaries.

⁶¹ See Interpellation 21.4655 (Mazzone) of 17 December 2021, ‘Eine Lücke schliessen bei den Sorgfaltspflichten im Umgang mit Gold’ <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20214655>> accessed 9 February 2025, with reference to the corresponding position statement in the consultation procedure on the DDTro.

⁶² See Federal Office of Justice, ‘Explanatory Report 3 December 2021 on the Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour (DDTro)’ 34 <<https://www.bj.admin.ch/dam/bj/de/data/wirtschaft/gesetzgebung/verantwortungsvolle-unternehmen/erlaeuterungen-vsotr.pdf>>.

⁶³ According to the explanatory report, the country of origin refers to the country in which the mineral was extracted: See *ibid* 35 f.

Companies also need to draw up a **risk management plan** (art. 964k CO; arts. 10–15 DDTro). Risk assessment instruments include on-site checks and information provided by third parties, expert consultation and recognised certification schemes,⁶⁴ but may also consist in ‘assurances’ by economic operators in the supply chain and other business partners (art. 10[2] DDTro). Companies must respond to the identified and assessed risks (art. 15[2] DDTro), e.g. by demanding better working conditions from the foreign supplier, suspending trade or, in extreme cases, terminating the relationship with a supplier or service provider, especially if the supplier commits serious human rights violations or supports non-state armed groups.⁶⁵

Companies must provide suppliers and the public with up-to-date information on their supply chain policies (art. 10[1][b] DDTro). They must establish, as an early warning mechanism for risk identification, a **reporting procedure** that allows all interested parties to raise reasonable concerns (art. 14 DDTro). All raised concerns must be documented in writing, whereby internal company documentation is sufficient. Also, an independent, external **audit** by a licensed audit expert is required for compliance with due diligence obligations regarding minerals and metals, but not in the area of child labour (art. 964k[3]CO; art. 16 DDTro). The management system for compliance with due diligence obligations is not audited for its effectiveness.⁶⁶ Finally, companies must **report annually on compliance**. Reports must contain information on whether and how the due diligence obligations were fulfilled and be published online (art. 964l CO; art. 17 DDTro).

Companies may be **exempted** from the due diligence obligations if they adhere to the OECD Conflict Minerals Guidance and the EU Conflict Minerals Regulation (see Section 3 below) or, in the case of child labour, to ILO Conventions Nos 138 on Minimum Age⁶⁷ and 182 on the Worst Forms of Child Labour⁶⁸ and the ILO-IOE *Child Labour Guidance Tool for Business* of 15 December 2015,⁶⁹ as well as the OECD Due Diligence Guidance for Responsible Business of 30 May 2018 or the UN Guiding Principles on Business and Human Rights of 2011 (art. 964j CO; art. 9 and Annex 2 DDTro).

Companies are partially exempted from the due diligence obligations if they can prove that they import and process metals that originate exclusively from **recycling** (art. 12[3] DDTro).⁷⁰ If such proof can be provided, obligations related to the establishment of reporting procedures, risk management and auditing do not apply. However, the companies are not exempt from traceability requirements or the annual reporting. Recycling within the meaning of the DDTro refers to the reutilisation of waste products. Gold bullions and bars are not covered by the term, as they may

⁶⁴ Such as the World Gold Council’s Conflict-Free Smelter Program and Conflict Free Gold Standard; the LBMA Responsible Gold Guidance; Responsible Jewellery Council’s Chain-of-Custody or Code of Practices; or the Fairmined Standard for Gold from Artisanal and Small-Scale Mining by the Alliance of Responsible Mining.

⁶⁵ See Federal Office of Justice (n 62) 43 f.

⁶⁶ See *ibid* 45.

⁶⁷ SR 0.822.723.8.

⁶⁸ SR 0.822.728.2.

⁶⁹ ILO/IOE, ‘How to Do Business with Respect for Children’s Right to Be Free from Child Labour: ILO-IOE Child Labour Guidance Tool for Business’ (2015).

⁷⁰ The provision is worded in an unfortunate way, as the wording leaves open whether the company is only exempt from the due diligence obligations in relation to the metals originating exclusively from recycling or whether the exemption is of general nature. However, on a systemic interpretation and taking into account the meaning and purpose of the provisions, it is clear that the latter cannot be intended, as the provisions would otherwise be devoid of purpose.

include mined gold, whereby a distinction in the end product is not possible. A gold bar manufactured from recycled gold and available for import under tariff number 7108.1200 does not fall under the term ‘recycling’ within the meaning of the DDTrO.⁷¹

The provisions of the Swiss Code of Obligations and the DDTrO do not provide for a ban on the import of minerals and metals from conflict and high-risk areas or of products or services with reasonable grounds to suspect child labour. Rather, the due diligence obligations and fulfilment transparency provisions are intended to have an impact on the market and are **not subject to state control**. According to the explanatory report on the DDTrO, the sanctioning body of this system is made up of consumers, equity and debt investors as well as civil society actors and organisations.⁷² In its response to a corresponding interpellation, the Federal Council stated that the CO does not provide for any state supervision. The extension of corresponding competences by the Central Office requires an amendment to the PMCA, which is planned as part of the ongoing revision of customs law. Specifically, due diligence obligations for melters are to be based on international standards and violations and breaches of due diligence obligations are to be criminalised.⁷³

