

**Human Rights Due Diligence:
Legislative Scan**

Research Paper #54

By Zoe McKnight

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This research paper (#54) is the second part of a three-part series on human rights due diligence (HRDD). Research Paper #53, Human Rights Due Diligence: International Instruments, provides an overview and comparison of the various international principles and guidelines that refer to, or recommend for, human rights due diligence. Research Paper #55, Human Rights Due Diligence: Recommendations for a Canadian Approach, provides recommendations for a Canadian approach to HRDD.

Executive Summary

The UN Guiding Principles recommend states implement and enforce domestic laws that require enterprises to respect human rights. But the framework provided for implementation focuses on remedy and does not include specific recommendations about legal sanctions or corporate liability in the event a business does not carry out due diligence and causes, contributes to, or is directly linked to adverse impacts. This is left to individual states.

Similarly, the Guiding Principles do not provide specific direction to states on issues of jurisdiction, applicable law, or “the material conditions of parent or contracting company liability. These elements remain a matter of domestic law. They have given rise to much uncertainty in the emerging relevant transnational civil litigation, as is the case for material conditions of parent-company liability.”¹ There has never been, to date, a court verdict addressing liability for the actions or negligence of a foreign supplier or subsidiary and any criteria for civil liability remain yet undetermined.² State domestic laws deal with these questions — or not — in various ways.

State regulatory options for embedding responsible business conduct and corporate respect for human rights in domestic law include: mandatory due diligence as a matter of compliance; incentives and benefits in return for due diligence practices; reporting and transparency requirements to encourage due diligence. Reporting and transparency requirements are the least effective.³ The underlying assumption is that enterprises will attempt to avoid or address adverse impacts if they are made public, but reporting laws do not address remedy, including civil liability, in the case of harm.

¹ Nicholas Bueno, "The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability," in *Accountability and International Business Operations: Providing Justice for Corporate Violations of Human Rights and Environmental Standards (forthcoming)*, ed. L.F.H. Enneking, I. Giesen, F.G.H. Kristen, L. Roorda, C.M.J. Ryngaert, and A.L.M. Schaap (London, New York: Routledge, Taylor and Francis, 2018), accessed July 16, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125672, 7.

² Bueno, *The Swiss Popular Initiative*, 2018, 8.

³ Sandra Cossart, Jerome Chaplier, and Tiphaine Beau De Lomenie, "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All," *Business and Human Rights Journal* 2 (June 15, 2017): accessed July 9, 2017, doi:10.1017/bhj.2017.14, 321.

There are two broad categories of domestic laws addressing the corporate responsibility to respect human rights: mandatory disclosure laws (California Transparency in Supply Chains, UK Modern Slavery Act, Australia Modern Slavery Act) and mandatory human rights due diligence (French Duty of Vigilance law, Dutch Child Labour Due Diligence proposal, Swiss Responsible Business Initiative, and the as-yet hypothetical German Human Rights Due Diligence Act).⁴ The UN Human Rights Council and the European Commission have called on governments to develop National Action Plans for corporate social responsibility and business and human rights. All countries in the scope of this research launched National Action Plans between 2013 and 2017.⁵ The 2011 EU corporate social responsibility strategy states that corporate social responsibility should be led by enterprises themselves, but explicitly cites the internationally recognized standards in soft law such as the OECD Guidelines for Multinational Enterprises, the ten principles of the United Nations Global Compact, the ISO 26000 Guidance Standard on Social Responsibility, the International Labour Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the United Nations Guiding Principles on Business and Human Rights.⁶

It is unclear what impact, if any, disclosure and due diligence policies have had on actual business behaviour. Most laws and regulations were implemented recently, or are currently underway, meaning impact assessments and evaluations are expected in the coming years in several countries.⁷ The instruments below are all related in the sense that they recognize responsible business conduct is a corporate obligation. The role of these laws is, generally, to stimulate companies to take responsibility for their international operations and supply chains by raising capacity, improving disclosure and transparency, and by conducting due diligence.⁸

⁴ Bueno, The Swiss Popular Initiative, 2018, 18.

⁵ Change in Context, *Government Policy to Stimulate International Responsible Business Conduct*, report, Ministry of Foreign Affairs of the Netherlands, January 2018, accessed August 13, 2018, <https://www.rijksoverheid.nl/documenten/rapporten/2018/01/01/government-policy-to-stimulate-international-responsible-business-conduct>, 8.

⁶ Change in Context, *Government Policy*, 2018, 21.

⁷ Change in Context, *Government Policy*, 2018, 8.

⁸ Change in Context, *Government Policy*, 2018, 15.

| | Scope | Rights | Remedy | Stakeholder engagement | Requirement | Enforcement |
|---------------------------------|---|--|---|---|-------------------------|--|
| France (2017) | 5,000+ employees within company and subsidiaries and incorporated in France, or 10,000+ employees in subsidiaries and incorporated abroad | All human rights (severe violations, health risks, bodily injury); based on UNGP | Duty of care; extraterritorial liability | HRDD plan drafted with stakeholders; operational-level grievance mechanism developed with trade union | Mandatory due diligence | Notice to comply; injunction with penalties; based on third-party notice |
| Switzerland (2018 – in process) | Companies with two of: \$40 million Swiss francs on balance sheet, sale of \$80 million Swiss francs, 500 full-time positions | All human rights (life, limb, property); based on UNGP | Reverse liability; extraterritorial liability; non-financial measures | Not included | Mandatory due diligence | Not included |
| UK (2015) | Companies with a total turnover of £36 million | Modern slavery | Not included | Suggested; non-binding | Reporting | Injunction to comply |
| California | Retailers and manufacturers with gross revenue of \$100 million USD | Modern slavery | Not included | Not included | Reporting | Injunction under exclusive jurisdiction of state Attorney General |
| Australia (2018 - in process) | Companies with annual revenue of \$100 million | Modern slavery | Not included | Not included | Reporting | Not included |
| Netherlands (2017 – in process) | TBD | Child labour | Not included | TBD | Mandatory due diligence | Fines up to €820,000; third party complaint system |
| German (potential) | “Large” companies | All human rights | Duty of care | Risk assessment; mitigation; complaint mechanism | Mandatory due diligence | Regulatory authorities and inspection; exclusion from state subsidy |

In brief: European Union Directive 2014/95 on Non-financial and Diversity Information (“Non-financial reporting directive”)

The business and human rights movement is increasingly embedded in positive law, particularly in requirements that companies report how they respect human rights. In line with this trend, the European Union Directive on Non-financial and Diversity Information (“Non-financial reporting directive”) was issued by the European Union in 2014. Extra-financial reporting increases transparency “with the aim of informing investors, consumers and more broadly all stakeholders on company practices, and enabling them to make informed decisions on whether or not to place their ‘trust’ in such companies.”⁹

The requirement is intended to capture entities of significant public relevance. EU rules on non-financial reporting apply to large public-interest companies with more than 500 employees. This covers approximately 6,000 large companies and groups across the EU, including listed companies, banks, insurance companies, and other companies designated by national authorities as public-interest entities. These entities are required to publish an annual report detailing policies regarding environmental protection, social responsibility and treatment of employees, respect for human rights, anti-corruption and bribery and diversity on company boards, and may use European, national or international instruments to guide their disclosures, such as the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles. The disclosures are intended to be “relevant and useful” rather than “exhaustive and detailed.”¹⁰ Information disclosed regarding human rights and labour rights should concern the actions taken, including due diligence measures, to ensure gender equality, implementation of the fundamental conventions of the ILO, working conditions, respect for trade union rights, and others, as well as information on the prevention of human rights abuses. If the entity does not take actions, it should disclose its rationale. Disclosure is based on severity and likelihood of harms from an enterprise’s own activities or those linked to its operations, products, services and business relationships, including its supply chains.

