

EU Issues Modern Slavery Due Diligence Guidance

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What's this all about?

As of yet the EU does not have equivalent legislation to the UK's Modern Slavery Act or similar national legislation that exists in some EU countries. But, moves are being made in the EU to adopt Environmental, Social and Corporate Governance (ESG)/supply chain legislative due diligence requirements on businesses (which we've written about here <https://www.corderycompliance.com/esg-supply-chain-dd-legal-trends/>). The EU has now issued guidance on "forced labour" risks in their operations and supply chains. This article looks at the highlights of this guidance.

The EU Guidance

The EU has issued a document entitled "On due diligence for EU businesses to address the risk of forced labour in their operations and supply chains" (the Guidance). The Guidance aims to help EU businesses take appropriate measures bridging the time until EU ESG/supply chain legislation is in place. This EU ESG will apparently introduce a mandatory due diligence duty requiring EU companies to identify, prevent, mitigate and account for sustainability impacts in their operations and supply chains, backed by regulatory enforcement mechanisms – the future legislative proposal will introduce mandatory human rights and environmental due diligence, including on risks linked to forced labour.

The Guidance does not use the term "modern slavery", instead preferring the term "forced labour", as set out in "ILO Convention No. 29 on Forced Labour" where it is defined as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". The Guidance sets out a number of examples of "forced labour".

Under the Guidance, when implementing due diligence procedures the following specific considerations are considered to be particularly relevant:

- Policies and management systems – these should be tailored to the risk of forced labour, including:

(a) Stipulating a "zero-tolerance policy" for forced labour, accompanied with other policies relevant to how forced labour may arise in the supply chain of the company, e.g. in relation to recruitment and retention practices, subcontracting, use of recruitment agencies, and state-sponsored forced labour;

(b) Policy and management systems should clarify that suppliers and staff will not face reprisals for reporting risk or instances of forced labour. Suppliers or staff should not be discouraged from reporting risk or instances of forced labour, and instead provide a clear procedure of how any reported risks will be addressed and, if needed, escalated;

(c) Building awareness with key company staff (such as buyers or procurement officers) and suppliers on what constitutes forced labour (e.g. their common forms, types of vulnerable workers and supply chains, and the expectations of suppliers especially those operating in higher-risk contexts). Internal company awareness of how its own activities, such its purchasing practices, may increase the risk of unauthorised subcontracting and other forced labour risk factors will be particularly important;

- Risk factors for forced labour, i.e. "red flags" – those to consider when scoping supply and value chains as part of due diligence should cover:

(a) Country risk factors:

- Countries that have not ratified the ILO fundamental conventions or have a weak record of implementation;

- Countries with state-orchestrated programmes including but not limited to:

mass mobilisation for large-scale national development programmes (particularly in centrally-planned economies);
labour and/or vocational programmes targeted at persons belonging to minorities (e.g. ethnic or religious);

- Legal regimes outlawing peaceful strike action;

- Countries with prison labour policies and programmes;

- The inability to conduct in-depth risk assessments, for example through threats or the enforced presence of government/employers etc.;

(b) Risk factors linked to migration and informality:

- The employment of migrant workers, in particular of irregular migrant workers;

- Workers recruited via third parties including government recruiters;

- Workers in on-site accommodation, or off-site accommodation linked to the employer;

- The presence of informally employed workers;

- The absence of written employment contracts;

- The presence of children and adolescents in the workplace, in particular in hazardous environments;

- Workers do not speak the local language;

(c) Risk factors linked to the presence of debt risk factors:

- The existence of credit-arrangements and debt schemes for workers;

- Restrictions on the ability of workers to freely dispose of their wages (e.g. a disproportionate portion of their wages is deducted for accommodation);

- Workers do not have free access to their identity and residency documents;

- Forcing workers to work more overtime hours than allowed by national law or (when relevant) collective agreements under the menace of penalty;

- The incidence of physical or psychological abuse, violence or harassment;

• In-depth risk assessments of specific high-risk suppliers or supply chain segments:

- Strengthening checks where the risk is higher, e.g. by carrying out in-depth assessments of recruitment agencies used by suppliers, or “choke points”, such as commodity traders, that source raw materials or operate upstream in high-risk areas;

- Carrying out extensive stakeholder engagement in areas with heightened risk, for example with trade unions, civil society or other experts;

- Enhancing training for staff and suppliers in high risk areas, and establishing stronger prequalification processes for suppliers;

- Ensuring independent and unannounced access to worksite and workers to collect information and carry out work-

place assessments;

- Interviewing workers in a secure environment, without the presence of their managers, with the assistance of an interpreter if necessary (e.g. in case of migrant workers or workers belonging to national minorities);

- Action to address risks of forced labour:

- Support, including where appropriate financial support, for suppliers and business partners to implement agreed corrective action plans;

- Supporting company-level social dialogue providing workers' representatives with the necessary means to assist in the development of effective collective agreements;

- Including credible threats and terms for disengagement if improvement is not demonstrated, in line with agreed timelines and indicators in corrective action plans;

- Measures to address risk may differ depending on whether the company seeks to: (a) disengage with suppliers or business partners and avoid the identified risks of forced labour; or, (b) stay engaged to prevent or mitigate the adverse impacts of forced labour practices, in terms of influencing government policy and factory hiring practices;

- Dealing with the risks of state-sponsored forced labour:

- It is important to analyse whether suppliers or business partners have the autonomy to select suppliers or materials from a source of their choosing, or otherwise have discretion to participate in state-sponsored labour programmes;

