

ESG/Supply Chain Due Diligence Legal Trends Update

Date : May 11, 2021

What's this all about?

Moves to increase Environmental, Social and Corporate Governance (ESG)/supply chain due diligence requirements on businesses have been increasing in the past few years and in particular recently, including with modern slavery compliance. The pace of change has increased across Europe in recent months with proposed new legislation in the EU and potential litigation in France. This article looks at recent highlights.

What's the position in the UK?

Under the UK the Modern Slavery Act 2015 organisations have to be transparent about their practices and policies in relation to preventing slavery and human trafficking, both within their own organisation and crucially within their global supply chains. They must also produce an annual modern slavery and human trafficking statement. Our FAQs and films about this can be found here <https://www.corderycompliance.com/uk-modern-slavery-human-trafficking-faqs/>.

Following a public consultation, in 2020 the UK government issued its thoughts about revising UK modern slavery compliance rules. We've written about that here <https://www.corderycompliance.com/uk-govt-modern-slavery-consultation-conclusions/>.

More recently, new impetus for reform of the compliance rules, along with possible legal changes in other related areas, came about following the UK Parliament's investigation into the Uyghurs in Xinjiang, China. We've written about that here <https://www.corderycompliance.com/new-supply-chain-laws-china/>. Old laws such as the UK's Foreign Prison-Made Goods Act 1897 may also see new life breathed into them. The UK Parliamentary committee tasked with dealing with this issue, the Business, Energy and Industrial Strategy (BEIS) committee, issued a report about this and supply chains more generally in March. We summarized that report here <https://www.corderycompliance.com/parliament-report-supply-chains/> and we're told that the UK government is expected to officially respond this month – possibly with new legislative proposals and/or a commitment to test the powers of the 1897 Act which does now feature in recent HMRC guidance.

The UK government also recently launched an official online modern slavery statement registry which can be used by an organisation to file their annual slavery statement. Currently this is voluntary but there are plans to make it mandatory. We've written about this here <https://www.corderycompliance.com/uk-modern-slavery-online-statement-registry/>. We have also written about the UK government's information requests in March to 15,824 companies relating to their modern slavery compliance which we uncovered through a recent Freedom Of Information request here <http://bit.ly/slaveryfoi>.

In a separate development, under the Global Human Rights Sanctions Regulations 2020, the UK recently also imposed sanctions (freezing orders against assets, prohibitions on providing financial funds to some individuals, and travel bans) on individuals and a company in China for human rights violations.

What's the position in other countries?

Other countries have similar transparency and disclosure requirements – the modern slavery transparency and disclosure requirements in Australia are on very similar lines to those in the UK (<https://www.legislation.gov.au/Details/C2018A00153>).

France has a 2017 Duty of Vigilance Law/Loi de Vigilance (<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/>) which can require businesses with at least 5,000 employees in France or at least 10,000 employees globally to put in place a so-called "Vigilance Plan" that identifies, assesses and seeks to mitigate human rights (and other) risks and tries to prevent human rights violations, both for the business itself and in its supply-chain; the plan must also be disclosed and non-compliance

can result in civil sanctions.

Germany has a draft Supply Chain Act/Lieferkettengesetz (latest version to come out soon) which may require businesses with over 3,000 employees (1,000 employees in 2024) to put in place a risk management system that assesses human rights risks, seeks to mitigate risks and tries to prevent adverse human rights impact, both for the business and throughout the supply-chain (albeit with tiered levels of due diligence based on various factors). Non-compliance may result in sanctions and exclusion from tendering procedures.

The Netherlands has a draft Child Labour Due Diligence Act/Wet Zorgplicht Kinderarbeid (<https://zoek.officielebekendmakingen.nl/stb-2019-401.html>) which may require businesses to do due diligence into whether their goods or services have been made with child labour and to put in place a plan to prevent child labour in their supply chains. The plan must be reported (to a regulator) and non-compliance can result in administrative and criminal sanctions.

What's the position in the EU?

Recently the European Parliament issued its official "European Parliament resolution of 10 March 2021 with recommendations to the [European] Commission on corporate due diligence and corporate accountability" which calls on the EU to adopt ESG/due diligence legislation. The proposals could have a significant effect on businesses, particularly those who import goods into the EU since some of the focus is on using customs and trade policy to drive supply chain due diligence. The proposals are very wide-ranging – amongst other things the Resolution:

1. Seeks to impose obligations on businesses *"to identify, assess, prevent, cease, mitigate, monitor, communicate, account for, address and remediate potential and/or actual adverse impacts on human rights, the environment and good governance in their value chain"*;
2. States that *"due diligence should encompass the entire value chain, but should also involve having a prioritisation policy"*;
3. Calls for *"supply chain traceability to be strengthened, based on the rules of origin of the (European) Union Customs Code"*;
4. States that *"the [European] Union's human rights policy and future corporate due diligence requirements adopted as a result of a legislative proposal from the [European] Commission should be taken into account in the conduct of [European] Union trade policy, including in relation to the ratification of trade and investment agreements and should cover trade with all trading partners" and "stresses that [European] Union trade instruments should include strong enforcement mechanisms such as withdrawal from preferential access in the event of non-compliance"*;
5. States that *"the scope of any future mandatory [European] Union due diligence framework should be broad and cover all large [businesses] governed by the law of a Member State or established in the territory of the [European] Union, including those providing financial products and services [...] as well as all publicly listed small and medium-sized [businesses] and high-risk small and medium-sized [businesses]"*, and *"considers that the framework should also cover [businesses] which are established outside the [European] Union, but are active on the [EU] internal market"*;
6. States that *"due diligence obligations should be a condition for access to the [EU] internal market and that operators should be required to establish and provide evidence, through the exercise of due diligence, that the products that they place on the [EU] internal market are in conformity with the environmental and human rights criteria set out in the future due diligence legislation"*;
7. Calls for *"complementary measures such as the prohibition of the importation of products related to severe human rights violations such as forced labour or child labour"*;
8. Emphasizes that *"due diligence obligations should be carefully designed to be an ongoing and dynamic process instead of a 'box-ticking exercise' and that due diligence strategies should be in line with the dynamic nature of adverse impacts" and "considers that those strategies should cover every actual or potential adverse impact on human rights, the environment or good governance"*;
9. States that *"due diligence also necessitates measuring the effectiveness of processes and measures through adequate audits and communicating the results"*;
10. States that *"to enforce due diligence, Member States should set up or designate national authorities to*

- share best practices, carry out investigations, supervise and impose sanctions”;*
11. Considers that “*a grievance mechanism [within the business] can provide effective early-stage recourse, provided they are legitimate, accessible, predictable, equitable, transparent, human rights-compatible, based on engagement and dialogue, and protect against retaliation*”;
 12. Seeks “*a liability regime and considers that in order to enable victims to obtain an effective remedy, [businesses] should be held liable in accordance with national law for the harm the [businesses] under their control have caused or contributed to by acts or omissions [...] unless the [business] can prove that it acted with due care in line with its due diligence obligations and took all reasonable measures to prevent such harm*”;
 13. Considers that “*conducting due diligence should not automatically absolve [businesses] from liability for the harm they have caused or have contributed to*”; and,
 14. Calls on the European Commission “*to conduct a thorough review of [businesses] based in Xinjiang that export products to the [European] Union in order to identify potential breaches of human rights, especially those related to the repression of Uighurs.*”

It is important to stress that (contrary to some reports) this is not law yet. The next step will be for the European Commission to issue a draft legal proposal, which would then make its way through the EU legislative pipeline.

What about court cases?

In France Sherpa, a well-known pressure group recently claimed to have brought a complaint before the Paris Public Prosecutor’s Office against multinational companies in the clothing/garment industry alleging the use of Uyghur forced labour in China by these organisations in their supply chains. Sherpa does have a history of similar action in other areas and in a joint campaign in France with ActionAid France previously had an indictment brought against a Korean business over similar allegations. Sherpa was also involved in similar action over environmental issues against a French oil company.

In the UK the Parliamentary enquiry also heard about somewhat similar pressure group litigation in the UK and it is likely that further cases will be brought.

What are the takeaways?

In order to better manage their third-party risk in the field of ESG/supply-chains, organisations will need to:

1. Put in place appropriate due diligence and risk management processes, procedures and policies. Look at building this in to holistic ESG and procurement processes;
2. Train staff to deal with these issues;
3. Be alert to pressure group activity. Some pressure groups, NGOs and universities are compiling target lists of organisations who they say are not taking these issues seriously. No business wants to appear on these lists and as a result it is important to escalate these requests quickly and deal with them appropriately. This is likely to need training for your social media people too;
4. Be alert to possible customs issues both at an EU level and at a UK level if the 1897 Act is used. Again make sure that your suppliers are clear that you expect total honesty on the origin of goods;
5. Carefully examine any claims you make or your sales channel make about ethical conduct, the origin of products etc. since some of the litigation is likely to be based on allegations of false claims. It is important to remember that in many cases the burden of proof is on the organisation making the claim and so proper, documented evidence should be obtained of any claim before it is made;
6. Get the Board on board; and,
7. Keep track of the draft legislation and plan resources accordingly to be able to implement requirements when the various new rules come into force.

For more information

We report about modern slavery compliance issues here <https://www.corderycompliance.com/category/modern-slavery/>.

We report about sanctions issues here <https://www.corderycompliance.com/category/sanctions/>

We report about compliance issues here <https://www.corderycompliance.com/news/>.

You can read the text of the Foreign Prison-Made Goods Act 1897 here <https://www.legislation.gov.uk/ukpga/Vict/60-61/63>.

There are details of the UK's recent China sanctions here <https://bit.ly/3y4wuhZ>

The European Parliament's resolution is here <https://bit.ly/2QbyTGu>

There are more details of Sherpa's claims here <https://bit.ly/3bl17FU>

For more information please contact André Bywater or Jonathan Armstrong who are commercial lawyers with Cordery in London where their focus is on compliance issues.

[Jonathan Armstrong](#), Cordery, Lexis House, 30
Farringdon Street, London, EC4A 4HH
Office: +44 (0)207 075 1784
Jonathan.armstrong@corderycompliance.com



[André Bywater](#), Cordery, Lexis House, 30
Street, London, EC4A 4HH
Office: +44 (0)207 075 1785
Andre.bywater@corderycompliance.com

Farringdon