In the absence of any enforcement mechanism in the DDTrO, it is hard to predict whether the regulations will have any impact at all on ASGM gold. The regulations do not provide for auditing with regard to child labour or recycled materials and do, overall, not go beyond prevailing international standards, including private. In general, however, we assume that the **market access of producers from the non-formalised ASGM sector will become more difficult** with increasingly strict disclosure obligations, such as those in articles 964a ff. CO, and due diligence requirements on the part of companies. As we have already observed with regard to the legal origin of the gold, it will also usually be easier for companies to credibly demonstrate compliance with human rights-related (and environmental) standards in the case of LSM gold or gold from formalised small-scale mines, as these are – assumingly – subject to a certain control by the state.

⁷¹ See Federal Office of Justice (n 62) 37 f.

⁷² See *ibid* 27.

⁷³ Interpellation 21.4655 (Mazzone) of 17 December 2021 (n 61).

3 Implications from EU regulation

3.1 Relevant regulation and regulatory developments

In recent years, the EU has adopted several regulations and directives (see Box 3 below) that introduce supply chain due diligence obligations with implications beyond the EU's borders. Some of these due diligence obligations are product-related, such as the **Conflict Minerals Regulation (CMR)** and the **Regulation on Deforestation-free Products (EUDR)**. The CMR imposes obligations on the gold industry if they source their gold from conflict or high-risk areas. In contrast, only agricultural commodities fall within the scope of the EUDR. Minerals or metals are – so far – not covered by it, even though gold mining is responsible for a large proportion of mining-related deforestation.⁷⁴ Extending the scope to gold would, however, require the renegotiation of the legal text, which in the worst case could lead to a dilution of existing obligations. The **Critical Raw Materials Act (CRMA)** focusses on the secure supply of 17 strategic and 34 critical raw materials, which do not include gold. The ban in the **Forced Labour Regulation (FLR)** on the market launch and export of products associated with forced labour requires comprehensive human rights due diligence across all stages of all product supply chains, applying universally to products regardless of origin or sector.⁷⁵ This also forces the gold industry to closely examine this aspect in its supply chain policy.

Unlike the regulations mentioned above, the **Corporate Sustainability Reporting Directive (CSRD)** and the **Corporate Sustainability Due Diligence Directive (CSDDD)** prescribe company-based disclosure and due diligence. The CSDDD, for example, applies to refineries and financial companies if they reach the application threshold in terms of size or turnover. Swiss refineries and financial companies that generate a net turnover of EUR 450 million in the EU are included in the scope of application.

The mentioned EU regulations provide for reporting obligations on the part of companies as well as national enforcement bodies, which have the necessary powers to carry out inspections and impose penalties, including significant fines. They also allow NGOs or other legal entities to present substantiated concerns or submissions. The CSDDD moreover provides for a remedy mechanism, as well as civil liability of companies and the right to full compensation.

The above instruments are described in more detail in the box below.

⁷⁴ fern, 'Mining in the Spotlight: Using Due Diligence to Protect Forests and Peoples from Mineral Extraction' (2024) 7 <https://www.fern.org/fileadmin/uploads/fern/Documents/2024/Fern_Mining_in_the_spotlight_Using_due_diligence_to_protect_forests_and_peoples_from_mineral_extraction.pdf> accessed 7 November 2024; 'What Does the EU's Critical Raw Materials Regulation Mean for People and Forests?' (2024) 2 <https://www.fern.org/fileadmin/uploads/fern/Documents/2024/Fern_What_does_the_EU%E2%80%99s_Critical_Raw_Materials_Regulation_mean_for_people_and_forests.pdf> accessed 7 November 2024.

⁷⁵ LBMA, 'SRS Report 2024' (n 23) 42.

Box 3: Overview on EU due diligence regulation

The **Conflict Minerals Regulation (CMR)**⁷⁶ came into force on 1 January 2021 and is largely equivalent to the corresponding regulations on conflict minerals in Swiss law. Due diligence obligations are based on the five-step framework of the OECD Conflict Minerals Guidance. Unlike in Switzerland, however, the implementation of the obligations is monitored by the state. The EU obliges member states to designate the competent authorities responsible to carry out *ex-post* checks. The authorities examine documents and audit reports and can carry out on-the-spot inspections (art. 11 CRM). Furthermore, the member states must lay down rules applicable to infringements (art. 16[1] CMR).