The directive required member states to transpose these provisions into domestic law by 2016, with companies complying by 2018, though the directive itself is non-binding on companies. EU directives require member states to achieve a certain result but do not dictate the specific measures taken. Member states are entrusted with compliance and enforcement, as well as determining what constitutes a public interest entity. National transpositions are now “approaching completion,” with the majority of EU states requiring very large entities such as listed companies, credit institutions, insurance companies, investment firms and pension funds, to report policies and

⁹ Brebant, Stéphane, Charlotte Michon and Elsa Savourey, “The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance,” *International Review of Compliance and Business Ethics: Supplement to Business and Company Legal Week* 50 (December 14, 2017), accessed July 9, 2018, <https://www.business-humanrights.org/en/frances-law-on-the-corporate-duty-of-vigilance-a-practical-and-multidimensional-analysis-in-english>, 10.

¹⁰ *Directive 2014/95/EU* 2014 (European Parliament).

performance annually.¹¹ Most often the directive, including penalties, if any, has been transposed with amendments to domestic accounting laws and corporate regulations. As of 2018, all EU member states have transposed the directive.

While the directive and member state-transposed laws and amendments espouse similar principles and goals, these should not be conflated with domestic human rights due diligence or transparency laws. For example, the French government transposed 2014/95/EU with amendments to the Law on Accounting, applying to public interest companies with 500 or more employees and a net turnover of €40 million, which must file a non-financial disclosure detailing the business model and non-financial risks and policies in an annual report. The French government also introduced separate legislation pertaining specifically to human rights due diligence in supply chains. The UK has both transposed the directive in a new financial regulation and introduced a law addressing modern slavery. The government of Denmark first introduced corporate social responsibility reporting with an amendment to the Danish Financial Statements Act, in 2008, and updated the same in 2015 to transpose the new EU directive.

In terms of procurement, Article 57 of Directive 2014/24/EU indicates that contracting authorities may exclude any economic operator where the contracting authority can demonstrate a violation of the ILO's eight fundamental conventions, and member states must take appropriate measures to ensure that in public contracts, "economic operators comply with applicable obligations in the fields of environmental, social and labour law established by union law, national law, collective agreements or by the international environmental, social and labour law(.)"¹² The latter applies to subcontractors as well.

European trade agreements incorporate international conventions on labour and the environment, and EU free trade agreements all include sustainable development chapters containing provisions on labour law, which mainly reiterate existing multilateral agreements, such as ILO conventions.¹³ Other provisions in EU trade agreements prevent parties from lowering social and environmental standards to promote trade and attract investments, and confirm states' rights to regulate in the social and environmental fields.¹⁴ However, state-to-state dispute settlement mechanisms do not apply to social and environmental standards or human rights clauses, and EU trade agreements do not include sanctions.

It should also be noted that the EU Timber Regulation and Conflict Mineral Regulation go beyond reporting and require, at the sectoral level, companies to conduct due diligence in their supply chains to minimise the risk of illegal timber or conflict tin,

¹¹ GRI and CSR Europe, *Member State Implementation of Directive 2014/95/EU: A Comprehensive Overview of How Member States Are Implementing the EU Directive on Non-financial and Diversity Information*, publication, 2017, https://www.globalreporting.org/resource/library/NFRpublication_online_version.pdf, 11.

¹² *Directive 2014/24/EU* 2014 (European Parliament).

¹³ Government of the French Republic, *National Action Plan for the Implementation of the United Nations Guiding Principles on Business and Human Rights*, report, 2017, accessed August 13, 2018, https://www.diplomatie.gouv.fr/IMG/pdf/pnadh_version_finale_en_cle8ffacb.pdf, 20.

¹⁴ Government of the French Republic, *National Action Plan*, 2017, 20.

tantalum, tungsten and gold. The timber regulation went into effect in 2013 and the conflict mineral regulation enters effect in 2021.¹⁵

In addition, respecting, protecting and guaranteeing human rights are binding requirements of the 2030 Agenda for Sustainable Development that the international community resolved to implement in 2015.

French Duty of Vigilance law (2017)

Law No. 2017-399 with its amendments to the Trade and Industry Code blends French tort (duty of care) law with human rights due diligence, explicitly seeking to “implement the legal principle of due diligence, recommended by the (United Nations Guiding Principles on Business and Human Rights).”¹⁶ The law arose from civil society demands and parliamentary discussion following the deadly Rana Plaza collapse in 2013 as lawmakers sought to strengthen the accountability of parent companies for overseas activity, suppliers and sub-contractors.

Scope

“Any company that at the end of two consecutive financial years, employs at least five thousand employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory, or that has at least ten thousand employees in its service and in its direct or indirect subsidiaries, whose head office is located on French territory or abroad, must establish and implement an effective vigilance plan.”¹⁷

The plan must include *reasonable* vigilance measures to allow for the identification and prevention of risks associated with severe human rights violations and fundamental freedoms, serious bodily injury, environmental damage or health risks resulting directly or indirectly from the company’s operations and from the operations of the companies it controls, as well as sub-contractors or suppliers with whom it maintains *an established commercial relationship*, when such operations derive from this relationship.¹⁸

Companies are not required to take due diligence measures against occasional suppliers or sub-contractors that are not regular actors in the supply chain.

About 150 of the largest French companies are thus required to develop, publish and implement a vigilance plan. There is some debate as to whether companies are

¹⁵ Change in Context, Government Policy, 2018, 24.

¹⁶ French parliamentary proceedings in Anna Triponel and John Sherman, “Legislating Human Rights Due Diligence: Opportunities and Potential Pitfalls to the French Duty of Vigilance Law,” *Corporate Social Responsibility Committee Publications*, May 17, 2017, accessed July 9, 2018, https://www.ibanet.org/Article/Detail.aspx?ArticleUid=e9dd87de-cfe2-4a5d-9ccc-8240edb67de3#_edn1.

¹⁷ *Law no. 2017-399 relating to the duty of vigilance of parent companies 2017* (France). Consolidated, March 20, 2017, translated, Business & Human Rights Resource Centre, <https://www.business-humanrights.org/en/french-duty-of-vigilance-bill-english-translation>.

¹⁸ *Law no. 2017-399 relating to the duty of vigilance 2017* (France).

required to conduct due diligence as strictly envisioned by the Guiding Principles, or “reasonable vigilance” as suggested by the wording of the legislation.¹⁹

The law covers all companies of a certain size in all sectors, all human rights, and the environment. The law exhibits extraterritoriality because the duty of care extends throughout the supply chain, and victims harmed outside France are empowered to apply for remedy in French court.²⁰

Process within law

The French law covers all aspects of due diligence laid out in the Guiding Principles. A human rights impact assessment or “risk mapping” in the language of the French Duty of Vigilance law, is described as “the first step in the drafting of the vigilance plan. This step is the most fundamental in the sense that its results will determine the subsequent steps and thus the effectiveness of the plan as a whole.”²¹ This specifically refers to the due diligence process laid out in the French law, but the latter is based explicitly on the UN Guiding Principles, which are in turn supported by a general framework of implementation in alignment with the French vigilance plan. Thus a human rights impact assessment or “risk mapping” should be considered a necessary *first step* in a more detailed, proactive, iterative and reactive process of due diligence. For example, once the risks are understood, they must be assessed and prioritized, prevented or mitigated, accounted for and reported.

Therefore, companies must: conduct an assessment that identifies, analyses and prioritizes human rights risks, updated as necessary over time; identify appropriate action to prevent or mitigate severe impacts; publish the due diligence plan as part of their annual report; participate in judicial and non-judicial dispute resolution, especially but not only by establishing operational-level grievance and alert mechanisms.

A person or group with a “legitimate interest” in demanding compliance with the obligations of the vigilance plan can start the process of a legal injunction, which provides a three-month period of formal notice during which the enterprise can show compliance. In the absence of a response to this formal notice, this person or group can appeal to the courts to demand compliance. Trade unions, non-governmental organizations and other well-established associations are entitled to make this request before a judge.²²

The French government’s observations on the law indicate the liability provisions are intended to convey an obligation of *means*, not obligation of *results*; that is, the law requires enterprises to implement the vigilance plan but an adverse impact does not necessarily suggest the plan was not adequately implemented. French tort law governs

¹⁹ Triponel and Sherman, *Legislating Human Rights Due Diligence*, 2017, 2.

²⁰ Cossart et al, *French Law on Duty of Care*, 2017, 319.

²¹ Brebant, Michon and Savourey, *The Vigilance Plan*, 2017, 14.

