

Recent Developments in Human Rights Due Diligence and Reporting

9 October 2020

Overview

September 2020 saw a number of important developments in the proliferation and strengthening of legislation concerning businesses' human rights and environmental due diligence and reporting obligations in the European Union (the "EU") and the United Kingdom (the "UK").

First, as [previously reported](#), earlier this year the European Commission announced its intention to enact legislation requiring mandatory human rights due diligence. On 11 September 2020, the European Parliament's Committee on Legal Affairs (the "JURI Committee") published a report requesting that the European Commission submit a legislative proposal on mandatory supply chain due diligence that would cover human rights, environmental and governance risks across a business's entire value chain (the "JURI Committee Report").¹ The JURI Committee Report also contains a series of recommendations and draft provisions for that legislative proposal. As expected following prior announcements and [reports](#), the proposed legislation is broad in scope and envisages a variety of penalties for businesses that fail to assess and prevent adverse human rights and environmental impacts. The recommendations make frequent reference to existing international standards, such as the UN Guiding Principles and the OECD's Due Diligence Guidelines.

Second, on 22 September 2020, the UK Government published its response to the public consultations on its recommendations to strengthen the reporting requirement under section 54 of the Modern Slavery Act 2015 (the "MSA" and the "MSA Report" respectively). The proposed measures include requiring companies to report against specific areas, publication of the modern slavery statements on a Government reporting service and, potentially, civil penalties for non-compliance.

¹ European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p. 6, available: [here](#).

Mandatory Human Rights Due Diligence in the EU

Background

On 29 April 2020, the European Commissioner for Justice, Didier Reynders, announced the European Commission's plan to develop legislation that would require EU businesses to carry out human rights and environmental due diligence. In June 2020, the EU Parliament's General Directorate for External Policies of the Union published a report recommending, amongst other things, that (i) any such legislation should not be limited to "large" businesses but instead should apply to all businesses placing products or offering services in the EU,² and (ii) the mandated due diligence should extend beyond first-tier suppliers to a business's entire value chain.³

The JURI Committee Report

The JURI Committee Report, echoing many of those recommendations,⁴ proposed the adoption of (i) a directive on mandatory supply chain due diligence; (ii) an amendment to the Rome II regulation to include a specific choice-of-law provision for "*Business-related human rights claims*"; and (iii) an amendment to the Brussels I regulation to establish extraterritorial jurisdiction in certain circumstances in relation to the matters covered by the proposed directive. The JURI Committee requested that the European Commission take the necessary steps to implement these legislative changes "*without undue delay*".

This JURI Committee also made a number of substantive recommendations regarding the proposed directive:

- **Aim of the proposed directive.** The aim of the proposed directive is to prevent and mitigate adverse human rights, governance and environmental impacts throughout EU businesses' value chains, as well as to ensure that businesses can be held accountable for these impacts and that anyone who has suffered harm can effectively exercise their right to obtain a remedy.⁵ Notably, the JURI Committee highlighted the limited impact of voluntary due diligence standards in this area.

² European Parliament, "Human Rights Due Diligence Legislation – Options for the EU", Directorate General for External Policies of the Union, June 2020, pp. 9 and 14, available: [here](#).

³ European Parliament, "Human Rights Due Diligence Legislation – Options for the EU", Directorate General for External Policies of the Union, June 2020, p. 11, available: [here](#).

⁴ European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, available: [here](#).

⁵ European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p. 11, ¶10, available: [here](#).

- **Scope of the proposed directive.** The directive should apply to “*all undertakings governed by the law of a Member State or established in the territory of the Union*”⁶ regardless of their size (although Member States may choose to exempt micro-enterprises), their sector (including the financial sector) and whether they are privately or state owned. The directive would also apply extraterritorially to limited liability companies established outside of the EU that sell goods or provide services in the internal market.⁷ Companies established outside of the EU will be in compliance with the directive if they fulfil the due diligence requirements set out in the relevant Member State’s legislation transposing the directive into national law.⁸ The due diligence obligation should be proportionate and commensurate to the business’s circumstances, which include its size, resources and leverage.
- **State-owned enterprises.** Entities that are state-owned or controlled should be required to procure services and goods from businesses that have complied with their due diligence obligations under the directive.⁹
- **Relevant risks.** The directive should require that businesses conduct due diligence with regard to human rights, environmental and governance “*risks*”, defined as “*a potential or actual adverse impact on individuals, groups of individuals and other organisations*”.¹⁰ “*Human rights risks*” are understood, at a minimum, as those expressed in the Bill of Rights, the UN Conventions protecting vulnerable persons and the core ILO Conventions.¹¹ Environmental risks refer to any potential or actual adverse impact that may impair the right to a healthy environment, including climate change and biodiversity. The recommendations in relation to environmental

⁶ European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p. 17, Article 2(1), available: [here](#) (“[t]his Directive shall apply to all undertakings governed by the law of a Member State or established in the territory of the Union.”)