The **Corporate Sustainability Reporting Directive (CSRD)**,⁷⁷ which entered into force on 5 January 2023, defines comprehensive disclosure obligations for large and listed companies on the social and environmental risks they face and on their own impact on people and the environment. Companies subject to the CSRD must report according to European Sustainability Reporting Standards (ESRS).⁷⁸

The **Regulation on Deforestation-free Products (EUDR)**⁷⁹ introduces product-based due diligence for a list of specific commodities, including cattle, cocoa, coffee, oil palm, rubber, soya and timber, and products produced from these commodities. In the future, such products may only be placed on the EU market or exported from the EU if they were not produced on land that was deforested after 2020 and are not associated with any other forest degradation that occurred after 2020 (art. 3 EUDR). The corresponding due diligence obligations include an obligation to trace back to the land on which the commodity was produced and to document the geolocation coordinates of production sites. The Regulation entered into force on 29 June 2023. The provisions are expected to apply from 30 December 2025 for large and medium-sized companies and from 30 June 2026 for micro and small companies.

⁷⁶ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130, 19.5.2017, 1, as amended by Commission Delegated Regulation (EU) 2020/1588 of 25 June 2020, OJ L 360, 30.10.2020, 1 (CMR).

⁷⁷ Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322, 16.12.2022, 15 (CSRD).

⁷⁸ Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards, OJ L 2023/2772, 22.12.2023.

⁷⁹ Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150, 9.6.2023, 206 (EUDR).

The **Corporate Sustainability Due Diligence Directive (CSDDD)**⁸⁰ stipulates due diligence obligations for large companies⁸¹ regarding human rights and environmental adverse impacts related to their own operations, as well as the operations of their subsidiaries and business partners along the supply chain. Due diligence under the CSDDD implies, among other things: the adoption of due diligence policies and risk management systems; risk assessment; prevention and mitigation of adverse impacts; remediation; meaningful stakeholder engagement; a compliance procedure; monitoring; and reporting (arts. 5–16 CSDDD). Member States must designate the competent authorities with the power to carry out investigations, conduct inspections, order measures and impose penalties (art. 25 CSDDD). Any person can submit substantiated concerns to the supervisory authorities (art. 26 CSDDD). The CSDDD also provides for civil liability of companies and the right to full compensation (art. 29 CSDDD). The Directive entered into force on 25 July 2024. Member States must transpose the Directive into national law by 26 July 2026. It will then enter into force in a staggered approach with full application on 26 July 2029.

The **Critical Raw Materials Act (CRMA)**,⁸² which was adopted on 18 March 2024, applies to raw materials of high economic importance for Europe while being also highly vulnerable to supply disruptions. With the CRMA, the EU aims to create strong, resilient and sustainable value chains for such materials, diversify its imports, and reduce strategic dependencies. The Act empowers the Commission to establish rules for the environmental footprint of critical raw materials subject to various safeguards.⁸³ Gold is, however, not considered a strategic or critical raw material under the CRMA and therefore does not fall within its scope.

Adopted on 19 November 2024, the **Forced Labour Regulation (FLR)**⁸⁴ forbids the placing and making available on the Union market, or the export from the Union market, of any product made using forced labour (art. 3 FLR). The FLR provides for the establishment of a cooperation and coordination platform for the competent national authorities (art. 6 FLR), an information and communication system (art. 7 FLR) and a database containing information on the risks of forced labour in certain geographical areas or in relation to certain products or product groups (art. 8 FLR). The competent authorities must assess the likelihood of a violation and carry out investigations (art. 14 ff. FLR). They may also conduct field inspections. If they conclude that a product has been produced using forced labour, the product is banned and withdrawn from the market or destroyed. The FLR also provides for controls by the customs authorities and penalties

⁸⁰ Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L 2024/1760, 5.7.2024 (CSDDD).

⁸¹ The CSDDD applies to EU companies with more than 1.000 employees and an annual net worldwide turnover of more than EUR 450.000.000 as well as non-EU companies with an annual net turnover of more than EUR 450.000.000 in the EU (art. 2 CSDDD).

⁸² Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020, OJ L 2024/1252, 3.5.2024 (CRMA).

⁸³ See European Commission, 'Critical Raw Materials Act' <https://single-market-economy.ec.europa.eu/sectors/raw-materials/areas-specific-interest/critical-raw-materials/critical-raw-materials-act_en> accessed 9 December 2024.

⁸⁴ Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937, OJ L 2024/3015, 12.12.2024 (FLR).

for economic operators in the event of non-compliance. The Regulation will enter into force as soon as it is published in the Official Journal and will apply after 3 years.

The conclusions on the Swiss regulations apply even more to the regulatory developments in the EU: without accompanying measures to support responsible ASGM producers, it will become **increasingly burdensome for refineries and other companies to fulfil their due diligence obligations when importing and processing ASGM gold.**

3.2 Swiss reactions to the regulatory developments in the EU

Switzerland has transposed most of the due diligence obligations under **CMRA** to the Swiss Code of Obligations and the DDTro, though without providing for state monitoring and enforcement mechanisms.