²² “Government’s Comments on the Duty of Care of Parent Companies and Ordering Companies,” LegiFrance, March 28, 2017, accessed July 9, 2018, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290672&dateTexte=&categorieLien=id>.

the responsibility and liability for damages, requiring a causal link between the lack of efficacy in due diligence and damage that occurred.²³

Stakeholder engagement

The law requires a human rights due diligence plan that is drafted in collaboration with stakeholders and multi-stakeholder initiatives, including at the subsidiary and territorial level.²⁴ The Guiding Principles “firmly underscore” the need for companies to engage with potentially impacted stakeholders throughout the design and implementation of the due diligence process,” including not only employees but workers in the supply chain and neighbouring communities.²⁵ Crucially, an operational-level grievance mechanism must be developed in a working partnership with trade union organization representatives. Stakeholders are also recognized as empowered to request an injunction, and the public reporting process serves as a starting point for assessment and monitoring by stakeholders and legitimately interested third parties.

Remedy

The law provides three judicial mechanisms to ensure implementation: a formal notice to comply, followed by an injunction with financial penalties until the enterprise shows compliance, and tort-based civil liability.

If an applicable company does not meet its due diligence obligations within three months of receiving a formal notice to comply, any interested party granted standing can request the relevant jurisdiction or court to compel the company to comply “under financial compulsion, if necessary.”²⁶ These groups could include local communities, employees, consumers, trade unions, associations or civil society organizations (CSOs).²⁷ Finally, a company “shall be liable and obliged to compensate for the harm *that due diligence would have permitted to avoid*.”²⁸ The legislation leaves intact tort law responsibility for compensation, and the burden of proof remains on complainants. Claimants must prove the breach or lack of reasonable vigilance, the damage, and a causal link between the two.

Gaps

The due diligence requirements extend from a company’s own operations to its subsidiaries, sub-contractors and suppliers, but only if there is an established commercial relationship from which business operations are derived. “Accordingly, the company’s human rights due diligence under French law would only cover businesses

²³ Triponel and Sherman, *Legislating Human Rights Due Diligence*, 2017, 5.

²⁴ Triponel and Sherman, *Legislating Human Rights Due Diligence*, 2017, 2.

²⁵ Triponel and Sherman, *Legislating Human Rights Due Diligence*, 2017, 2.

²⁶ *Law no. 2017-399 Relating to the Duty of Vigilance* 2017 (France).

²⁷ Beau de Loménie, Tiphaine, and Cossart, Sandra. “Stakeholders and the Duty of Vigilance.” *International Review of Compliance and Business Ethics: Supplement to Business and Company Legal Week* 50 (December 14, 2017). Accessed July 9, 2018. <https://www.business-humanrights.org/en/frances-law-on-the-corporate-duty-of-vigilance-a-practical-and-multidimensional-analysis-in-english>, 5.

²⁸ *Law no. 2017-399 relating to the duty of vigilance* 2017 (France).

with whom the company has a stable, regular and ongoing relationship, with a certain volume of business.”²⁹ While this may provide certainty to enterprises, human rights risks are often greater among suppliers without these stable relationships and also “frequently exist at more remote tiers of a company’s value chain.”³⁰

The Guiding Principles rejected the proximity-based “sphere of influence” notion in favour of evaluating whether an enterprise caused, contributed to or was directly linked to an adverse impact through its operations, products or services. This strategic rejection suggests an enterprise should still conduct broad due diligence in order to detect actual or potential adverse impacts in its sector, geographical region or operations, whether or not it has established commercial relationships at more remote tiers of its supply chain. The French law could result in enterprises prioritizing first-tier suppliers and sub-contractors in their due diligence practices, incentivize companies to avoid entering an established commercial relationship with high-risk partners to avoid liability, or lead to judicial decisions that differentiate between due diligence attempts based on severity and risk — as envisioned in the Guidelines — from those based on the nature of business relationships.³¹ Since companies are responsible for respecting human rights at all times, the Guidelines suggest using *leverage* to influence suppliers, sub-contractors and others in the supply chain if the enterprise is directly linked to adverse impacts through its activities, products or services, even if the enterprise itself did not cause or contribute to those impacts.

Under French law, an enterprise is required to demonstrate the measures in its Vigilance Plan have been implemented but the Plan itself does not establish an obligation of results: “the occurrence of damage in a subsidiary, a subcontractor or a supplier can not be regarded as a breach of the duty of care of the company. The lack of vigilance can only be characterized by a clearly insufficient mapping of the risks or the lack of compliance with the internal control procedures that the company itself has decided in the context of the plan.”³² This means it may be difficult to hold a company accountable if the harm is perceived as outside the realm of reasonable vigilance.

There is also debate over whether the corporate structure known as Société par actions simplifiée (SAS, or joint-stock company) is subject to the Duty of Vigilance law because these are exempt from existing reporting rules for non-financial information that predate the new law. There are questions surrounding the identification of “employee,” and concerns only salaried workers would fall under the calculation. The definition, for the purposes of the new law, of “subsidiary” is unclear. Under the Trade and Industry Code, a subsidiary is one in which 50 per cent of a company’s capital is held by another company, but some have argued that the notion of control is more essential. Subsidiaries with a parent company that fulfills its vigilance obligations on behalf of its subsidiaries can be in some circumstances considered in compliance with the law and

²⁹ Triponel and Sherman, *Legislating Human Rights Due Diligence*, 2017, 4.

³⁰ Triponel and Sherman, *Legislating Human Rights Due Diligence*, 2017, 4.

³¹ Triponel and Sherman, *Legislating Human Rights Due Diligence*, 2017, 4.

³² Government's Comments on the Duty of Care, 2017.

exempted, though this function is open to interpretation. Without legislative clarification, these disputes will likely persist, but the law expressly incorporates the UN Guiding Principles, which rely on a broad interpretation of the corporate responsibility to “know and show” that they respect human rights” regardless of size, sector, operational context, ownership and structure of the enterprise, whether through their own operations or via business relationships.³³

Policy coherence

France has a robust domestic legal framework on responsible public procurement. The French Law on the Social and Solidarity Economy, covering enterprises with socially useful goals, came into effect in 2015 and seeks to ensure that more public purchases are made from socially responsible businesses and to encourage a more broad use of social clauses in procurement contracts. If a maximum annual procurement amount is exceeded, contracting authorities must adopt schemes promoting socially responsible purchases.³⁴ Under Decree 2016-360 governing contracting authorities, Article 6 states contract holders must respect the working conditions set down in the labour laws and regulations of the country in which workers are hired, or in the ILO eight fundamental conventions if these have not been incorporated into domestic law of the host state.³⁵

In addition, the French National Action Plan on Sustainable Public Procurement sets specific targets for social and environmental provisions, which can be reflected in the tender’s terms and conditions, specific criteria used to select bids, or performance clauses.³⁶ Finally, after transposing Article 57 of Directive 2014/24/EU on public procurement, French law now states that public contracts may not be awarded to economic operators that have been found guilty of fraud, corruption or the trafficking or exploitation of human beings.³⁷

The French export credit agency systematically applies the recommendations of the OECD Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence. The Common Approaches are more elaborate than the Guiding Principles as they require detailed due diligence determining human rights impacts; they require quarterly publication of all funded projects guaranteed for more than €10 million, and the publication of high-risk projects on credit agency websites for a full month prior to the transaction’s closing. The French credit agency COFACE requires a detailed impact assessment statement before awarding government guarantees to projects likely to have major impacts on human rights, and

³³ Stephane Brebant and Elsa Savourey, "Scope of the Law on the Corporate Duty of Vigilance," *International Review of Compliance and Business Ethics: Supplement to Business and Company Legal Week 50* (December 14, 2017), accessed July 9, 2018, <https://www.business-humanrights.org/en/frances-law-on-the-corporate-duty-of-vigilance-a-practical-and-multidimensional-analysis-in-english>, 5.

³⁴ Government of the French Republic, National Action Plan, 2017, 24.

³⁵ Government of the French Republic, National Action Plan, 2017, 25.

³⁶ Government of the French Republic, National Action Plan, 2017, 25.

