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Human Rights and Global Strategy

Human Rights in Supply Chains: How New Laws in Europe and the UK Impact Companies Around the World

By: Lucy Blake and Karam Jardaneh

On the occasion of the tenth anniversary of the United Nations Guiding Principles on Business and Human Rights (the "UNGPs"), the Human Rights Council noted the “unprecedented” efforts of companies and governments around the world in promoting respect for human rights. The UNGPs set out actionable steps for companies to adopt in order to prevent human rights abuses in their operations. The UNGPs are not legally binding and are often referred to as “soft-law”; however, there are growing expectations on companies worldwide to adhere to them. This comes at a time when “soft law” obligations are gradually evolving into “hard law” with countries around the world introducing legislation requiring companies to conduct due diligence into potential adverse human rights impacts from their products, operations, and supply chains.

In this article, we consider some of the developments in the European Union (the “EU”) and in the United Kingdom (the “UK”), including recently enacted and proposed new legislation as well as attempts to hold companies to account for their adverse human rights impact through litigation. Much of the legislation applies (or will apply) to certain international companies with operations in the UK and the EU, so it will be of interest to companies around the world. More broadly, the developments demonstrate a clear direction of travel in the evolution of the UNGPs towards “hard law” and an increasing expectation in the market that companies should understand and mitigate human rights risks. These developments may be seen as a sign of things to come around the world.

EU

In April 2020 (following an extensive study commissioned by the European Commission (the “EC”) on due diligence requirements throughout a company’s supply chain) the EU Justice Commissioner announced that the EC would introduce legislation providing for mandatory human rights and environmental due diligence. On 23 February 2022, almost two years after its initial announcement, the EC adopted a proposal for a directive[1] on Corporate Sustainability Due Diligence. Whilst the proposed directive still needs to be approved by the EU Parliament and Council and therefore may yet be amended, the proposal provides a good indication of the due diligence requirements that are likely to be imposed by the EU.

In particular, the proposed directive imposes due diligence duties on companies to identify, bring to an end, prevent, mitigate and account for negative human rights and environmental impacts in their own operations, subsidiaries and value chains. Separately, certain large companies will need to ensure that their business strategy is compatible with limiting global warming to 1.5 °C in line with the Paris Agreement. If the proposed directive is approved, the obligations will apply not only to certain companies registered in the EU but also to certain overseas companies that generate revenue in the EU.[2] The proposed directive also imposes duties on directors to set up and oversee the implementation of due diligence and to integrate it in their corporate strategy. EU member States will be required to designate national authorities to supervise and impose effective, proportionate and dissuasive sanctions, including fines and compliance orders.

Not all EU member states are waiting for the EU legislation to take their own action. For example, in 2017, France adopted the French Duty of Vigilance Law, and in July 2021 Germany passed the German Supply Chain Act (which will come into force in January 2023). Both require companies to conduct due diligence on the impact of their operations on community welfare, in particular on human

rights and the environment, and take steps to mitigate any issues identified. Both the French and German laws will apply not only to domestic organisations but to large international organisations operating in France or Germany and employing a certain number of staff.

Penalties for failing to comply with the German law include potential debarment from public contracts and a fine up to 2% of their global revenue. Penalties for failing to comply with the French law are less clear. The law originally provided for fines of up to EUR 10 million for non-compliant companies; however, these provisions were invalidated by the French courts[3],and it remains to be seen how the French law will be enforced. In addition, other European states such as The Netherlands, Switzerland, Norway, and Belgium have recently enacted or proposed new legislation requiring companies to vet their supply chains for human rights abuses.

In addition, beyond the introduction of due diligence obligations, in September 2021, the EC President announced its intention to ban products manufactured using forced labour. While there were some suggestions that the ban could be included in the mandatory due diligence legislation, the ban was ultimately not included in the proposed directive published on 23 February 2022. However, on the same day, the EC confirmed that it was "*preparing a new legislative instrument to effectively ban products made by forced labour from entering the EU market*". Across the Atlantic, the new US Uyghur Forced Labor Prevention Act includes broad prohibitions on the importation of goods from Xinjiang and requires companies to take steps to prevent items produced using forced labour from entering the US (see Jenner and Block's article on *Law360*). It also calls for the United States to develop a diplomatic strategy to coordinate with international partners and allies to address forced labor in Xinjiang. This may result in increased international cooperation and attention to global supply chains.

UK Modern Slavery Act

The UK was one of the first countries in Europe to introduce legislation designed to clean up supply chains and abolish modern slavery. The UK Modern Slavery Act ("MSA") was introduced in 2015. As well as codifying existing prohibitions on human trafficking and modern slavery, the MSA imposed reporting obligations on all UK and non-UK companies that (i) carry on "a business, or part of a business in any part of the [UK]" and (ii) have an annual turnover of £36 million (just under $50 million) or more. Companies subject to the reporting obligations are required to publish an annual statement setting out the steps they take to prevent modern slavery in their businesses and their supply chains. To the extent such companies do not take any steps to prevent modern slavery, they must make a statement to that effect.