From 26 June to 17 October 2024, the Federal Council conducted a consultation on a proposal to adapt the Swiss Code of Obligations to the **CSRD**. It includes stricter rules for corporate sustainability reporting and a broader scope of application. According to the proposal, reporting will moreover be reviewed by an external auditing company or a conformity assessment body.⁸⁵

The Federal Council has not yet decided whether it will also draft a legal proposal corresponding to the provisions of the **CSDDD**. The CSDDD requires the implementation of significantly more extensive due diligence requirements than the Swiss provisions. The scope of the CSDDD is also much broader. In contrast to Swiss law, the CSDDD moreover provides for civil liability and other enforcement mechanisms. The companies concerned will increasingly pass on their obligations to companies along the value chain – including Swiss suppliers. Approximately 50,000 Swiss companies are directly or indirectly affected by the CSDDD.⁸⁶

The Federal Council might base possible implementation regulations comparable to the provisions of the **EUDR** on Article 35e(3) of the Environmental Protection Act,⁸⁷ which authorises the Federal Council to impose requirements on the placing on the market of raw materials and products or prohibit their placing on the market if the cultivation, extraction or production significantly pollutes

⁸⁵ Swiss Federal Council, 'Press release of 26. June 2024: Nachhaltige Unternehmensführung: Bundesrat schlägt strengere Regeln für Berichterstattung vor' <<https://www.bj.admin.ch/bj/de/home/aktuell/mm.msg-id-101585.html>> accessed 13 December 2024.

⁸⁶ BSS Volkswirtschaftliche Beratung AG, 'Auswirkungen der CSDDD auf Schweizer Unternehmen, Standortattraktivität und Wettbewerb' (2023) 25 ff. <<https://www.newsd.admin.ch/newsd/message/attachments/85536.pdf>> accessed 12 December 2024.

⁸⁷ Federal Act of 7 October 1983 on the Protection of the Environment (EPA, SR 814.01).

the environment or significantly jeopardises the sustainable use of natural resources.⁸⁸ However, the Federal Council is hesitant in adopting such provisions for the time being.⁸⁹

Overall, the Swiss supply chain due diligence requirements are weaker than those of the EU, cover fewer companies and have hardly any enforcement mechanisms. However, many companies are affected by the EU regulations, especially in an indirect way.

⁸⁸ See Danielle Breitenbücher and Satenig Chadoian, 'Ressourcenschonung und Kreislaufwirtschaft in der Schweiz: Ein Überblick über die neueren Entwicklungen im Bundesumweltrecht' [2024] URP 554.

⁸⁹ See the Federal Council's response to Motion 22.4414 (Vara) of 14 December 2022 'Combating Deforestation. Implementation of EU Provisions in Swiss Law' <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20224414>> accessed 23 January 2025; Swiss Federal Council, 'Press release of 14 February 2024: Bundesrat führt Aussprache zur Entwaldungsverordnung der EU (EUDR)' <<https://www.bafu.admin.ch/bafu/de/home/themen/wald/mitteilungen.msg-id-100021.html>> accessed 13 December 2024.

4 International and private standards

International and industry standards and labels on responsible sourcing also play an important role in how refineries deal with ASGM gold. They have an impact not only on the Swiss gold market but also on regulatory developments. Like some of the legal provisions mentioned above, these standards are based on the OECD Conflict Minerals Guidance and are constantly being adapted, e.g. with the aim of creating more clarity and consistency in the area of recycled gold. In the following, we focus on the work of the International Organization for Standardization (ISO), the LBMA and the Responsible Jewellery Council (RJC). For information on other certification schemes (e.g. Fairmined; Fairtrade) and public-private initiatives focusing on the ASGM sector (such as the *Swiss Better Gold Initiative* launched by the Swiss State Secretariat for Economic Affairs and the Swiss Better Gold Association), please refer to the report by Martina Burger and others.⁹⁰

4.1 International Organization for Standardization

The ISO's Jewellery and Precious Metals Technical Committee (ISO/TC174) is currently developing a standard specifying **high-level requirements for responsible precious metals sourcing**, processing and traceability (Part 1),⁹¹ as well as on minimum rules and procedures for corresponding conformity assessment schemes (Part 2).⁹² The aim is to ensure that only metals sourced in compliance with the OECD Conflict Minerals Guidance are used throughout the supply chain, all the way to the end consumer.

The ISO Standard will also specify requirements for **recycled gold** (Part 3),⁹³ the definition of which is often unclear. According to the ISO draft definition, recycled gold includes:

- *pre-consumer recycling gold*, such as production scrabs;
- *post-consumer recycling gold*, such as jewellery or dental scraps; or
- *waste-recycled gold*, such as gold from E-wastes.

Once refined, mined gold, mixed gold and recycled gold are physically and chemically indistinguishable, meaning that there is no reliable analytical method to verify that a given product is made specifically with recycled gold.⁹⁴ The ISO definition therefore only includes gold from 100%

⁹⁰ Burger and others (n 3) 13 f. and Appendix.

⁹¹ ISO/AWI 21261-1: Jewellery and precious metals — Responsible precious metals — Part 1: General requirements for responsible precious metals (under development).

