GIBSON DUNN

Part Two – Mandatory Corporate Human Rights Due Diligence: What Now and What Next? An International Perspective

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Part Two: National Developments

In this two-part alert, we examine key global legislative developments and proposals in the bourgeoning field of mandatory corporate human rights due diligence. In Part One (published on 8 February 2021), we looked at very recent steps taken by the institutions of the EU towards implementation of legislation at a pan-European level. In this Part Two, we consider developments within the EU and in the UK, and we also look beyond Europe, to APAC, the US and Canada.

Developments within Europe
France

In 2017, France introduced a pioneering piece of legislation: the *Loi de Vigilance*[1] (the "**LDV**"), which inserted provisions into the French Commercial Code imposing substantive requirements on companies in relation to human rights and environmental due diligence.

Pursuant to the LDV, companies with more than 5,000 employees in France (or 10,000 employees in France or abroad) must establish, implement and publish a "*vigilance plan*", in order adequately to address risks within their supply chains or which arise from the activities of direct or indirect subsidiaries or subcontractors.

Each vigilance plan should include appropriate measures to identify, analyse and map the risks to human rights, the environment, fundamental freedoms and the health and safety of individuals. The vigilance plan should also include action plans to mitigate those risks and prevent any such damage, as well as a monitoring system to ensure that the plan is effectively implemented.

Critically, the LDV provides a route for third parties (such as trade unions and NGOs) to seek an injunction forcing compliance where a company is deemed to be failing to comply with the plan. Penalties may also be imposed if the injunction is granted, but the LDV does not provide any guidance as to what those might be: they remain matters for the judge's discretion.

Further, the LDV sets out a civil cause of action such that companies can be sued in tort by any third party for any damage caused in relation to the activity of a subsidiary, a subcontractor or a supplier, if it can be proven that the proper implementation of that company's vigilance plan could have prevented the damage suffered by the relevant third party. The LDV itself is unclear on the level of recoverable damages, and it remains to be seen how the courts will treat such claims.

The initial draft legislation also provided for the ability to impose fines of up to EUR30

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million on companies in breach of the LDV. However, given the broad drafting and the lack of clarity of these punitive provisions, the French *Conseil constitutionnel* censored and effectively suppressed these sanctions for breach of the principle of legality of penalties[2].

The LDV has slowly but steadily been implemented by the largest French corporations as part of their corporate social responsibility programs, with vigilance plans and other non-financial reporting now published by most listed companies in their annual reports. Clearly these reports are coming under intense scrutiny by civil society, with a number of formal notices by NGOs against multinationals gaining widescale publicity. A handful of notices have so far led to the commencement of injunctive proceedings.

Over the past year in particular, the French courts have been grappling with how best to approach injunctive proceedings under the LDV as a matter of procedure. On 10 December 2020 the Court of Appeal of Versailles handed down two decisions which confirmed for the first time that commercial courts (and not general civil courts) should have exclusive jurisdiction over such injunctions. These decisions may well be subject to judicial review before the French *Cour de cassation* and it may take several months, if not years, until the procedural regime for such proceedings is fully clarified. In addition, on 11 February 2021 the *tribunal judiciaire* of Nanterre handed down a strongly worded judgment which recognised the exclusive jurisdiction of civil courts instead of commercial courts to assess whether or not companies should comply with their vigilance plans[3]; a decision which appears to extend to both injunctive proceedings and claims for damages. It remains to be seen how the courts will resolve these conflicting positions.

As recently as 3 March 2021, the first substantive claim for damages under the LDV was filed against a French company by 11 French and American NGOs. The claim was filed against Casino (a French mass-market retailer with activities in Brazil and Colombia) in front of the *tribunal judiciaire* of Saint Étienne (where the company has its head office), seeking damages in relation to its alleged involvement in the deforestation of the Amazon rainforest. The claimants are seeking damages of EUR3 million in respect of alleged breaches of the LDV, on the basis that Casino allegedly purchased meat from providers involved with the clearing of the rainforest. The meat was allegedly offered for sale in supermarkets through Casino's subsidiaries Pao de Açucar in Brazil and Exito in Columbia[4].

As somewhat of a test case for the French court on the civil liability remedy under the LDV, these proceedings will inevitably be monitored closely by NGOs and companies alike, and could take some 12-18 months to reach a conclusion.