The reporting obligations under the MSA have, however, been widely criticized for lacking teeth – at present, the UK Government cannot impose penalties on companies for non-compliance with these requirements.[4] In response to a consultation on the MSA reporting requirements, the UK Government promised in September 2020 to strengthen the legislation. Examples of the measures promised by the UK Government include mandating specific topics that organisations should cover in their MSA statements and requiring statements to be published on a government register to empower investors, consumers and civil society to scrutinize organisations' actions. In addition, in January 2021 as part of the UK's response to the human rights violations in Xinjiang, the UK Foreign Secretary announced that the "*Home Office will introduce fines for businesses that do not comply with their [MSA] transparency obligations*". There have also been calls to introduce a criminal offence for any individual (including a company director) who is knowingly or recklessly responsible for a false or materially incomplete MSA statement.

European Litigation

The drive to bring companies to account for human rights violations has also been amplified in courtrooms across Europe, where various claims have been brought by non-governmental organisations and activists against companies in relation to human rights and climate change abuses. These cases demonstrate the European courts' increasing inclination to view companies as owing duties of care to the communities amongst whom they operate, and in particular to take active steps to prevent adverse human rights and environmental impacts in their supply chains.

In the June 2021 case *Milieudefensie et al. v. Royal Dutch Shell plc*, the Hague District Court considered the impact on the human rights of Dutch citizens of pollution arising from the operations of Royal Dutch Shell ("RDS"). The Dutch Court held that RDS had obligations ensuing from the "unwritten standard of care" under Dutch tort law which means that "*acting in conflict with what is generally accepted according to unwritten law is unlawful*". The Dutch Court acknowledged the UNGPs in interpreting the Dutch law obligations noting that the UNGPs "*constitute an authoritative and internationally endorsed 'soft law' instrument*". The Dutch Court ordered RDS to reduce CO2 emissions across the Shell group globally by net 45% (compared to 2019 levels) by 2030. The case is under appeal.

In the UK, the courts have found that UK companies could in certain circumstances owe a duty of care to overseas communities in respect of alleged environmental damage by their subsidiaries. In February 2021, the UK Supreme Court confirmed that there was a real issue to be tried as to whether RDS owed a duty of care to Nigerian claimants for alleged environmental damage arising from an oil spill purportedly caused by its Nigerian subsidiary (see *Okpabi and others v Royal Dutch Shell Plc*). One month later, the English Court of Appeal ruled that an English shipping company that sold a tanker for demolition could owe a duty of care to shipbreaking workers in Bangladesh that ultimately dismantled the tanker (see *Hamida Begum (on behalf of MD Khalil Mollah) v Maran (UK) Limited*). Both cases remain at an early stage, but the Court's apparent readiness to consider the existence of a duty of care owed by a UK parent company for the acts of its subsidiaries and across its supply chain is a significant milestone in the evolving field of Environmental, Social and Governance ("ESG") litigation.

Next steps

It is apparent that companies around the world are facing increasing pressure on multiple fronts to take responsibility for their supply chains. This pressure is being exerted not only by new laws and new and creative litigation by activists, but also by the market, as investors[5] and consumers are increasingly demanding companies to demonstrate a strong commitment to human rights. Companies would be well advised to get ahead by taking steps to consider the potential applications of their products and to vet their supply chains for human rights risks, taking a zero-tolerance approach to abuse (see our Client Alert: Six Best Practices in Corporate Human Rights and Social Responsibility).

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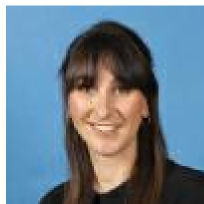
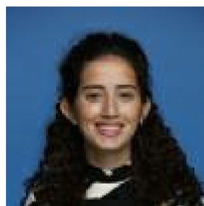


Lucy Blake

lblake@jenner.com | Download V-Card



Karam Jardaneh

kjardaneh@jenner.com | Download V-Card

Meet Our Team

Practice Leaders

Amb. Keith M. Harper

Co-Chair

kharper@jenner.com

Download V-Card

Amb. David Pressman

Co-Chair

dpressman@jenner.com

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[1] Directives set out goals for EU member states to achieve through their own national legislation. It is up to each member state to devise its own laws on how to reach these goals.
[2] Including (i) "Group 1 companies", which are EU companies with 500+ employees and EUR 150 million+ in turnover worldwide (ii) and "Group 2 companies", which are EU companies operating in defined high impact sectors (such as textiles, agriculture, extraction of mineral) with 250+ employees or more than €40 million of turnover worldwide. For non-EU companies, the proposed directive applies to them if they generate revenue aligned with the thresholds for Group 1 and Group 2 in the EU.
[3] The provisions were invalidated on the basis that the obligations on companies in the French law were insufficiently defined and it would be unconstitutional to fine companies for a failure to comply with indeterminate obligations. (See https://www.conseil-constitutionnel.fr/en/decision/2017/2017750DC.htm)
[4] That being said, the UK Government has had considerably more success in prosecuting actual instances of human trafficking and modern slavery since the MSA was introduced. As well as introducing reporting requirements, the MSA also codified existing prohibitions on human trafficking and slavery, leading to a number of recent successes in prosecuting modern slavery and exploitation. The number of defendants who have been prosecuted for human trafficking and modern slavery in the UK increased from 284 in 2017-18 to 322 in 2020-21 (an increase of over 13%).
[5] For example, in October 2021, a group of 94 investors with more than US$6T in assets under management and advisement reaffirmed their support for mandatory human rights and environmental due diligence in the EU.

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