³⁷ Government of the French Republic, National Action Plan, 2017, 26.

these are published on the agency’s website.³⁸ Businesses applying to COFACE must confirm they have read and understood the OECD Guidelines.

Path to legislation

The path to legislation was a “four-year strenuous process” involving the joint efforts of CSOs, trade unions, and Members of Parliament, as well as intense parliamentary debate.³⁹ The law originated in a proposal from Paris-based association Sherpa and other members of the Citizens’ Forum for Corporate Social Responsibility, who participated in drafting the original bill introduced in 2013. The provisions in the original draft would reverse the burden of proof from victims to companies and create a new liability regime, neither of which appeared in the final text following “intense lobbying from business.”⁴⁰ Despite this concession, 120 legislators from both parliamentary chambers referred the bill to the Constitutional Council, arguing it was unconstitutional. The Council determined the law did not violate constitutional principles with the exception of a proposed 10 million-euro penalty for failing to develop, publish and implement a due diligence plan, and a 30 million-euro penalty for incurring damage directly related to non-compliance, both of which were removed from the final draft.⁴¹

An interested party can still sue, essentially asking the court to compel an enterprise to develop, publish and implement a human rights due diligence plan, and the enterprise can be held liable for damages through a civil action. If a victim can establish an enterprise’s failure to comply with the vigilance plan or the plan’s inadequacy led to harm, this could be considered a breach of the enterprise’s legal obligations under duty of care considerations and thus incur liability under the French Civil Code.

While the legislation incorporates the UN Guiding Principles, the initial proposal included criminal responsibility in the form of the civil fine and a burden of proof to be placed on companies, which were required to prove they met their due diligence obligations; both were reversed, and the threshold was raised to target only the largest companies. These changes were criticized by multiple CSOs, which noted that many of the companies involved in the Rana Plaza collapse as well as many extractive sector enterprises would escape this legislation. Critics described the final bill as “watered down.”⁴²

The objections were perceived by civil society as political, not legal, in nature. The MPs who brought the objection argued the bill contained vague requirements that disregarded constitutional principles such as the accessibility, intelligibility and predictability of laws. The Constitutional Council agreed the terms of the civil fine, which is a criminal sanction under French law, were indeed not specific enough to comply with

³⁸ Government of the French Republic, National Action Plan, 2017, 28.

³⁹ Cossart et al, French Law on Duty of Care, 2017, 317.

⁴⁰ Cossart et al, French Law on Duty of Care, 2017, 317.

⁴¹ Cossart et al, French Law on Duty of Care, 2017, 318.

⁴² Cossart et al, French Law on Duty of Care, 2017, 317.

the principle of legal predictability through clear drafting. The terms deemed unspecific included “reasonable vigilance measures,” “adapted risk mitigation actions” and broad references to human rights violations and fundamental freedoms, as well as the range of companies and activities falling under the scope of duty of care.⁴³ The Council left intact the possibility of an injunction delivered by a judge to order a company to establish, implement and publish a Vigilance Plan as well as fines for non-compliance under the injunction, and validated the other aspects of the bill. The Constitutional Council also “confirmed the strength and importance of general civil liability principles, and the ability to apply them worldwide without being inhibited by the corporate veil” of complex and opaque corporate structures, and the legitimacy of limiting free-market activities when justified by public interest or other constitutional principles.⁴⁴ In addition, by describing the conditions under which the civil fine could be aligned with constitutional principles, the Council made it possible for the next legislative assembly to reinstate the fine with tighter provisions.⁴⁵

Best practices

The Duty of Vigilance law represents an attempt to follow the recommended path of translating non-binding international “soft law” into binding domestic legislation with the United Nations Guiding Principles not only serving as inspiration but explicitly forming its frame of reference.⁴⁶ The “normative force of the Guiding Principles is derived from their acceptance by states, combined with the support of stakeholders and companies,” and the French law marks an instance of the Principles’ increasing recognition as a global standard of responsible business conduct.⁴⁷

The Duty of Vigilance law, following the Guiding Principles, does not differentiate or rank human rights, but requires enterprises to respect all international human rights, and moves due diligence as the process with which this obligation is fulfilled from the conceptual “soft law” sphere to the obligatory legislative sphere.

It also pushes due diligence beyond reporting to implementation and remedy in a move that seems to “provide the means necessary to guarantee (the law’s) own effectiveness,” in part because the implementation reporting allows stakeholders to monitor company compliance and because the law provides for penalties through injunctions, fines and civil liability.⁴⁸

The law also challenges the corporate veil by requiring parent companies to demonstrably respect human rights throughout the supply chain, and circumvents the

⁴³ Cossart et al, French Law on Duty of Care, 2017, 321.

⁴⁴ Cossart et al, French Law on Duty of Care, 2017, 322.

⁴⁵ Cossart et al, French Law on Duty of Care, 2017, 323.

⁴⁶ Stephane Brebant and Elsa Savourey, “Law on the Corporate Duty of Vigilance: A Contextualized Approach,” *International Review of Compliance and Business Ethics: Supplement to Business and Company Legal Week* 50 (December 14, 2017), accessed July 9, 2018, <https://www.business-humanrights.org/en/frances-law-on-the-corporate-duty-of-vigilance-a-practical-and-multidimensional-analysis-in-english>, 2.

⁴⁷ Brebant and Savourey, Law on the Corporate Duty of Vigilance, 2017, 3.

⁴⁸ Brebant and Savourey, Law on the Corporate Duty of Vigilance, 2017, 6.

principle of separate legality of subsidiaries by referring to general civil liability law entrenched in the French Civil Code, although the practical and legal application of this is unproven. Regardless of liability, the Vigilance Plan does require French parent and “instructing” (controlling) companies to include multiple entities in their due diligence and seek to avoid causing or contributing to damages even within those entities that have a separate legal personality.⁴⁹

Swiss Popular Initiative on Responsible Business 2018 (in process)

The proposed constitutional amendment via Popular Initiative 17.060 was launched by more than 100 CSOs, unions, church groups and activists in 2015 under the umbrella group Swiss Coalition for Corporate Justice. The original intention was to introduce a constitutional amendment by popular vote. Instead, the Federal Council recommended Parliament reject the initiative and introduced a counter-proposal, which is similar to a legislative bill and can be translated into law without a popular vote. The counter-proposal was accepted by the lower chamber and remains under review by the upper chamber, likely until 2019.

If adopted, the new provisions under the Law of the Limited Public Company would amend the Code of Obligations to introduce new requirements that large Swiss companies must adopt due diligence measures relating to the protection of human rights and the environment, including abroad.

Scope

The counter-proposal would compel large Switzerland-based companies to carry out mandatory human rights and environmental due diligence and publicly report on the measures taken. Under the existing Code of Obligations, boards of directors are entrusted with ensuring enterprises comply with laws and regulations, though these duties can be delegated to operational management and subsidiaries. To that end, boards of directors of applicable companies would be required to: identify actual and potential impacts on human rights and the environment of business activities; assess these risks; take “effective measures” to minimize the identified risks and ensure effective remedy for violations; monitor the effectiveness of the measures; report on the process and outcomes.⁵⁰ The adverse impacts of the activities of controlled companies or business relationships with third parties are also subject to this due diligence.

These measures apply only to enterprises that, alone or together with one or more domestic or foreign companies controlled by them, exceed two of the three following criteria in two consecutive financial years: a balance sheet total of 40 million Swiss francs; sales of 80 million Swiss francs; 500 full-time positions on an annual average.

⁴⁹ Brebant and Savourey, *Law on the Corporate Duty of Vigilance*, 2017, 7.

⁵⁰ Swiss Coalition for Corporate Justice, “Parliamentary Initiative for MHRDD: Unofficial Translation of the Counter-proposal by the Swiss Parliament to the Citizen Initiative ‘Responsible Business Initiative’,” *Business & Human Rights in Law*, May 4, 2018, accessed July 18, 2018, http://www.bhrinlaw.org/180508-swiss-parliament-counter-proposal_unofficial_en-translation_updated.pdf, 1.