⁹² ISO/AWI 21261-2: Jewellery and precious metals — Responsible precious metals — Part 2: Minimum rules and procedures for conformity assessment schemes (under development).

⁹³ ISO/DIS 21261-3 - Jewellery and precious metals — Responsible precious metals — Part 3: Requirements for recycled gold (draft available). The draft standard classifies sources of gold as either mined gold, mixed gold, recycled gold, or investment gold. Recycled gold itself contains the subcategories of pre-consumer recycled gold and post-consumer recycled gold, including waste-recycled gold (e.g. from E-waste).

⁹⁴ ISO/DIS 21261-3 ch 3.1.

recycled gold sources (no gold from mixed sources) and – much like under art. 12[3] DDTro – excludes investment gold products (e.g. bullion bars and investment coins) and any other fine gold products issued from refining processes, unless such products have been produced exclusively from recycled gold sources. Also, the ISO certification of recycled gold is linked to the material and assessment requirements of parts 1 and 2 of the standard. The definition of recycled gold proposed by the ISO is therefore much narrower than the definitions commonly used today.

4.2 London Bullion Market Association (LBMA)

The LBMA is an industry association with over 160 members, including producers, refiners, traders, fabricators, transporters, storage companies and financial institutions. It is the world's most important standard-setting body related to gold trade. As the LBMA oversees the London Bullion Market – one of the most important trading centres for gold and silver – membership is practically a prerequisite for all major players in global gold trading. All gold refineries certified by the LBMA (so-called *Good Delivery List*), including the four largest Swiss gold refineries,⁹⁵ are obliged to fulfil the requirements of the *Responsible Gold Guidance* (RGG), which is based on the OECD Conflict Minerals Guidance. The implementation of this certification is audited on an annual basis by an independent auditor under the supervision of the LBMA.

The RGG is the usual industry standard for larger volumes of gold from the LSM sector. To adhere to the RGG, refiners must establish a chain of custody or **traceability** system. In the current RGG Version 9, traceability is based on written evidence and declarations that prove the origin of the gold, even though the LBMA encourages its members to use technological solutions (such as DNA markers, geoforensic passports or blockchain) because they improve the reliance in the traceability systems when compared to declaratory systems (see Box 4).⁹⁶

Box 4: Traceability solutions in Swiss refineries

Swiss refineries use different means to trace gold to a specific gold mine or refinery. However, the gold that is claimed to be fully traceable in this way does not correspond to standard market gold, but only concerns certain product lines or gold from certain partner mines. Zürcher Kantonalbank described the methods used in 2021 as follows:⁹⁷

- Argor-Heraeus uses a **DNA marker** for complete forensic traceability of the gold from the mine to the refinery. A marker with an individual DNA sequence is designed for each mine. It is sprayed onto the raw gold (doré gold) at the mine and analysed at the refinery. The refinery can clearly assign the raw gold to a specific mine based on the marker.

⁹⁵ Swiss Federal Council, 'Gold Report 2018' (n 21) 8.

⁹⁶ LBMA, 'LBMA Responsible Gold Guidance Version 9' (n 31) 19; Zürcher Kantonalbank, 'Kurzstudie "Traceable Gold"' (Zürcher Kantonalbank 2021) <<https://www.zkb.ch/media/zkb/dokumente/blog/magazin/Traceable%20Gold%20Online.pdf>>.

⁹⁷ Zürcher Kantonalbank (n 96).

This enables clients of Swiss Raiffeisen banks, whose gold bars are all refined by Argor-Heraeus, to use the traceability tool on the Raiffeisen website⁹⁸ to find out which mines their gold comes from and which mining operations, logistics companies and refineries were involved in the production process. To make this possible, the gold needs to be refined in a separate production line and labelled specifically.⁹⁹

- Metalor uses a **geoforensic passport** to check the origin of the gold when it enters the refinery. A two-stage analysis first determines the traces of other metals present in the raw gold of a specific region or mine, corresponding to a geoforensic signature. Gold characteristics from various countries and mines are recorded in Metalor's internal database (Step 1). By comparing the signature with the database, the exact geographical origin of the gold sample can be determined (Step 2).
- MKS Pamp uses document-based **blockchain technology** to trace the gold for its 'Provenance Gold' product. 'Provenance' customers gain insight into the countries of origin of the gold and the mine certification standards.
- Valcambi ensures full traceability of the 'Green Gold' product based on **documents and independent audits**. Green Gold is mined in qualified mines in the USA and processed on a separate production line.
- In addition to the fully traceable products, mixed solutions are also offered in some cases, in which the gold is fused with standard market gold and thus loses its full traceability.

