

Litigation Department

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## Non-Compliance with Human Rights Obligations Poses New Legal Risks for UK Companies

### *An overview of recent developments in UK law regarding business and human rights*

The UK government has launched a new action plan on business and human rights that is designed to implement the UN's Guiding Principles on Business and Human Rights. The plan outlines concrete legal obligations for UK companies, including a new requirement that UK companies include information on human rights in their annual strategic reports, and refers to potential new sanctions for companies that fail to comply with certain human rights standards.

### Introduction

Businesses are coming under increased scrutiny to ensure compliance with basic human rights commitments. Companies in the extractive industries or that rely on imports from low-wage economies need to pay particular attention to these developments. For example, major mining projects may interfere with local communities' access to water or even involve the displacement of indigenous peoples. Likewise, UK businesses that rely on imports manufactured in countries where workers may not enjoy basic rights will need to be vigilant to observe new legal obligations regarding compliance with human rights standards.

The purpose of this alert is to summarise recent developments in UK law regarding business and human rights. The requirement that businesses take steps to ensure respect for human rights is no longer simply a matter of good governance and "soft" law. Companies involved in international businesses must comply with newly developed binding legal obligations. Failure to do so may result in legal sanctions, public criticism by an official body and reputational damage, which may have far-reaching commercial consequences.

The UK government took an important step in this area on 4 September 2013, when it launched an action plan on business and human rights (the "UK Action Plan"). The UK government described the UK Action Plan as the UK's national implementation plan for the UN Guiding Principles on Business and Human Rights (the "UN Guiding Principles").<sup>1</sup> The UK Action Plan confirms that the UK government expects UK businesses to consider and respect human rights, and to comply with the UN Guiding Principles.

The UK Action Plan outlines concrete legal obligations binding on UK companies and summarises recent legal changes. It also outlines the UK government's plans for further developments in this area.

The main developments that UK companies need to be aware of include:

- The legal requirement that certain UK companies include information on human rights issues in their annual strategic reports

- The authority of the Department for Business, Innovation and Skills (BIS) to issue public determinations that companies have acted inconsistently with certain human rights standards

This *Client Alert* summarises the main aspects of the UK's implementation of the UN Guiding Principles, with particular focus on issues of most direct relevance to UK businesses.

## **The UN Guiding Principles**

The UN Guiding Principles were originally proposed by John Ruggie (the UN Special Representative on Business and Human Rights) and adopted by the UN Human Rights Council on 16 June 2011.<sup>2</sup> The UN Guiding Principles established “three pillars”. These are: (i) the State duty to protect against human rights abuses by business enterprises, (ii) the corporate responsibility to respect human rights, and (iii) access to remedy for victims of business-related human rights abuses.

The UN Guiding Principles are non-binding. However, in light of the developments summarised in the UK Action Plan, there are now binding legal obligations on UK businesses to ensure respect for human rights.

### **Pillar 1: The State Duty to Protect Against Human Rights Abuses by Business Enterprises**

The UK Action Plan emphasises recent steps that the UK has taken to ensure good corporate governance and the respect for human rights. These include:

- The UK Bribery Act, under which UK companies are liable for bribery committed anywhere in the world, (for further information on the UK Bribery Act, see [The UK Bribery Act: What Every Business Needs to Know](#))
- The UK's implementation of the OECD Guidelines for Multinational Enterprises, pursuant to which BIS may publicly determine that UK businesses have acted inconsistently with human rights, as discussed further below
- The Companies Act 2006 requirement that company directors have regard to the impact of the company's operations on the community<sup>3</sup>

The UK Action Plan identifies further steps that the UK government has taken to protect against human rights abuses by businesses. These include:

- Under UK government procurement rules, public bodies may exclude tenderers from bidding where a company has been responsible for human rights breaches
- Under the OECD 2012 Common Approaches, Export Credit Agencies are required to take account of “adverse project-related human rights impacts”<sup>4</sup>

### **Pillar 2: The Corporate Responsibility to Respect Human Rights and the Strategic Report Regulations**

The UK Action Plan emphasises that the UK government expects UK businesses to respect human rights in light of the UN Guiding Principles. A fundamental principle in this regard is the requirement for businesses to conduct due diligence to avoid infringing human rights.

The recent Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 (the "Strategic Report Regulations") implemented this principle into UK law. The Strategic Report Regulations came into effect on 1 October 2013 and apply to financial years ending on or after 30 September 2013.<sup>5</sup>

The Strategic Report Regulations require generally that all companies other than small companies publish a strategic report for each financial year. The strategic report must contain a fair review of the company's business and a description of the principal risks and uncertainties facing the company.

However, the Strategic Report Regulations contain additional reporting requirements for "quoted" companies.<sup>6</sup> Notably, quoted companies must now include in their strategic reports, to the extent necessary for an understanding of the development, performance or position of the company's business, information about: (i) social, community and human rights issues; and (ii) any policies of the company in relation to social, community and human rights issues and the effectiveness of those policies.<sup>7</sup> For example, a company operating in the mining sector may be expected to include information relating to any detrimental environmental and social effects of its business and related policies. The strategic report must expressly state if it does not include this information.