The law applies only to “the most severe impacts on human rights and the environment,” and to companies with a “particularly high risk of violating the provisions for the protection of human rights and the environment.” An enterprise is responsible for *respecting* human rights or the environment only throughout its commercial activity, and is not responsible outside this field.⁵¹ The project is in fact aimed at the corporate management of boards of directors and their duty of care, with the recognition that *states*, not companies, are ultimately responsible for the *protection* of human rights. This concept derives from the UN Guiding Principles.

The provisions would not apply to the subsidiary companies themselves, but would apply to Swiss enterprises that control foreign companies if they meet the above criteria, if their business activities are closely related, or if the activities of the foreign subsidiaries involve a particularly high risk.⁵² Due diligence considerations would extend throughout the supply chain, not just to controlled companies or contractual business relationships, although liability is limited to legally controlled subsidiaries, and then only when control is really exercised.⁵³

The original popular initiative invoked the UN Guiding Principles and OECD Guidelines for Multinational Enterprises, applicable to all enterprises regardless of size, requiring the state to regulate the obligations of companies that have a registered office, central administration or principle place of business in Switzerland, such that these enterprises would have been required to conduct “appropriate due diligence,” by identifying real and potential adverse impacts, taking measures to prevent the violation of human rights and environment standards, ceasing any ongoing violations, accounting for actions taken. These duties would have applied to companies controlled by the enterprise as well as their business relationships, with enterprises liable for damages caused by companies under their control if they violated international human rights or environmental standards.⁵⁴

The current Swiss counter-proposal still cites the UN Guiding Principles and the OECD instruments as models for conducting human rights due diligence, including identifying risks, taking measures to address those risks and reporting results.⁵⁵ Due diligence should be considered an ongoing part of risk assessment and legal compliance processes, and the counter-proposal introduces legal regulation on the boards of directors vested with the duty of compliance.

⁵¹ Swiss National Council, "Law of the Public Limited Company: Content of the Report," Supplementary Report of the Committee on Legal Affairs of 18 May 2018, May 18, 2018, accessed July 18, 2018, <https://www.parlament.ch/centers/documents/fr/bericht-rk-n-16-077-2018-05-18-f.pdf>, 4, unofficial translation.

⁵² Swiss Coalition for Corporate Justice, "How Does the Parliamentary Counter-proposal Differ from the Popular Initiative (RBI)?" Swiss Coalition for Corporate Justice News, May 4, 2018, accessed July 18, 2018, https://corporatejustice.ch/wp-content/uploads/2018/07/Comparision_RBI_counter-proposal_EN-1.pdf.

⁵³ Swiss Coalition for Corporate Justice, "How Does the Parliamentary Counter-proposal Differ?", 2018.

⁵⁴ Bueno, The Swiss Popular Initiative, 2018, 2.

⁵⁵ Swiss National Council, Law of the Public Limited Company, 2018, 5.

The human rights covered by the law include only those contained in binding provisions under international laws that have been ratified by Switzerland.⁵⁶ “Where the law refers to the provisions for the protection of human rights and the environment also abroad, this refers to the corresponding international provisions, which are binding for Switzerland.”⁵⁷

Process within law

There is no novel process for remedy or due diligence laid out in the counter-proposal. The law suggested in the counter-proposal mainly sets out general requirements for mandatory due diligence, including public reporting, that large Swiss companies would have to follow.

Stakeholder engagement

Consultation or engagement with stakeholders do not appear in the original proposal. The words “stakeholder,” “union” or “labour” do not appear in the English translation of May 2018. These concepts also do not appear in the original proposal.

Remedy

The text of the counter-proposal states an enterprise’s obligations extend to taking “effective measures to minimize the identified risks concerning human rights and the environment as well as to ensure effective remedy for violations.”

Under the proposal, remedy can include non-financial measures such as apologies, reimbursement, penal and preventive measures. A company is not obliged to provide remedy unless it caused or contributed to the harm.⁵⁸ This concept also aligns with the Guiding Principles. Generally, the law would introduce a new duty of care for the boards of directors of large companies, such that adequate due diligence could insulate parent companies from liability. The text of the bill does not elaborate enforcement.

In terms of civil liability, “Companies that are also obliged by law to comply with the provisions for the protection of human rights and the environment (i.e. due diligence) abroad are also liable for the damage caused *to life and limb or property* abroad by companies actually controlled by them in the performance of their official or business activities by violating the provisions for the protection of human rights and the environment. In particular, companies shall not be liable if they can prove that they have taken the measures required by law to protect human rights and the environment in order to prevent such damage or that they have not been able to influence the conduct of the controlled company in connection with the alleged infringements.”⁵⁹

In other words, a parent company is liable for the damage caused to life, limb or property by its activities or those of a subsidiary abroad, but not liable if it can prove it

⁵⁶ Swiss Coalition for Corporate Justice, "How Does the Parliamentary Counter-proposal Differ?", 2018.

⁵⁷ Swiss Coalition for Corporate Justice, Parliamentary Initiative for MHRDD, 2018, 2.

⁵⁸ Swiss National Council, Law of the Public Limited Company, 2018, 6.

⁵⁹ Swiss Coalition for Corporate Justice, Parliamentary Initiative for MHRDD, 2018, 2.

conducted appropriate due diligence to prevent the harm, or prove it was not able to prevent the subsidiary from taking the actions that caused the harm. Control is subjective and must be established and is not determined by economic dependence or influence alone. Liability may not be determined in cases of human rights violations in which damage to life, limb or property did not result.

The counter-proposal includes a provision confirming Article 133 of the Federal Act on Private International Law that requires tort law must be applied in the state where the harm occurred; however, an enterprise domiciled in Switzerland that controls a company domiciled abroad is considered liable for claims of the type mentioned above and Swiss law will determine its liability under the counter-proposal.⁶⁰

Under the counter-proposal, enterprises face an obligation of means, not an obligation of results. That means compliance is related to the undertaking of due diligence, not to any result of the due diligence. A Swiss government commentary on the proposal clarifies the law creates no new obligations for enterprises, which are required only to respect human rights, not protect — the latter remaining the purview of the state — such that the new law is primarily negative in scope, or an “obligation to abstain: companies must abstain from harmful behavior from the point of view of human rights and the environment.”⁶¹

Gaps

Compared to the popular initiative, the counter-proposal is considered weaker in the sense that the new regulation would apply to fewer companies and civil liability would be restricted to apply only in the event of injury or harm to life, physical integrity or property.” Due diligence must be “appropriate” and depends on “leverage” though neither are defined in the text of the proposal.⁶²

Under the counter-proposal, “effective control” of a subsidiary may lead to parent company liability whereas mere influence does not. The notion of “control” is not defined in the UN Guiding Principles or OECD Guidelines. Under the Swiss terminology, control is distinct as a concept from leverage, which is related to influence; a company may have leverage but not control.

The original popular initiative would have included “controlled companies and all business relationships,” a broad but subjective distinction. The counter-proposal is clear parent company liability is limited to cases in which control is “actually exercised” such that a parent company may include a controlled company in its due diligence practices but not be liable for its actions.⁶³

The original initiative set no size limit and applied to small- and medium-size enterprises, though “the legislator is to taken into the account the needs of small and

⁶⁰ Swiss Coalition for Corporate Justice, Parliamentary Initiative for MHRDD, 2018, 4.

⁶¹ Swiss National Council, Law of the Public Limited Company, 2018, 4.

⁶² Swiss Coalition for Corporate Justice, “How Does the Parliamentary Counter-proposal Differ?”, 2018.

⁶³ Swiss National Council, Law of the Public Limited Company, 2018, 6.

medium-sized companies that have limited risks of this kind (i.e. human rights and the environment).⁶⁴ Generally, this meant small companies were exempted unless considered high-risk.

Neither the counter-proposal nor the original initiative explicitly state due diligence procedures, except to indicate enterprises must identify, take measures to prevent, cease violations, and account for actions taken including a public report. Neither mention suppliers or supply chains, nor provide further clarification on these issues. Neither mention stakeholder engagement.