- It is also important to consider steps that can be taken to communicate to governments responsible for state-sponsored forced labour policies, through direct communications or through letters from industry associations. Such communications may include: an expression of serious concern over reports of forced labour; a request for information and transparency, including those related to information on site level production, trade, type of employment, contracts and freedom of movement; a request for independent access for auditors and assessors; a request for the government to engage with international observers and relevant multilateral organisations, such as the United Nations or the International Labour Organization; and, timelines and consequences of inaction;

- Responsible disengagement:

- Forced labour has a severe adverse impact. Disengagement from a business relationship is appropriate as a last resort after failed attempts at preventing or mitigating severe impacts, when adverse impacts are irremediable, where there is no reasonable prospect of change, or when the entity causing the impact does not take immediate action to prevent or mitigate identified impacts;

- A real possibility of disengagement is necessary in many instances for an enterprise's leverage to be effective. In these situations enterprises should also consider and address the potential adverse impacts of a decision to disengage. If an enterprise determines that disengagement is the most appropriate action, there are a range of measures it may take to ensure that its disengagement process is responsible, e.g.: complying with national laws, international labour standards and the terms of collective bargaining agreements; articulating escalation measures for disengagement up front with the business relationship; providing detailed information supporting the decision to disengage to management and to the trade union, where one exists; and, where feasible, providing sufficient notice of the disengagement to the business relationship;

- It may not always be possible for an enterprise to end a business relationship on short notice, for example where the term of the business relationship is dictated by contract or practical considerations (e.g. an investment in a pooled portfolio) or where the supplier is a crucial business relationship (e.g. a critical raw material essential to the core product available only from a small group of suppliers operating in a high-risk context). In such cases, it is recommended that enterprises: report the situation to the most senior level of the enterprise; continue to monitor

the business relationship, and revisit the decision to continue the business relationship where circumstances change; explain the decision not to end the business relationship - how this decision aligns with policies and priorities, what actions are being taken to attempt to apply leverage to mitigate the impacts, and how the business relationship will continue to be monitored in future;

- Remediation:

- When an enterprise identifies that it has caused or contributed to actual adverse impacts, it should address such impacts by providing for or cooperating in their remediation;

- Seeking to restore the affected person or persons to the situation they would be in had the adverse impact not occurred (where possible) and enable remediation that is proportionate to the significance and scale of the adverse impact;

- Consulting and engaging with impacted rights holders and their representatives in the determination of the appropriate remedy;

- Forced labour is a crime. Companies should put in place a system to report crimes to local authorities. Where they have caused or contributed to forced labour, companies should cooperate with local authorities to help provide appropriate forms of remedy;

- Gender-responsive due diligence:

- Risks of harm in the supply chain often differ for men and women, e.g. women are more likely to be paid lower wages than men and are more often linked to precarious, informal or irregular employment (risk factors for forced labour);

- Women may suffer disproportionately from sexual and gender-based violence and harassment at the workplace to bring or keep them in forced labour;

- When scoping the risks of harm, businesses should consider contexts where women may be disproportionately impacted, e.g.: in contexts where women face severe discrimination; in conflict and post-conflict contexts; in sectors and global supply chains in which large numbers of women are employed such as, apparel, electronics, tourism, health and social care, domestic work, agriculture and fresh cut flowers;

- Additionally, companies may need to adjust the actions they take to identify, prevent, mitigate and address those impacts, such as: collecting and assessing gender-disaggregated data; identifying overlapping/accumulated vulnerabilities (e.g. indigenous, illiterate, female worker); developing gender-sensitive warning systems and protection of whistleblowers, as well as assessing if grievance mechanisms are gender-sensitive, taking into consideration the obstacles that may prevent women from accessing them; and, supporting women's equal and meaningful participation in consultations and negotiations;

- Dealing with forced labour risk associated with raw materials of unknown or high-risk origin:

- It is important to devise and adopt a binding, time-bound and measurable plan with suppliers or other business partners to credibly obtain and verify information on origin;

If after implementing the plan, the origin is still unknown or declared as coming from a high-risk country, assess whether independent access to worksite and workers to collect information and carry out work-place assessments is feasible. If not feasible, ask your suppliers to source materials from commodity traders outside of the high-risk area.

What is the key takeaway?

The key takeaway is that although this is just guidance (and so not legally-binding) it is a sign of what may be

coming with the forthcoming EU ESG legislation. It is likely that this legislation may be very extensive and detailed. So, organisations should consider starting to prepare for the future in an area of compliance that is becoming a global trend.

For more information

The EU guidance can be found here https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3664.

Modern slavery compliance continues to be a hot topic, for example see our article here <https://www.corderycompliance.com/new-supply-chain-laws-china/>, and litigation is starting to develop.

Check out our film about spotting the signs of modern slavery here <https://www.corderycompliance.com/spotting-the-signs-of-modern-slavery/>.

For more information on Cordery's work on modern slavery and a short film explaining UK modern slavery law click here <https://www.corderycompliance.com/modernslavery/>. Cordery's Modern Slavery Action helps organisations meet their modern slavery reporting requirements for a fixed fee. There are more details here <https://www.corderycompliance.com/solutions/modern-slavery-action/>.

We report about modern slavery issues here [Modern Slavery and Supply Chain Management \(corderycompliance.com\)](https://www.corderycompliance.com/modern-slavery-and-supply-chain-management/).

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

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