⁷ European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p. 17, Article 2(2), available: [here](#) (“[i]t shall also apply to limited liability undertakings governed by the law of a non-Member State and not established in the territory of the Union when they operate in the internal market selling goods or providing services.”)

⁸ European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p. 17, Article 2(2), available: [here](#) (“[a]n undertaking governed by the law of a non-Member State and not established in the territory of the Union shall be considered in compliance with this Directive if it fulfils the due diligence requirements established in this Directive as transposed in the legislation of the Member State in which it operates.”)

⁹ European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p. 12, ¶15, available: [here](#).

¹⁰ European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p. 18, available: [here](#).

¹¹ European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p. 18, available: [here](#).

risks make reference to the Taxonomy Regulation, which we reported on in [January](#) and [May 2020](#).

- **Due diligence strategy.** Businesses should be required to conduct an impact assessment as to whether their operations or business relationships cause or contribute to the relevant risks identified above. If a business concludes that it does not cause or contribute to such risks, it must publish a statement to that effect.¹² If a business does identify risks, it must establish a due diligence strategy,¹³ to be published (on the business's website and/or on an EU centralised platform) and communicated to its workers, business relationships and national competent authorities.¹⁴
- **Consultations.** Businesses should conduct “*good faith, effective, meaningful, informed*” consultations with stakeholders (defined broadly) in establishing their due diligence strategies.
- **Grievance mechanisms.** The directive should require businesses to set up grievance mechanisms that conform to the relevant UN Guiding Principles at company or sector level.¹⁵
- **Penalties.** Member States should provide for penalties applicable to infringements of the national provisions adopted to implement the directive.¹⁶ Repeated infringement of those national provisions, intentionally or with serious negligence, should constitute a criminal offence.¹⁷
- **Due diligence not a defence.** The proposal does not envisage that due diligence will constitute a defence to civil liability incurred under the relevant national provisions. The purpose of due diligence is to prevent adverse impacts and thus reduce susceptibility to civil liability.

¹² European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p. 19, Article 4(3), available: [here](#).

¹³ European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p. 19, Article 4(4), available: [here](#).

¹⁴ European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p. 21, Article 6, available: [here](#).

¹⁵ European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p. 15 – ¶33 and p. 22 – Article 9, available: [here](#).

¹⁶ European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p. 26, Article 19(1), available: [here](#).

¹⁷ European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p. 26, Article 19(2), available: [here](#).

The JURI Committee also recommended the following amendments to the Brussels I and Rome II regulations to reflect the adoption of the proposed directive:

- The Rome II regulation—which concerns conflicts of law in relation to non-contractual obligations—should be amended to include a specific choice-of-law provision for “*Business-related human rights claims*”. The proposed provision would allow claimants to choose between (i) the law of the country in which the damage occurred, (ii) the law of the country in which the event giving rise to the damage occurred and (iii) the law of the place where the defendant business is domiciled or, if it is not domiciled in the EU, where it operates.¹⁸
- The Brussels I regulation—on “*jurisdiction and the recognition and enforcement of judgements in civil and commercial matters*”—should extend the jurisdiction of Member States over “*Business-related human rights claims*” to (i) the extra-territorial operations of a business domiciled or operating in the EU, if an adverse extraterritorial impact can be imputed to that business, e.g., through a corporate or other business relationship,¹⁹ and (ii) claims that would not otherwise fall within their jurisdiction—on an exceptional basis—if access to justice so requires (*forum necessitatis*).²⁰

Next Steps

As noted above, the JURI Committee Report requests that the European Commission submit a legislative proposal on mandatory supply chain due diligence, following the recommendations set out in the report, without undue delay. Once the European Commission has submitted²¹ its legislative proposal, it will be considered and voted on by the EU Parliament and the European Council.²² If the directive is adopted, Member

¹⁸ European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p.31, ¶5, available: [here](#).

¹⁹ European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p. 29, Article 8(5), available: [here](#) (“an undertaking domiciled in a Member State may also be sued in the Member State where it has its domicile or in which it operates when the damage caused in a third country can be imputed to a subsidiary or another undertaking with which the parent company has a business relationship [...]”)

²⁰ European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p. 29 – ¶6 and Article 26a, available: [here](#) (“[t]he present Regulation further introduces a new Article 26a incorporating a *forum necessitatis* that should be conditional on two elements, namely a risk of denial of justice in the third country where a human rights violation has taken place and a sufficiently close connection to the Member States concerned.”)

²¹ If the European Commission were to decide not to submit a proposal, pursuant to Article 225 of the Treaty on the Functioning of the European Union, it would need to inform the European Parliament of its reasons.

²² European Commission, “Parliament and Council adopt”, available: [here](#).