Germany

Just this year, Germany has also taken important steps towards the implementation of mandatory human rights due diligence standards akin to the French LDV model.

In February, a first official legislative proposal on a Human Rights Supply Chain Duty of Care Act was published. This followed months of negotiations by the coalition parties, with key points of the draft law proposed by the conservative-led German Federal Ministry for Economic Cooperation and Development (BMZ), alongside the social democrat-led German Federal Ministry of Labour and Social Affairs (BMAS).

While the draft legislation may still be subject to further minor amendments, it is now treated as agreed, and is expected to be passed this year.

Starting in January 2023, German companies with more than 3,000 employees across their group structure (reducing to 1,000 employees from 2024) will be obliged to take action to protect human rights across their own activities and their supply chains. Corporates must conduct adequate due diligence in relation to human rights and certain environmental risks. A risk analysis should be conducted at least annually, with a

requirement for regular reporting and the implementation of preventative measures where risks are identified. Pursuant to the Act, corporates must also establish an operational-level grievance mechanism, and provide for remedial measures for human rights abuses.

Obligations under the Act are imposed in respect of a company's own business operations and its first tier of suppliers. Lower tier suppliers are expected to be considered on an ad-hoc basis where appropriate (for example, if the company becomes aware of potential human rights violations by a supplier at that level).

Under the Act, a state inspection authority will be established to investigate reported violations at companies on-site. In cases of non-compliance, companies face sanctions such as fines of up to two per cent. of average worldwide turnover, and the exclusion from public sector contracts for up to three years.

The imposition of civil liability – which was strongly opposed by the German Federal Ministry of Economics (BMWI) as companies feared unpredictable legal consequences and mass litigation – has not been included the draft legislation. However, the Act does create a right for NGOs and trade unions to litigate before a German court on behalf of affected individuals, if human rights violations are suspected.

The Netherlands

Legislation in the Netherlands also focuses on substantive due diligence standards. The Child Labour Due Diligence Act 2019 (*Wet Zorgplicht Kinderarbeid*) introduces a duty of care on companies to investigate whether their goods or services have been produced using child labour, and to devise a "*plan of action*" (*plan van aanpak*) if there is "*a reasonable suspicion*" (*redelijk vermoeden*) of such issues arising. In addition, relevant companies are expected to submit a declaration to a regulatory body (yet to be appointed) affirming that they have exercised an appropriate level of supply chain due diligence.

Notably, the law applies to all companies that sell or supply goods or services to Dutch consumers, regardless of where the company is based or registered: there are no exemptions for legal form or size. There will be regulatory oversight of a company's implementation of measures and compliance with the law, with potential fines of up to EUR870,000 or 10 per cent. of total worldwide turnover. Further, the law envisages potential director-level criminal liability (with up to two years of imprisonment) if a company receives two fines for breaching the law within a five-year period. As a result, the Netherlands was one of the first jurisdictions to attach criminal sanctions in the context of mandatory human rights due diligence.

The Child Labour Due Diligence Act 2019 is due to come into effect in mid-2022. Before then, the government intends to prepare a General Administrative Order nominating the regulatory body for the Act, and providing further information on companies' specific obligations.

Switzerland

Switzerland also recently considered a more substantive regime which would impose mandatory due diligence obligations on corporates, akin to the LDV in France (the "*Responsible Business Initiative*" or "**RBI**"). However, in a national referendum on 29 November 2020, the motion to adopt the RBI received insufficient votes. As such, a counterproposal from the Swiss Parliament, which concentrates on transparency and reporting rather than substantive due diligence requirements, looks set to be adopted in the first half of 2021.

Under the proposed law, certain Swiss companies would be required to report publicly on measures taken to ensure compliance with human rights and environment laws in the

company's areas of activity, including abroad and with third parties. This would include identifying and minimising risks, and ensuring effective remedies are available. Non-compliance may result in the payment of damages.

The UK

By contrast with France, Germany and the Netherlands, the primary UK regime is modelled on transparency and reporting requirements, rather than substantive due diligence obligations regarding human rights.

At inception, the Modern Slavery Act 2015 was celebrated as one of the first initiatives of its kind: requiring entities with a UK business and a global turnover of more than £36 million to publish a statement on their website which sets out the steps taken to ensure no slavery in their supply chains (or, in the event that no due diligence is undertaken, to acknowledge that fact expressly). Critically, while the preparation of a statement on these issues is mandatory for eligible companies, the *content* of the Statement is set out in the Act as guidance only, and the Act has been heavily criticized because many companies simply fail to comply with the Act at all, and there is no enforcement regime to compel compliance (according to a UK government report in 2020, approximately 40 per cent. of organisations are failing to comply with the provisions of the Act[5]).