The Financial Reporting Council has issued draft guidance on the strategic report requirements (the "FRC Draft Guidance").<sup>8</sup> The consultation period for the FRC Draft Guidance is due to end on 15 November 2013. The FRC Draft Guidance advises that the strategic report should include information on human rights issues "when their influence, or potential influence, on the development, performance, position or future prospects of the entity's business is of such a nature or magnitude that they are relevant to shareholders".

The Conduct Committee of the Financial Reporting Council (the "FRC Conduct Committee") is responsible for monitoring the compliance of the strategic report with the Strategic Report Regulations. The FRC Conduct Committee may investigate cases where it appears that required information has not been provided and has the power to apply to the court for a declaration that a strategic report does not comply with the requirements and for an order requiring the directors to prepare a revised strategic report.<sup>9</sup>

The strategic report must be approved by the board of directors. If a strategic report is approved but fails to comply with the relevant content requirements, an offence is committed by any director who: (i) knew that the report did not comply, or was reckless as to whether the report complied; and (ii) failed to take reasonable steps to secure compliance with those requirements or to prevent the report from being approved.<sup>10</sup>

### **Pillar 3: Access to Remedy for Victims of Human Rights Abuses and National Contact Points**

The UK Action Plan emphasises the wide range of judicial and non-judicial grievance mechanisms.

The complaint mechanism under the OECD Guidelines for Multinational Enterprises (the "OECD Guidelines") is particularly relevant for businesses.<sup>11</sup> The OECD Guidelines require each signatory State to establish a National Contact Point (NCP) to receive complaints of human rights violations by businesses. The NCP may make public determinations following such complaints.

BIS is the UK's NCP. Interested parties (which may be victims and/or NGOs acting on their behalf) may make complaints to BIS alleging non-compliance by UK companies with the OECD Guidelines.<sup>12</sup> Upon receipt of such complaints, BIS has issued public determinations that some companies had failed to

comply with the OECD Guidelines and that others should bring their practices into line with the OECD Guidelines.

BIS has found a range of conduct to be inconsistent with the OECD Guidelines. This includes a UK mining company's failure to implement an adequate and timely consultation mechanism to engage an indigenous community directly affected by a planned mine in India, and the refusal by a subsidiary of a UK company to acknowledge the formation of a trade union in Algeria. BIS has also recommended that certain mining companies build upon existing procedures for engagement with local communities and be forthcoming in disclosing to affected communities and their representatives information on the potential environmental impact of projects.

## Conclusion

The requirement that businesses comply with human rights standards is no longer simply a moral one or a question of good governance and social responsibility. Businesses and their transactional lawyers now need to be aware of the binding legal obligations in this area, which have sanctions for non-compliance.

The UK is at the forefront of the implementation of the UN Guiding Principles, and the UK Action Plan reflects the seriousness with which the UK government expects businesses to take their human rights obligations. This is a growing legal area and businesses in the UK and elsewhere need to monitor these and similar obligations carefully. Failure to do so may result not only in legal sanctions, but also non-judicial and public determinations that a business has failed to comply with basic human rights standards, which may have far-reaching reputational consequences.

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## Endnotes

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- <sup>1</sup> The UK Action Plan is available at <https://www.gov.uk/government/publications/bhr-action-plan>.
- <sup>2</sup> The UN Guiding Principles are available at <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>.
- <sup>3</sup> Section 172(1)(d) of the Companies Act 2006.
- <sup>4</sup> The OECD 2012 Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence are available at [http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=tad/ecg\(2012\)5&doclanguage=en](http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=tad/ecg(2012)5&doclanguage=en).
- <sup>5</sup> The Strategic Report Regulations are available at [http://www.legislation.gov.uk/uksi/2013/1970/pdfs/uksi\\_20131970\\_en.pdf](http://www.legislation.gov.uk/uksi/2013/1970/pdfs/uksi_20131970_en.pdf).
- <sup>6</sup> “Quoted” companies means UK-incorporated companies that are listed on the London Stock Exchange or in an European Economic Area State, or admitted for dealing on the New York Stock Exchange or NASDAQ, pursuant to Section 385 of the Companies Act 2006.
- <sup>7</sup> Section 414C(7) of the Companies Act 2006, as amended by the Strategic Report Regulations.
- <sup>8</sup> The FRC Draft Guidance is available at <http://www.frc.org.uk/Our-Work/Publications/Accounting-and-Reporting-Policy/Exposure-Draft-Guidance-on-the-Strategic-Report.pdf>.
- <sup>9</sup> Section 456 of the Companies Act 2006, as amended by the Strategic Report Regulations.
- <sup>10</sup> Sections 414D(2) and (3) of the Companies Act 2006, as amended by the Strategic Report Regulations.
- <sup>11</sup> The OECD Guidelines are available at <http://www.oecd.org/daf/inv/mne/48004323.pdf>.
- <sup>12</sup> More information is available at <http://www.bis.gov.uk/nationalcontactpoint>.