Policy coherence

Switzerland is not an EU member state and has not transposed the EU directive on public procurement. Instead, these practices in Switzerland are governed by the Federal Act on Public Procurement, which states that the federal government can award contracts for goods and services in Switzerland on the condition that, where goods and services are produced abroad, providers must comply at a minimum with the eight core conventions of the International Labour Organization (ILO).⁶⁵ However, while the Swiss government purchasing offices ensure sustainable procurement practices according to the principles of equal treatment, transparency, competition and the economic use of public funds, sustainability or human rights factors are not yet included in the award criteria.⁶⁶

The strategic goals of the Swiss Federal Council's own related enterprises do not include criteria for business and human rights. Instead, "the Federal Council expresses the expectation that related enterprises will pursue a sustainable corporate strategy to the best of their business ability."⁶⁷

The Swiss Export Risk Insurance body (SERV) does not actually grant export credits but offers insurance and guarantees. SERV will not grant this protection if a project does not meet international human rights standards, and in cases of elevated risk, SERV requires applicants to conduct human rights due diligence and may consider any findings made by the Swiss National Contact Point.⁶⁸ Under the guidelines of the Swiss Agency for Development and Cooperation, the agency may reject partnerships with companies that partners that have repeatedly been involved in human rights abuses or cannot make a compelling case they have reduced their human rights risks.

Swiss free trade agreements and investment agreements include "consistency clauses," designed to ensure sufficient domestic policy scope remains to fulfil the human rights

⁶⁴ Bueno, *The Swiss Popular Initiative*, 2018, 13.

⁶⁵ Government of Switzerland, *Report on the Swiss Strategy for the Implementation of the UN Guiding Principles on Business and Human Rights*, report, December 9, 2016, accessed August 13, 2018, [https://www.business-humanrights.org/sites/default/files/documents/Report on Swiss strategy for implementation of UNGPs.pdf](https://www.business-humanrights.org/sites/default/files/documents/Report%20on%20Swiss%20strategy%20for%20implementation%20of%20UNGPs.pdf), 25.

⁶⁶ Government of Switzerland, *Report on the Swiss Strategy*, 2016, 25.

⁶⁷ Government of Switzerland, *Report on the Swiss Strategy*, 2016, 23.

⁶⁸ Government of Switzerland, *Report on the Swiss Strategy*, 2016, 23.

obligations of both Switzerland and the contract partner and clauses requiring consistency with human rights, labour and environmental standards. They also reference international instruments to protect human rights, and provide that any agreement “may not compromise or challenge existing international law — and therefore also human rights — obligations.”⁶⁹

Path to legislation

In 2014, the Swiss government released a report on the legal obligations of corporate directors to conduct human rights due diligence with respect to corporate activities abroad, and identified several measures that could be adopted in business law to increase corporate responsibility in this regard, including the obligation of corporate directors to exercise human rights due diligence.⁷⁰ In 2015, the lower chamber of the Swiss parliament narrowly rejected a motion requiring the government to take further steps in this direction. That same year, the government adopted the Position Paper on Corporate Social Responsibility, which presented corporate and state strategies for implementing responsible business conduct, but met criticism for failing to address the issue of liability.

In 2016, the government released its National Action Plan on implementing the UN Guiding Principles, which included the expectation that companies domiciled or active in Switzerland respect human rights in their activities both in Switzerland and abroad, but did not introduce mandatory human rights due diligence and neither clarified the issue of Swiss corporate liability for the actions of foreign suppliers, sub-contractors or subsidiaries.⁷¹ The NAP acknowledged the lack of compulsory due diligence, and argued that Swiss companies adopting such policies would be penalized in world markets until the practice was adopted internationally. However, the NAP does indicate that remedy for transnational tort claims should be available in Swiss courts if the defendant is a corporation domiciled in Switzerland.

In 2015, the Swiss Coalition for Corporate Justice launched the popular constitutional initiative “Responsible Business: Protecting Human Rights and the Environment,” which obtained more than 100,000 signatures, the threshold for introducing a referendum on the amendment. The amendment would have added article 101a, “Responsibility of Business” to the constitution.⁷² In Switzerland, supporters of a popular initiative have 18 months to collect 100,000 signatures from the Swiss electorate. Amendments are permitted only to the constitution, not to specific laws. After obtaining the signatures, the initiative is submitted to the Federal Council executive branch and Parliament, which can then accept or reject the amendment, or draft a counter-proposal.

⁶⁹ Government of Switzerland, Report on the Swiss Strategy, 2016, 31.

⁷⁰ Bueno, The Swiss Popular Initiative, 2018, 8-9.

⁷¹ Bueno, The Swiss Popular Initiative, 2018, 10.

⁷² Bueno, The Swiss Popular Initiative, 2018, 12.

In 2017, the Federal Council recommended Parliament reject the initiative. After debate, the lower parliamentary chamber, the National Council, accepted a counter-proposal, which will be discussed by the upper chamber in fall 2018.⁷³ The counter-proposal included a number of concessions, including limiting the initiative to only very large corporations and restrictions on civil liability. This took the form of “indirect counter-proposal,” which is similar to a legislative bill and can be enacted without a popular vote, as opposed to a “direct counter-proposal.” This indirect counter-proposal is now under review by the upper chamber, the Council of States, which makes a final decision. The counter-proposal expressly intends to incite the withdrawal of the initiative. This is up to the discretion of the initiating coalition, which has stated it would withdraw. Despite the concessions, former UN Special Representative John Ruggie called the counter-proposal a “workable compromise” and a progressive step in a public statement in June.⁷⁴

Best practices

The counter-proposal follows the original initiative in demanding reverse liability, removing the burden of the plaintiff to prove the controlling company acted negligently and instead requiring the parent company to prove it had taken “all due care” to prevent adverse impacts.⁷⁵ Under the counter-proposal, enterprises must prove they have discharged their duty to respect human rights through due diligence. This can be demonstrated through third party confirmation or auditing, but the parent company still bears the burden of proof.⁷⁶

An interesting side note from the text of the original proposal: despite Private International Law provisions that suggest a tort claim should be heard in the jurisdiction where the harm took place, “International civil liability cases are common in Swiss courts’ rulings. In such cases, Swiss courts often apply foreign law, specifically the law of the State in which the damage has occurred.”⁷⁷ Indeed, Article 55 of the Swiss Code of Obligations allows victims of human rights violations committed by subsidiaries abroad to seek remedy in Swiss courts.⁷⁸

⁷³ Swiss Coalition for Corporate Justice, “Details about the Initiative,” About the Initiative, accessed July 18, 2018, <https://corporatejustice.ch/about-the-initiative/>.

⁷⁴ John Ruggie, “Statement on Swiss Citizens’ Initiative,” Business & Human Rights in Law, June 10, 2018, accessed July 18, 2018, [https://www.business-humanrights.org/sites/default/files/documents/Statement on Swiss Citizens.pdf](https://www.business-humanrights.org/sites/default/files/documents/Statement%20on%20Swiss%20Citizens.pdf).

⁷⁵ Bueno, The Swiss Popular Initiative, 2018, 15.

⁷⁶ Swiss National Council, Law of the Public Limited Company, 2018, 14.

⁷⁷ Swiss Coalition for Corporate Justice, “The Initiative Text with Explanations,” Swiss Coalition for Corporate Justice News, no date, accessed July 18, 2018, https://corporatejustice.ch/wp-content/uploads/2018/06/KVI_Factsheet_5_E.pdf, 2.

⁷⁸ Swiss Coalition for Corporate Justice, “The Initiative Text with Explanations,” no date, 2.

UK Modern Slavery Act (2015)

The UK government passed legislation in 2015 pertaining to slavery, servitude, forced or labour and human trafficking, and included a provision for an Independent Anti-slavery Commissioner. The Act reinforces existing criminal penalties for anyone holding or intending to hold another person in slavery, forced or compulsory labour, or human trafficking for exploitative purposes, sexual or otherwise. Penalties for slavery or human trafficking offences include imprisonment for life for conviction on indictment, or up to 12 months and an unlimited fine for a summary conviction.