Public scrutiny and criticism of the Act led to a public consultation in 2020, to which the UK Government responded in September 2020, setting out various options to strengthen the reporting requirements and to enhance enforcement. The UK Government now intends to mandate the areas that modern slavery statements must cover, set a uniform reporting period for all entities (1 April to 31 March) and a single reporting deadline (30 September), extend the reporting requirement to public bodies with a budget of £36 million or more, and establish a central public repository for modern slavery statements. The Government is also considering options for civil penalties for non-compliance, and has committed to set up a regulatory body with the authority to impose such penalties.[6]

More recently, there have been two separate legislative developments which focus on substantive corporate due diligence connected with human rights issues. On 25 August 2020, the Department for Environment, Food & Rural Affairs announced a proposal to prohibit larger businesses operating in the UK from using products grown on land that was deforested illegally. The proposals would require businesses to carry out due diligence on key commodities in their supply chains to ensure they were produced in line with local laws protecting forests, with fines (as yet undefined in terms of scale) for non-compliance. After a six-week consultation period which ended at the beginning of October, the proposal was introduced in the Environment Bill on 11 November 2020, and is now progressing through Parliament.

Further, on Tuesday 12 January 2021, the UK Foreign Secretary announced new measures to mitigate the risk of importing goods linked to human rights abuses in China; driven by concerns over treatment of the Uighur population in China's Xinjiang province.[7] As part of these measures, the UK Government has issued new, robust and detailed guidance to British firms setting out the specific risks faced by companies with links to Xinjiang and underlining the challenges of effective due diligence.[8] The Government has expressed an intention to publish public procurement rules (for central government, non-departmental bodies and executive agencies) which would prohibit those agencies from contracting with suppliers when there is evidence of rights violations in their supply chains. The Government has also expressed an intention to review export controls to prevent the shipping of any goods and technology to China that could contribute to such violations and repression in Xinjiang.

The United States and Canada
The United States

While the US has been a global leader in the sanctions space on human rights related issues (the so-called "*Magnitsky sanctions*" are an example), with the exception of California, it is less advanced on human rights reporting and / or substantive corporate human rights due diligence.[9]

The California Transparency in Supply Chains Act 2010 (the "**California Act**") was the first legal enactment of its kind to address modern slavery through transparency and reporting obligations, and was the inspiration for the UK Modern Slavery Act. Focused on reporting and disclosure , the California Act requires companies doing business in California, with annual worldwide "*gross receipts*" in excess of USD100 million, to disclose information regarding their efforts to eradicate human trafficking and slavery within their supply chains. Such disclosures (typically delivered in the form of a company transparency statement) must cover what actions the company is taking in areas such as verification of product supply chains, audits of suppliers, and maintenance of appropriate standards and training.

The exclusive remedy for a violation of the California Act is an action brought by the California Attorney General for an injunction. However, such action has been infrequent to date.

At the federal level, several bills have been proposed that would require publicly-listed companies to conduct human rights diligence and / or disclose the diligence measures they have taken, but these have gained little traction before Congress.

- In 2015, against the backdrop of the California Act and the UK Modern Slavery Act, a draft Business Supply Chain Transparency on Trafficking and Slavery Act ("**BSCTA**") was introduced, to be overseen by the SEC. The draft envisaged disclosure of information by public companies as to the measures taken to identify and address conditions of forced labour, slavery, human trafficking and child labour within their supply chains. The draft legislation quickly gained support of investors, with 112 faith-based investors, sustainable and responsible shareholders, pension funds and research organisations (representing over USD1 trillion in assets under management globally) expressing strong support for the legislation in an open letter in September 2015. Progress has, however, been slow. In March 2020 the BSCTA was referred to the House Committee on Financial Services, but it failed to receive a vote when heard before Congress[10].
- In parallel, the draft Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019 (in the form of an amendment to the Securities Exchange Act of 1934) was opened for debate by the US House of Representatives Committee on Financial Services in July 2019. This Act would require publicly-listed companies to conduct human rights due diligence (both upstream and downstream) and report on their findings and responses, with oversight by the SEC. The bill notes that while certain countries have leveraged ESG regulation to mandate risk assessment of human rights violations, the US has not, and the bill seeks to fill this gap. That said, the future of the Act is somewhat uncertain, given a lack of progress since July 2019.
- A third piece of draft legislation, the draft Slave-Free Business Certification Act, would require every "*covered business entity*" (defined as any issuer under section 2(a) of the Securities Act of 1933 that has annual, worldwide gross receipts of USD500 million) to audit and report on instances of forced labour in their supply chains, under the supervision of the Department of Labor. As drafted, companies that deliberately violate the Act could be liable for civil damages of up to USD100 million, and punitive damages of up to USD500 million. The Slave-Free Business Certification Act was referred to certain House and Senate committees for their consideration in 2020. It was anticipated that this bill would gain bipartisan support, both from Republicans focused on anti-trafficking and anti-slavery initiatives and Democrats focused on broader human rights concerns and corporate accountability. However, the bill did not receive a vote when heard