States will be required to incorporate, or transpose, its provisions into national law, generally within two years.²³

The UK Government's Response to the "*Transparency in Supply Chains Consultation*"

In 2015, the UK became the first country in the world to require businesses to report on steps that they are taking to identify and address modern slavery risks in their operations and supply chains. [View our previous Client Updates on the [UK MSA](#) and [its impact](#).] In 2018, the UK Government commissioned an independent review of the MSA to assess its operation and effectiveness and to suggest improvements. One of the four areas subject to review was section 54 of the MSA, which requires certain organisations to publish a slavery and human trafficking statement, approved by their boards of directors, on their website or, if they do not have a website, to provide a written copy to anyone who may request one ("MSA Statement"). The Government subsequently launched a consultation regarding several of the recommendations, including:

- The areas that MSA Statements should cover;
- A potential centralised Government-run reporting service for MSA Statements;
- A single reporting deadline for all businesses subject to the MSA;
- The introduction of civil penalties for breaches of the MSA; and
- The extension of reporting to the public sector.

The MSA Report, published on 22 September 2020, represents the UK Government's response to that consultation.

Content of MSA Statements

In Section 1 of the MSA Report, the UK Government set out proposals to strengthen the impact of MSA reporting by mandating specific topics for organisations to report against,²⁴ including the six areas already identified in the Government's guidance, namely:

²³ EUR-Lex, "European Union directives", available: [here](#).

²⁴ Home Office, "Transparency in supply chains consultation, Government Response", 22 September 2020, p. 6, available: [here](#).

- the organisation's structure, business and supply chains;
- its policies in relation to slavery and human trafficking;
- its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
- where there is a risk of slavery and human trafficking in the business and the steps taken to assess and manage the risk;
- its effectiveness in ensuring that slavery and human trafficking are not taking place in its business or supply chains, measured against such performance as it considers appropriate; and
- the training and capacity building about slavery and human trafficking available to its staff.

Reporting Requirements

In light of the consultation, the UK Government indicated that it will mandate that organisations publish their MSA Statements on a Government-run centralised reporting service and not just on their own websites.²⁵ The Government will also incorporate feedback from the consultation into the ongoing design of this service. The Government further indicated that it will introduce a single reporting deadline of 30 September, with a reporting period from 1 April to 31 March (March being the most common month for financial year end in the UK). By setting a single reporting deadline six months after the end of the reporting period, the Government intends to mitigate some of the potential challenges a single reporting deadline might present.²⁶ The amended legislation will also require that MSA Statements clearly state the date of board (or equivalent) approval and director (or equivalent) sign off. Group MSA Statements will be required to specify the specific group entities covered by the Statement.²⁷

Civil Penalties

The MSA Report notes that there are mixed views on the introduction of civil penalties for breaches of the MSA. The Government plans to consider enforcement options in

²⁵ Home Office, "Transparency in supply chains consultation", 9 July 2019-17 September 2019, p. 3, available: [here](#).

²⁶ Home Office, "Transparency in supply chains consultation, Government Response", 22 September 2020, p. 14, available: [here](#).

²⁷ Home Office, "Transparency in supply chains consultation, Government Response", 22 September 2020, p. 15 available: [here](#).

conjunction with the development of the Single Enforcement Body for employment rights and will issue a further update in due course.²⁸

Public sector supply chains

The UK Government will extend section 54 of the MSA to public bodies, a proposal that enjoyed wide support among respondents to the consultation. A budget threshold of £36 million will apply to determine which public bodies will be subject to the MSA, and public bodies will be allowed to publish “*group statements*”. The accounting officer, chief executive or equivalent person must sign off, and the senior management body must approve the MSA Statement.²⁹

Next steps

The UK Government has committed to publishing updated MSA guidance for businesses and public sector organisations in 2020, including best practices for reporting against each of six already existing areas. The guidance will further encourage organisations to be open about their priorities for the coming year.³⁰ The UK Government also committed to introducing a bill for measures requiring legislative change when parliamentary time allows.³¹

The UK and the EU’s proposed legislations come in the context of a growing global trend of regulation and guidelines that have strengthened business integrity obligations. For example, in addition to the MSA in the UK, the Loi de Vigilance in France has led to new types of sanctions and new disclosure obligations related to corporate supply chains, and the upcoming ESG Disclosure Regulation and related legislative frameworks will set new standards for fund and portfolio managers (among others). In addition, corporations are increasingly expected to implement best practices to comply with guidelines such as the United Nations Guiding Principles on Business and Human Rights, the United Nations Global Compact, the Voluntary Principles on Security and Human Rights and the OECD Guidelines for Multinational Enterprises.

²⁸ Home Office, “Transparency in supply chains consultation, Government Response”, 22 September 2020, p. 14, available: [here](#).

²⁹ Home Office, “Transparency in supply chains consultation, Government Response”, 22 September 2020, p. 18, available: [here](#).

³⁰ Home Office, “Transparency in supply chains consultation, Government Response”, 22 September 2020, p. 9, available: [here](#).

³¹ Home Office, “Transparency in supply chains consultation, Government Response”, 22 September 2020, p. 40, available: [here](#).

Debevoise's cross-practice Business Integrity Group is closely monitoring these developments. Tools like the **Debevoise Business Integrity Screen** can help companies implement a systematic approach to business integrity risks to manage the rapidly evolving reputational, financial, political and legal consequences of such risks.

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Please do not hesitate to contact us with any questions on how this development may impact your business.

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