As all major Swiss refineries are bound to the RGG and thus indirectly to the OECD Conflict Minerals Guidance via their LBMA accreditation, all these refineries can in principle claim an **exemption under Article 9 DDTrO** and have no due diligence obligations under the DDTrO. However, the OECD has criticised the LBMA for the partially inadequate implementation of the Guidance in the past: in its Alignment Assessment of 2018, the OECD criticized the quality or rigour of the risk assessment undertaken by LBMA refiners. According to the OECD assessment, many refiners limited their enquiries to the direct supplier (such as a merchant bank or other refinery), even when the supplier was not part of a responsible sourcing programme and the origin of the gold was unknown. Refiners tended to rely on declarations from suppliers that they would comply with the refiner's policy, but did not investigate suppliers' human rights performance themselves as part of their due diligence. Reports from on the ground assessments of mine sites were not always available and tended to focus on commercial matters only. Analysis of broader conflict or human rights risks was lacking from the site visit reports. Auditors did not challenge refiners on such practices. Supply chains were especially opaque with respect to 'recycled' or previously refined gold, such as kilobars from refineries that are not part of a responsible sourcing programme.¹⁰⁰ A Swiss NGO that investigated Swiss gold imports from Colombia also criticized audits of a Swiss refinery

⁹⁸ Raiffeisen Schweiz, 'Mit gutem Gewissen in Gold investieren' <<https://www.raiffeisen.ch/rch/de/wissen/anlegen/mit-gutem-gewissen-in-gold-investieren.html>> accessed 4 February 2025.

⁹⁹ Raiffeisen Schweiz, 'Gold Rückverfolgbarkeit' <<https://www.raiffeisen.ch/gold-rueckverfolgbarkeit/de.html>> accessed 4 February 2025.

¹⁰⁰ OECD, *Alignment Assessment of Industry Programmes with the OECD Minerals Guidance* (OECD 2018) 68 f.

carried out for the refinery's LBMA accreditation.¹⁰¹ In response to the OECD Alignment Assessment, the LBMA launched a new toolkit for auditors in 2023.¹⁰²

The LBMA recognises that there is confusion among industry participants regarding the definition of **recycled gold**, which opens the door to potential abuse and false claims. The LBMA therefore supports the ongoing efforts by the ISO to establish a harmonised definition linked to due diligence requirements. During the drafting of RGG Version 10 in 2025, the LBMA will revisit its recycled gold definition in light of the ISO process.¹⁰³ It also advocates strong(er) due diligence requirements to prove the source of both primary and secondary material.

ASGM gold and recycled gold were a focus topic of the LBMA's Responsible Sourcing Programme in 2024. A key objective of its **ASGM initiative** is to improve governance structures and apply appropriate due diligence to bring more legitimate ASGM feedstock into the *Good Delivery List* system. This should prevent problematic ASGM gold from entering the secondary market and ultimately being declared as recycled gold.¹⁰⁴ With the initiative, the LBMA aims to 'reverse the avoidance that has hobbled the full potential the sector represents for millions of miners and the economic development of producer countries around the globe.'¹⁰⁵ It published an ASGM Toolkit for refiners with a list of due diligence requirements, based on the concept of progressive improvement, which allows ASGM suppliers to meet certain requirements over time. The ASGM initiative complements the *Artisanal and Small-Scale Gold Mining Domestic Purchase Programme* (ASGM DPP) of the World Gold Council and Central Banks.

4.3 Responsible Jewellery Council

Other relevant standards in the precious metals trade, such as the **Code of Practices** (CoP) standard of the RJC, are also based on the OECD recommendations. However, the CoP standard includes more detailed **environmental provisions** (e.g. on biodiversity or the use of mercury and cyanide) in addition to ethical, social and human rights practices. The standard does not exclude members that have significant negative impacts in these areas but provides behavioural guidelines for such cases. In relation to ASGM, it requires members to regularly assess risks, including unsafe working conditions, uncontrolled use of mercury or cyanide and significant environmental impacts, e.g. on biodiversity. It also commits members to seek **development opportunities for ASGM communities** and to use their best endeavours to positively influence local practices (CoP8). The standard provides similar obligations for members that source gold directly from informal recyclers (CoP9).

While the CoP relates to the general business practices of a company and is mandatory for all RJC members, the **Chain of Custody** (CoC) certification focuses specifically on the separation and

¹⁰¹ Mercier (n 2) 3.

¹⁰² LBMA, 'LBMA Assurance Provider Toolkit' (November 2023) <<https://cdn.lbma.org.uk/downloads/responsible-sourcing/LBMA-Assurance-Provider-Toolkit.pdf>> accessed 13 December 2024. See also LBMA, 'LBMA Responsible Sourcing Programme: Third Party Assurance Guidance' (2022) <<https://cdn.lbma.org.uk/downloads/responsible-sourcing/Third-Party-Assurance-Guidance-2022-V2-FINAL.pdf>> accessed 13 December 2024.

¹⁰³ LBMA, 'SRS Report 2024' (n 23) 16. For the LBMA definition of recycled gold, see LBMA, 'LBMA Responsible Gold Guidance Version 9' (n 31) 6.

¹⁰⁴ LBMA, 'SRS Report 2024' (n 23) 13.