before Congress on 21 July 2020[11] and has not progressed any further for now.

Canada

In Canada, Bill S-216 ("*An Act to enact the Modern Slavery Act and to amend the Customs Tariff*") was introduced to the Senate on 29 October 2020. This bill proposes a similar regime to that which was set out in the UK Modern Slavery Act and the California Act. It imposes supply chain reporting requirements on businesses which (subject to a few discrete exceptions) meet at least one of the following conditions for at least one of the two most recent financial years as shown on their consolidated statements: (i) the entity has at least CAD20 million in assets; (ii) the entity has at least CAD40 million in revenue; or (iii) the entity employs an average of at least 250 employees. Unlike the laws of the UK and California, however, the Bill provides for fines and far-reaching investigative powers in the event of non-compliance, with scope for fines of up to CAD250,000 per offence. The Bill also envisages director, officer and agent liability for certain breaches. One key distinguishing feature of the proposed Act lies in its amendment to the Customs Tariff. Similar to provisions of federal US trade law, this amendment means that goods will be wholly excluded from entering Canada if they are manufactured by forced labour or child labour.

While a predecessor of Bill S-216 was unsuccessful, this iteration has the support of an All-Party Parliamentary Group to End Modern Slavery and Human Trafficking, and so its prospects are stronger. Following its debate at a second reading in the Senate on 5 November 2020, it appears that the Bill is advancing steadily.

Regionally, the Canada-United States-Mexico Agreement ("**CUSMA**") came into effect on 1 July 2020 and contains modern slavery-related prohibitions. Under CUSMA, Canada must prohibit the importation of goods produced by forced or compulsory labour, including child labour. Failure to comply could result in exclusion or seizure of goods, reputational risks, Administrative Monetary Penalties, and potentially additional legal consequences, including criminal investigation, depending on the particulars of a situation.

APAC
Many jurisdictions within APAC, such as Hong Kong and Singapore, have focused more on the criminalisation of human trafficking or modern slavery in recent years, rather than the concept of mandatory corporate human rights due diligence or reporting requirements.

Hong Kong

In Hong Kong, efforts to introduce a draft Crimes (Amendment) (Modern Slavery) Bill 2019, which would have imposed a requirement on corporates to disclose their efforts (if any) in tackling modern slavery in their supply chains – similar to the UK's Modern Slavery Act – did not receive the government's support, and ultimately were discontinued in September 2019. In fact, the Bill was prepared with the expectation that it would not be passed into law. As indicated by the formal legislator responsible for preparation of the Bill, it was one *"that would incur public spending, and requires the Government's consent when the bill is not in line with current government policies"*[12]. As it stands there is therefore no human rights due diligence reporting or substantive mandatory due diligence legislation in the pipeline, and while the listing rules of the Hong Kong Stock Exchange envisage disclosure of information on policies and compliance with relevant laws and regulations relating to prevention of child and forced labour, this is not mandatory, but only recommended.

Singapore

Singapore is in a similar position: the listing rules of the Singapore Exchange require listed

issuers to prepare annual sustainability reports, describing the issuer's sustainability practices with reference to, *inter alia*, material environmental, social and governance factors. There are, however, no general corporate mandatory reporting requirements relating to human trafficking or modern slavery as yet.