The ILO defines slavery as “all work or service which is exacted under the menace of any penalty for its non-performance and for which the worker does not offer himself voluntarily,” which covers practices referred to as modern slavery, including human trafficking.⁷⁹ Today, modern slavery is described as a “predictable feature of the global political economy, including the supply chains that create buildings, garments, palm oil, sugar, seafood, tea, footwear, electronics and metals.”⁸⁰ The Modern Slavery Act is seen by the UK government as a means to prevent modern slavery through increasing transparency so the public, customers and investors are better informed.⁸¹

Scope

Section 54 of the Act requires a commercial organization, corporation or partnership that conducts business in the UK and has a total turnover of more than £36 million (\$62 million CAD) to publish and make public a slavery and human trafficking statement each financial year indicating the steps taken, *if any*, to ensure human trafficking and slavery are not taking place in its supply chain or any part of the enterprise’s own business. Under Section 54(b), an enterprise reporting it “has taken no such steps,” has fulfilled its obligations under the law.⁸²

“Turnover” refers to the value of the sale of goods and services, after taxes and trade discounts, which has accrued to the enterprise or its subsidiary undertakings; a parent company can produce the statement for subsidiaries that meet the threshold.⁸³ “Supply chain” is understood as its common meaning and applies beyond first-tier suppliers.

Around 17,000 companies are believed to be subject to the reporting requirement. The law applies equally to multinational enterprises supplying goods or services in the UK but incorporated elsewhere. However, criteria for determining whether a company “does business” in the UK are not included in the Act, and the statutory guidance suggests a “common sense approach,” which means enterprises that do not have a “demonstrable

⁷⁹ Genevieve LeBaron and Andreas Rühmkorf, “The Domestic Politics of Corporate Accountability Legislation: Struggles over the 2015 UK Modern Slavery Act,” *Socio-economic Review*, December 2, 2017, doi:10.1093/ser/mwx047, 1.

⁸⁰ LeBaron and Rühmkorf, Domestic Politics, 2017, 1.

⁸¹ Her Majesty’s Government, *Transparency in Supply Chains Etc. A Practical Guide*, Statutory Guidance, Home Department, 2015, accessed July 24, 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf, 3.

⁸² *Modern Slavery Act 2015* (UK).

⁸³ Her Majesty’s Government, *Transparency in Supply Chains Etc.*, 2015, 7.

business presence” in the UK will not be included in the provision.⁸⁴ It’s likely that courts will ultimately decide.

The law also does not mandate what must be included in the slavery and human trafficking statement besides the steps taken or not, and only suggests some non-mandatory types of information, such as: organizational structure, relevant modern slavery policies, elements of supply chain at high-risk for slavery, measures taken to prevent slavery and their efficacy.⁸⁵ If the company has a website, the statement must be signed by a director or equivalent and displayed prominently on the home page or available to anyone who makes a written request for one.⁸⁶

The duties imposed on commercial organizations fall under the purview of the UK’s Secretary of State (Home Secretary), who may issue guidance about these duties at his or her discretion. The duties imposed are also enforceable by the Secretary of State bringing civil proceedings in the High Court for an injunction.

Despite the Act’s broad policy objective to eradicate modern slavery, the mandatory requirements are limited to reporting what steps an enterprise has taken, or report it has taken none, such that “(nothing) in the reporting requirement compels an organization to take any action to address modern slavery, or to ensure that any steps taken are effective.”⁸⁷ Thus the reporting requirement is intended to increase accountability through transparency alone. At the heart of the UK approach is the notion that transparency will “create a level playing field” and drive up standards through market competition.⁸⁸

A legislative amendment known as The Modern Slavery (Transparency in Supply Chains) Bill was introduced in the House of Lords in 2017. If passed, the Modern Slavery Act would be broadened to include public bodies; would require the government to produce a list of the commercial organizations obligated to publish a statement, categorised by sector; would ban enterprises that failed to report as required from procurement contracts with local, regional or state authorities.⁸⁹ In 2018, the Independent Anti-Slavery Commissioner called on the government to force its public contractors to comply with the Modern Slavery Act, citing the Sancroft-Tussell Report which showed that of the government’s top 100 suppliers, only 58 per cent had produced legally compliant transparency reports in 2017.⁹⁰

⁸⁴ Her Majesty's Government, Transparency in Supply Chains Etc., 2015, 6.

⁸⁵ *Modern Slavery Act 2015* (UK).

⁸⁶ *Modern Slavery Act 2015* (UK).

⁸⁷ Rae Lindsay, Anna Kirkpatrick, and Jo En Low, "Hardly Soft Law: The Modern Slavery Act 2015 and the Trend Towards Mandatory Reporting on Human Rights," *Business Law International* 18, no. 1 (January 2017), https://www.cliffordchance.com/briefings/2017/02/hardly_soft_law_themodernslaveryact2015an.html, 31.

⁸⁸ Lindsay et al, *Hardly Soft Law*, 2017, 31.

⁸⁹ Lindsay et al, *Hardly Soft Law*, 2017, 39.

⁹⁰ Amelia Shean et al, *The Sancroft-Tussell Report: Eliminating Modern Slavery in Public Procurement*, report, March 2018, accessed July 24, 2018, <https://sancroft.com/wp-content/uploads/2017/11/The-Sancroft-Tussell-Report.pdf>.

Process within law

Under Section 54, applicable companies are required to publish the slavery and human trafficking statement for each financial year of the organization. Otherwise, the provisions of the Act clarify domestic criminal definitions and sentencing for those convicted of trafficking or holding a person in slavery.

Stakeholder engagement

Engagement with civil society, trade unions and other stakeholders is not included under the Modern Slavery Act. The words “stakeholder,” “union” or “labour” do not appear in the text of the law or its explanatory notes.

The Home Department’s statutory guidance suggests when an enterprise detects slavery or human trafficking within its supply chain abroad, its response should be tailored to the local context, which may include contacting CSOs, industry bodies, trade unions or other support organizations — stakeholders — to address the situation. The guidance suggests companies can benefit from working collaboratively with others, such as industry bodies and multi-stakeholder organisations, to improve industry-wide labour standards and to advocate for improved laws and policies in sourcing countries, where appropriate.”⁹¹ The guidance also recommends companies consult the OECD Guidelines for Responsible Business Conduct for advice on consulting with relevant groups such as trade unions. These recommendations are non-binding.

In addition, the guidance refers to the UN Guiding Principles and suggests companies should refer to these when implementing due diligence, situating the latter in terms of “a wider framework around ethical trade, corporate social responsibility and human rights and should form part of a wider human rights due diligence process where possible.”⁹² The guidance also notes that under the Guidelines, human rights due diligence requires consultation with stakeholders that are potentially or actually affected by a company’s operations and supply chain, but these should be seen as best practices, not legal expectations.

On the other hand, it is stakeholders who are expected, through public scrutiny, to determine the impact of the reporting requirement on human rights, trafficking and slavery rather than any monitoring or enforcement by government.⁹³

Remedy and liability

If an enterprise subject to the reporting obligation fails to publish the slavery and human trafficking statement under Section 54 of the Act, the Secretary of State can apply to the court for an injunction compelling the organization to comply. An enterprise then failing to comply with the court injunction could be held in contempt of court, resulting in an

⁹¹ Her Majesty’s Government, Transparency in Supply Chains Etc., 2015, 15-16.

⁹² Her Majesty’s Government, Transparency in Supply Chains Etc., 2015, 32.

⁹³ Lindsay et al, *Hardly Soft Law*, 2017, 35.

unlimited fine.⁹⁴ Otherwise, the Act does not introduce new civil liabilities or tort considerations.

