

Top of the List

Best-in-class companies are already anticipating change by reviewing and refreshing their human rights programmes

Sam Eastwood, PARTNER, James Ford, SENIOR ASSOCIATE, AND Libby Reynolds, ASSOCIATE, AT MAYER BROWN INTERNATIONAL LLP

Navigating the constantly evolving human rights landscape is of paramount importance for companies.

There has been a marked rise in laws creating obligations on corporates to conduct human rights due diligence and report on associated risks in their supply chains. The announcement that the European Union is set to introduce its own due diligence law by 2021 reinforces this important trend. Companies should prepare for the upcoming legislative changes by reviewing their human rights and environment due diligence programmes and, in particular, should look beyond Tier One suppliers when assessing human rights risks in their supply chains.

There are also increasing expectations from key stakeholders – investors, shareholders and consumers alike – which are driving companies to increase their focus on responsible and sustainable business. These demands have been amplified by the COVID-19 pandemic, which has exposed human rights violations, leading to irreparable reputational damage, weakened investor confidence and diminished company value.

The associated increased focus on human rights impacts in supply chains, at both a national and international level, will only serve to accelerate the impetus towards wider mandatory human rights due diligence requirements. The emerging picture is that an effective human rights compliance programme is no longer a ‘tick-box’ exercise: it is an essential feature of a corporate risk management strategy. Human rights are not a topic that can be reserved for a company’s Corporate Social Responsibility team, but should be at the top of the agenda for in-house lawyers, compliance

professionals and indeed the company secretary and the board.

Business and Human Rights

The United Nations Guiding Principles on Business and Human Rights (UNGPs) (2011) were the first globally accepted voluntary standard holding businesses and governments accountable for adverse human rights impacts. Under the UNGPs, businesses have a responsibility to conduct effective human rights due diligence on their supply chains. The UNGPs have since influenced, and been integrated into, a number of international standards, such as the OECD’s Guidelines for Multinational Enterprises and Due Diligence for Responsible Corporate Lending and Securities Underwriting, as well as industry specific guidance.

The move towards mandatory human rights due diligence is gathering pace. The French Duty of Vigilance Law came into force in March 2017 and requires companies to take measures to identify risks within their supply chain and to prevent human rights violations. The Dutch Child Labour Due Diligence Act 2019 also requires certain companies to certify that they have conducted due diligence in relation to child labour in their supply chains. Other countries are set to follow suit: Switzerland is set to hold a referendum later in 2020 on introducing its own due diligence law and, on 14 July 2020, the German government announced its intention to introduce its own due diligence law before the end of 2021.

In parallel, there have been movements towards increasing transparency and reporting on steps companies have taken to identify and mitigate modern slavery in their supply chains. The UK Modern Slavery Act 2015 requires certain companies to report on modern slavery risks in their supply chains. Similar

public disclosures are required under laws such as the California Transparency in Supply Chains Act 2010 and the Australian Modern Slavery Act 2018.

Increasing Stakeholder Expectations

Separately, and in addition to the evolving legislative dynamic, key stakeholders are increasingly focused on non-financial risks such as human rights risks in the supply chain. Investors, shareholders and even consumers are putting more emphasis on environmental, social and governance (ESG) factors in making business decisions. A good example is the Norges Bank Responsible Investment Strategy in which the bank states that it expects “companies to integrate human rights into their policies, corporate strategy, risk management and reporting”.

In practice, a failure to properly assess, manage and mitigate ESG risks – including human rights risks – can hit investor confidence, diminish company value and irreparably damage company reputation. A recent case in point is Boohoo, a hugely successful fast fashion business, which saw 50% of its share value (£1.5 billion) wiped out in just 48 hours amid revelations that the company could be linked to a Leicester factory where employees were allegedly being paid less than half the minimum wage and were operating in unacceptable working conditions. A key takeaway from that case is not the length of the supply chain, but that the factory could ultimately be linked to Boohoo as the end retailer.

Environmental Due Diligence

Against this backdrop, there have been repeated calls for a harmonised approach towards human rights and environmental due diligence at an EU level. While civil society has been instrumental in pursuing change, there has been considerable support from the business community. A study commissioned by the European Commission found that a number of businesses are supportive of mandatory human rights legislation at an EU level because, among other things, this would increase legal certainty, level the playing field, and provide a non-negotiable standard to facilitate leverage across their supply chains. The study also found support for mandatory due diligence requirements to extend beyond Tier One suppliers to include the whole value chain.

The European Commissioner for Justice has responded to these calls by committing to a legislative initiative in 2021 on an EU-wide mandatory human rights and environmental due diligence law. Crucially, the Commissioner has suggested that the law will contain an enforcement mechanism with sanctions. In response to this development, the European Parliament’s Responsible Working Group (Responsible Working Group) has called for, among other things, the law to apply to all businesses, to establish civil liability for human rights abuses and environmental harms, and to ensure authorities are provided with effective instruments to monitor compliance.

While human rights and supply chain risks were already receiving more attention in the lead up to COVID-19, the current pandemic has placed even

greater focus on these risks. The Responsible Working Group has stated that the crisis has highlighted the precarious nature of global value chains and reinforced the need to ensure their resilience and sustainability. Indeed, as part of its coordinated response to combat the pandemic and its consequences, the European Parliament passed a resolution “that corporate human rights and environmental due diligence are necessary conditions in order to prevent and mitigate future crises and ensure sustainable value chains”. The increased focus on human rights impacts in supply chains at both a national and international level will only serve to accelerate the move towards wider mandatory human rights due diligence requirements.

Human Rights and Sanctions

The increasing overlap between human rights and sanctions provides an added layer of complexity for companies to consider in identifying and managing human rights risks. On 6 July 2020, the UK introduced its first post-Brexit autonomous sanctions regime with a focus on “perpetrators of the worst human rights abuses”. 47 individuals and two companies were added to the UK sanctions list and were made subject to an asset freeze with immediate effect. The new sanctions framework includes the authority to sanction companies who are complicit in forced or compulsory labour. This presents another supply chain consideration for companies that must comply with UK sanctions. These new UK sanctions reflect the US’ Magnitsky sanctions under which the US can impose sanctions on persons involved in serious human rights abuses or corruption.

Company Compliance Programmes

The evolving legal landscape towards human rights risks – as emphasised by the prospective EU mandatory due diligence legislative initiative – is indicative of a shifting risk landscape for companies. Increasing stakeholder expectations and reputation risk exposure have already led many companies to (re)consider their human rights due diligence programmes to identify, manage and prevent human rights abuses in their supply chains. The prospect of an EU level requirement for mandatory human rights due diligence could also increase litigation and regulatory exposure in future. Best-in-class companies are already preparing for the upcoming legislative changes by:

- carrying out a human rights impact assessment and taking proportionate counter-measures, as well as communicating internally and externally what measures have been taken
- reviewing and reinforcing complaints mechanisms and speak-up programmes
- ensuring the business is well equipped to deal with ‘crises’
- reviewing the extent to which their board is equipped to address supply chain risks,
- reviewing the role, resources and expertise of the legal and compliance functions, who should play a key part in addressing these new challenges. n