Australia

Inspired by the UK's Modern Slavery Act 2015, Australia introduced its own mandatory human reporting regime in 2018, with a Modern Slavery Act which entered into force on 1 January 2019. The Act imposes mandatory modern slavery reporting requirements on large businesses and other entities in the Australian market with annual consolidated revenue of at least AUD100 million. Such entities are required to prepare modern slavery statements on an annual basis, setting out relevant actions to assess and address modern slavery risks in the entity's operations. The Act goes further than its UK cousin, by stipulating what topics a company's modern slavery statement must cover (for example, the risks of modern slavery practices in a company's operations and supply chains, and the actions that the company has taken to assess and address those risks), and by implementing a central repository of statements housed by the Government. However, the Act has faced similar criticism to the UK Act in that it is considered to lack teeth, evidenced by a paucity of enforcement for non-compliance. Critics have also noted that the Act only imposes reporting requirements (and not requirements to take substantive action), which may simply encourage a '*tick-the-box'* form of reporting.

With regulators and investors in the region paying increasing attention to these issues, and with multinationals facing heightened expectations globally in any event as a result of developments in Europe, it may be only a matter of time before APAC legislatures start seriously considering mandatory reporting standards, even if not substantive due diligence requirements.

International law

No international round up would be complete without referring to the ongoing preparation of a draft UN Treaty on Business and Human Rights, which has been in development since 2014 and is now in its third iteration. As it stands, the draft envisages imposing obligations on states to "*ensure that their domestic law provides for a comprehensive and adequate system of legal liability*" for businesses domiciled or operating within their territory which have abused human rights.[13] Such mechanisms would include requiring business enterprises "*to undertake human rights due diligence proportionate to their size, risk of severe human rights impacts and the nature and context of their operations*" and would require State Parties to impose sanctions for non-compliance with those due diligence duties.[14] Notably, the draft Treaty requires states to ensure that businesses "*respect all internationally recognized human rights and prevent and mitigate human rights abuses throughout their operations*." It also requires states to ensure that their domestic law holds businesses accountable for "*failure to prevent another legal or natural person with whom it has a business relationship, from causing or contributing to human rights abuses*" where there is an element of control.[15]

The draft Treaty recently underwent its sixth round of discussions by the Open-Ended Intergovernmental Working Group, and this project looks set to continue for some time, with scepticism among some critics that it will ever be adopted.

Conclusion

Given the momentum in human rights due diligence and transparency / reporting legislation internationally, companies are well advised to consider their existing risk management frameworks and to reflect on the depth of their understanding and oversight of human rights issues in their operations. The array of different legislative initiatives and approaches, coupled with the inevitable complexity and multi-layered nature of corporate supply chains, means that the position is by no means straightforward. Early engagement

on these issues is therefore key.

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[1] Law 2017-399 of 27 March 2017

[2] *Conseil constitutionnel*, Decision n°2017-750 DC 23rd March 2017 *Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.* We note that the public law department of GDC Paris led by Nicolas Baverez represented several professional organisations in the context of this constitutional dispute.

[3] *Tribunal Judiciaire* of Nanterre 11th February 2021 RG n° 20/00915

[4] Beef Report June 2020 from *Envol Vert* "*Casino Group – eco responsible for deforestation*"

[5] Available here.

[6] https://www.gov.uk/government/news/new-tough-measures-to-tackle-modern-slavery-in-supply-chains.

[7] https://www.gov.uk/government/news/uk-government-announces-business-measures-over-xinjiang-human-rights-abuses.

[8] https://www.gov.uk/government/publications/overseas-business-risk-china/overseas-business-risk-china.

[9] While not the focus of this alert, there has been legislation in respect of "*conflict minerals*". At a federal level, the US Congress mandated in Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 that the US Securities and Exchange Commission should enact rules requiring public companies to determine whether they are subject to reporting any "*conflict minerals*" used in their products. The disclosure requirements are intended to bring greater public awareness and transparency of the human rights abuses caused by armed groups in the Democratic Republic of Congo and promote responsibility with regard to conflict mineral supply chains. For further information, please see our client alert on this topic: here.

[10] See https://www.govtrack.us/congress/bills/116/hr6279

[11] See https://www.govtrack.us/congress/bills/116/s4241

[12] https://www.iias.asia/the-newsletter/article/legislation-and-other-tactics-combatting-human-trafficking-hong-kong

[13] Article 8.1 of the Draft Treaty (Second Revised Version).

[14] Articles 6.2-6.6 of the Draft Treaty (Second Revised Version). *Available here*.

[15] Available here.

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