¹⁰⁵ *ibid* 14.

traceability of materials. The four largest Swiss refineries are certified in accordance with the two RJC labels mentioned.¹⁰⁶ The members undergo regular audits. These standards do not require disclosure of the source or the audit procedures. The results of the risk analysis also do not have to be disclosed.¹⁰⁷ The two standards performed poorly in the OECD's 2018 Alignment Assessment,¹⁰⁸ whereupon the RJC adapted the two standards in 2024.

4.4 The role of industry standards

The development and ongoing adaptation of industry standards is incentivised by (the threat of) government regulation. At the same time, industry activity potentially influences future regulatory developments, e.g. in terms of the consistent use of terminology. Especially in relation to ASGM, private initiatives play an essential role, as ASGM is not specifically addressed by Swiss regulation and ASGM-related data is not officially recorded.

A growing number of private or public-private initiatives focus specifically on ASGM gold with the aim of building trust in the ASGM sector and increasingly integrating suppliers into the legal international market. This integration is linked to a number of due diligence obligations on the part of downstream companies adhering to the relevant standards and ultimately requires a thorough review of ASGM practices from an environmental and social perspective. With the concept of gradual improvement, suppliers are given time to make the necessary adjustments, including the formalisation process.

Private ASGM-related initiatives aim to make the sector fit for the stricter regulations in consumer markets such as Switzerland or the EU and could mitigate possible unintended negative effects of regulations that lack context sensitivity on the ASGM sector. However, the share of certified ASGM gold in international gold trading is still negligible.¹⁰⁹ It seems that the initiatives have not yet had their full effect or that further efforts are required on the part of both the industry and regulators.¹¹⁰

¹⁰⁶ Swiss Federal Council, 'Gold Report 2018' (n 21) 8.

¹⁰⁷ *ibid.*

¹⁰⁸ OECD (n 100) 76 ff.

¹⁰⁹ See Section 1.2 above.

¹¹⁰ On challenges related to ASGM certification schemes, see Burger and others (n 3) 17 ff.

Concluding observations

This brief overview of the current legal situation shows that we are dealing with a very dynamic area of law that is currently undergoing major changes. The changes are being driven by the EU (together with other countries) but also by the industry itself, which is constantly advancing its standards. It is striking that the existing narratives on sustainability and supply chain due diligence in the gold trade diverge greatly between the industry's self-image on the one hand and the story told by NGOs on the other.

We assume that one key factor is the **different understanding of transparency**: in a 'chain of custody', upstream companies pass information on to downstream companies. The companies disclose the information they collect from the suppliers to the auditors (if audits take place) and, as the case may be, to the customer (business-to-business) while maintaining commercial confidentiality. Civil society, on the other hand, demands public transparency, particularly with regard to the sources of the gold. The terms *transparency* and *traceability* are therefore often confused in the debate.

Conceptual vagueness is another factor: for example, *country of origin* is sometimes understood to mean the country of last refining, as in customs legislation, but sometimes it means the country of extraction, as under the DDTrO. *Recycled gold* may or may not include bullions and bars traded under tariff number 7108.1200, depending on the definition. This lack of clarity makes it difficult to get a clear picture of the extent and rigour with which refineries in Switzerland check their supply chains right down to the source. Our investigations have led us to the following observations:

- **Traceability back to the source is required** by the OECD Conflict Minerals Guidance and all standards and legislation based on it. For mined gold, this means in principle that the refiner must know the mine of origin in order to be able to assess whether it is conflict gold or not. Whether and to what extent the Swiss refineries actually have such information was not the subject of this stocktaking.
- The supply chain due diligence and corresponding documentation must be audited independently. **Not all data must be publicly accessible**, however. Companies do not currently have to disclose price information, supplier identities or transportation routes, as long as no **"red flag" locations** are involved.¹¹¹ Red flag locations of gold origin include mines in conflict-affected or high-risk areas; exporting countries known to have limited reserves, stocks or production capacities; and countries known to trade with conflict gold, including labelled as recyclable or mixed gold.¹¹²
- Methods and technologies for tracing gold have improved in recent years, especially regarding mined gold. While **technical traceability solutions** are often considered more reliable than documentary-based solutions, it seems questionable to what extent they can facilitate traceability in the context of smallest-scale producers whose gold is collected in small quantities via informal networks and intermediaries. Small producers

¹¹¹ OECD (n 38) 111 fn 59.

¹¹² *ibid* 87 f. On the question of to whom the data relating to red flag locations must be disclosed, see Mercier (n 2) 11.

do usually not have the necessary investment capacity for such technologies, or access to institutions capable of providing verifiable data. The assumption that blockchain mechanisms would prevent gold from illegal sources from being smuggled into formal value chains is considered as conceptually flawed, as it works without third-party assessments and depends completely on the personal trustworthiness of the trader or smelter company that registers the ore on blockchain.¹¹³ Traceability is moreover associated with increased efforts by downstream companies, as separate processing is usually necessary to avoid contamination with other gold.

- **Traceability requirements** therefore have political implications, as they bear the risk of excluding small producers from formal production and trade. It has been argued that such requirements serve to satisfy downstream consumers' transparency demands but not the empowerment of smaller producers and local monitoring devices.¹¹⁴
- The OECD Conflict Minerals Guidance only provides for **limited due diligence obligations regarding recycled gold**. However, the company must ensure that recycled gold (including gold previously refined) is not used to launder conflict gold. Yet, as there is currently no uniform definition of recycled gold or corresponding requirements, gold that has not been responsibly sourced can be relabelled by additional refining or blending and marketed as recycled gold.¹¹⁵ Traceability in relation to recycled gold is generally considered a challenge. Various efforts are currently being made to strengthen traceability, both in relation to mined gold and recycled gold. A **harmonised definition of recycled gold**, which is linked to due diligence obligations, is expected to create more transparency in this area.
- The Precious Metals Control has **no direct competences regarding human rights or environmental due diligence obligations**. Controls in the application of the AMLA are limited to the exclusion of a fraudulent origin of the gold. Due to lack of more accurate information, they basically rely on the 'formality' of the activities encountered in the respective gold value chain – irrespective of how and by whom the gold has been produced. Production systems implying informal elements, which are common in the ASGM sector, have a difficult position in this regard.
- Compliance of supply chain due diligence obligations under the DDTro is **not subject to state control**. This is one of the most striking differences to EU law and calls into question the effective implementation and enforcement of the Swiss law. Also, Swiss refineries that already formally comply with the OECD Conflict Mineral Guidance as part of their LBMA accreditation are exempted from the due diligence obligations under the DDTro. Switzerland also provides for an **exemption** from due diligence obligations with regard to recycled gold. This contrasts with the ongoing efforts of the industry and standard-setting bodies to develop new approaches to improve traceability of recycled

¹¹³ Fritz Brugger, 'Blockchain Won't Help with Conflict Minerals' (*ETH Zurich Zukunftsblog*, 11 April 2019) <<https://ethz.ch/en/news-and-events/eth-news/news/2019/04/blog-brugger-blockchain-conflict-minerals.html>> accessed 18 December 2024.

¹¹⁴ See Alejandra Villanueva Ubillús and Gisselle Vila Benites, 'Performing Traceability: Unpacking the Artisanal and Small-Scale Gold Mining (ASGM) Trade Circuit in Peru' (2023) 102 *Journal of Rural Studies* 103088, 3.

¹¹⁵ See, for instance, Interpellation 21.4655 (Mazzone) of 17 December 2021 (n 61), with reference to the position statement by the 'Fondation de la Haute Horlogerie' in the consultation procedure on the DDTro.

gold to avoid *greenwashing* and *gold washing*, and also with the desire of some gold processors to give more supervisory competences to the Precious Metal Control.¹¹⁶

- The OECD Alignment Assessment Report as well as investigations and media reports by various stakeholders indicate that companies do not always know the source of the gold they process or are not always able to **adequately assess the conditions and risks on the ground**. The customs data also indicate this (with significant quantities of imported gold from non-producing countries), as does the practice of individual refineries to market gold for which traceability is guaranteed as special and at a premium. Aggregated data on the exact sources cannot be found in the companies' sustainability reports either. The extent to which the refineries (can) trace the majority of the gold they import, e.g. from the UAE, back to the source remains unclear.
- Stringent supply chain due diligence requirements bear the risk that companies may satisfy the criteria by abandoning high-risk suppliers or regions. The **ASGM sector is the most vulnerable** in this respect. Cut off from the legal market, suppliers then have to find other ways to sell their products, including by switching 'to less scrupulous buyers without changing their practices'.¹¹⁷ This problem has now been recognised and is being addressed in various standards, for example through the concept of continual improvement in performance, as envisaged by the OECD, the CSDDD and others, but also through ASGM-related initiatives by the LBMA, the World Gold Council, and others. It is still difficult to estimate the effect of these initiatives. However, it seems clear that the route for ASGM gold sourced from illegal or unformalized mines into the international market is becoming more difficult with increasingly stricter due diligence obligations. The standards and ongoing initiatives attempt to take this into account by supporting mines in the formalisation process and **opening up a legal route** to the international market through co-operation with the players involved in responsible sourcing.
- Despite new efforts in the area of ASGM gold, **certified ASGM gold only accounts for a negligible amount of the global gold trade**. Even gold traded as sustainable, ethical or green only accounts for very small quantities. That said, the World Gold Council reports an increase in certified ASGM gold trade.
- The OECD Conflict Minerals Guidance and various standards are based on **compliance with national legislation** (and international minimum standards), not on the actual impact on people and the environment. The loss of biodiversity associated with the construction of a large mine and the resulting deforestation, for example, may hardly be taken into account if this is not covered by national legislation. In this respect, the EU has adopted a **new generation of regulations** that also take account of non-prohibited impacts such as deforestation.

¹¹⁶ See *ibid*, with reference to the corresponding position statement in the consultation procedure on the DDTro.

¹¹⁷ *fern* (n 74) 2.

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