Gaps

The language in the Act has been criticized as vague, and the reporting requirements as lax: companies can simply “re-purpose boilerplate CSR statements” to be seen in compliance.⁹⁵ The “minimalist” transparency clause “effectively gives a statutory backing to generic and promotional CSR reporting which, so far, has not achieved much in terms of eradicating forced labour by suppliers. Despite all the rhetoric about leading the fight against slavery, in legal terms, the actual outcome is purely a statutory reference to private governance reporting without any binding requirements or sanctions.”⁹⁶ Had the UK government adopted legislation instituting stricter requirements, companies may have been forced to create robust, “sophisticated” due diligence programs.⁹⁷

Critics suggest a lack of liability means that “companies will find the compliance requirements easy to meet,” leading them to evade responsibility for the human rights abuses such as slavery in their supply chains.⁹⁸

In addition, there is no government repository for the annual reports, and there is no formal mechanism to monitor or supervise compliance or quality control.⁹⁹ Besides a compliance injunction, the only penalty faced by a UK company is the potential for reputational damage: “(it) will be for consumers, investors and Non-Governmental Organizations to engage and/or apply pressure where they believe a business has not taken sufficient steps.”¹⁰⁰

Due diligence is not a requirement of the transparency obligations, although the statutory guidance notes that human rights due diligence can enable more effective reporting, more effective action and better risk management. The guidance notes that, based on the UN Guiding Principles, human rights due diligence would include: understanding the operating context; monitoring and evaluation processes; proof of stakeholder engagement; operational-level grievance mechanisms; embedding the respect for human rights throughout the organization.¹⁰¹ None of these measures are required by law under the Modern Slavery Act.

Many companies do not meet even the minimal reporting requirements. A 2018 analysis of more than 100 statements from global, large- and medium-size information and communications technology sector companies that do business in the UK and would be

⁹⁴ Lindsay et al, *Hardly Soft Law*, 2017, 35.

⁹⁵ LeBaron and Rühmkorf, *Domestic Politics*, 2017, 26.

⁹⁶ LeBaron and Rühmkorf, *Domestic Politics*, 2017, 26.

⁹⁷ LeBaron and Rühmkorf, *Domestic Politics*, 2017, 26.

⁹⁸ LeBaron and Rühmkorf, *Domestic Politics*, 2017, 26.

⁹⁹ Lindsay et al, *Hardly Soft Law*, 2017, 35.

¹⁰⁰ Her Majesty's Government, *Transparency in Supply Chains Etc.*, 2015, 6.

¹⁰¹ Her Majesty's Government, *Transparency in Supply Chains Etc.*, 2015, 33-34.

subject to the Act found that less than one in five companies (18 per cent) were in compliance with all three components of the law: statements published on the company website with a link on the homepage; approved by a board of directors or equivalent; signed by a director or equivalent.¹⁰² This is broadly consistent with the findings of the Business and Human Rights Resource Centre's Modern Slavery Registry, which captures more than 5,000 statements and shows an overall compliance rate of 20 per cent.¹⁰³

Policy coherence

The Act explicitly aligns with the Protocol to the United Nations Convention against Transnational Organized Crime, named the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime known as the Palermo Protocol.¹⁰⁴

The UK's Bribery Act, which does require a form of due diligence to ensure enterprises are not engaged in bribing officials, was considered but ultimately rejected as a model for a more stringent Modern Slavery Act. The Bribery Act is, however, explicitly used as an example of an existing legal and policy framework in the UK's National Action Plan on the implementation of the UN Guiding Principles (2013, updated 2016), which "shows that a more stringent legislation in the Modern Slavery Act would have fit equally well into its existing framework of business regulation."¹⁰⁵ The Bribery Act includes criminal penalties for non-compliance.

The NAP on the implementation of the UN Guiding Principles indicates the government expects UK-registered businesses to fulfill their obligation to respect human rights, including by adopting appropriate due diligence policies to identify, prevent and mitigate human rights risks, and commit to monitoring and evaluating implementation.¹⁰⁶ The Action Plan is clear that businesses must lead in this regard, with government playing "a supporting role."¹⁰⁷ The NAP reiterates that while the UK is subject to international human rights obligations, these only generally apply within a state's own territory and jurisdiction. Thus, although the UK could choose as a matter of policy to regulate

¹⁰² Know the Chain, *Eradicating Forced Labour in Electronics: What Do Company Statements under the UK Modern Slavery Act Tell Us?* report, March 2018, accessed August 10, 2018, https://knowthechain.org/wp-content/uploads/KTC-ICT-MSA-Report_Final_Web.pdf, 4.

¹⁰³ Know the Chain, *Eradicating Forced Labour*, 2018, 9.

¹⁰⁴ United Kingdom, The National Archives, HM Government, *Modern Slavery Act 2015 Explanatory Notes*, 2015, accessed July 20, 2018, <http://www.legislation.gov.uk/ukpga/2015/30/notes/division/3>, Introduction, note 5.

¹⁰⁵ LeBaron and Rühmkorf, *Domestic Politics*, 2017, 27.

¹⁰⁶ United Kingdom, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*, Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, May 2016, accessed July 24, 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf, 14

¹⁰⁷ United Kingdom, *Good Business*, 2016, 14.

overseas business conduct, there is no general requirement to regulate the extraterritorial activities of business enterprises domiciled in the UK.¹⁰⁸

In 2015, the UK already had a disclosure provision under the Companies Act (2006) in which incorporated public companies with a premium listing of shares on the Main Market of the London Stock Exchange are required to comply with certain non-financial reporting and disclosure requirements that, since 2013, include the publication of a report containing a “fair review” of the company’s business and a description of the risks it faces.¹⁰⁹

The NAP is relatively vague on procurement, noting only that the UK government procurement rules “allow for human rights-related matters to be reflected in the procurement of public goods, works and services, taking into account the 2014 EU Public Procurement Directives.”¹¹⁰

On export credit, the UK government has implemented the OECD Common Approaches and considers project-related human rights impacts when providing funding support through UK Export Finance. That agency considers any reports made publicly available by the UK National Contact Point in respect of the human rights record of a company when considering a project for export credit.¹¹¹

The NAP does not address human rights in trade agreements, except to note the UK supports the ongoing inclusion of human rights clauses in EU trade agreements, which was first established in 2008. It is unclear what might change after the UK leaves the European Union.

Path to legislation

The intention to introduce a Modern Slavery bill was announced by the British Home Secretary in 2013. The UK government had faced pressure from civil society groups for a decade to enact this type of law and efforts increased in the wake of global governance initiatives such as the UN Guiding Principles. Despite international private law that suggests liability for damages should be determined in the jurisdiction in which the harm occurred, human rights violations often take place in regions with weak institutions, enforcement or access in which remedy may not be available and legislators recognized that “the home country of multinational enterprises should not turn a blind eye to recurrent reports about gross human rights violations at supplier factories.”¹¹²

¹⁰⁸ United Kingdom, Good Business, 2016, 16.

¹⁰⁹ Lindsay et al, Hardly Soft Law, 2017, 43.

¹¹⁰ United Kingdom, Good Business, 2016, 10.

¹¹¹ United Kingdom, Good Business, 2016, 8.

¹¹² LeBaron and Rühmkorf, Domestic Politics, 2017, 16.

At the beginning of the legislative process, the government considered “an array of governance initiatives of varied levels of stringency, ranging from new criminal liabilities for companies found to have forced labour in their supply chains, to mandatory reporting on the effectiveness of corporate efforts to prevent and address forced labour, the least stringent initiative was ultimately adopted.”¹¹³

However legislators acknowledged in the Draft Modern Slavery Bill Report that “voluntary initiatives alone will not be enough to ensure that all companies take the necessary steps to eradicate slavery from their supply chains.” In fact, in 2014, the Joint Committee on the Draft Modern Slavery Bill considered three types of legislation following testimony from UK anti-slavery CSOs listed in decreasing stringency: mandatory due diligence plus extraterritorial liability; mandatory reporting with liability restricted to deceit, not negligence; or transparency in the form of an annual slavery and human trafficking public statement with no additional liability considerations.¹¹⁴

Some CSOs advocated for strict rules and some industry groups lobbied against introducing any new burdens. But a global coalition of multinational enterprises was created with the purpose of championing the transparency model, with the backing of a group of CSOs. In fact, many saw a strategic collaboration with industry as not only reasonable but necessary to getting a modern slavery bill through Parliament, a move that has been criticized for allowing industry to co-opt the effort.¹¹⁵ The publication *It Happens Here: Equipping the United Kingdom to Fight Modern Slavery*, funded by Manpower Group, was released by the Centre for Social Justice in 2013, recommending transparency legislation. The Centre was lobbying for transparency laws at the time, working with politicians, business leaders and CSOs.¹¹⁶ It received broad media coverage, was cited by government officials and was rapidly endorsed by CSOs — though some continued to push for more stringency — leading to the Transparency in Supply Chains coalition, including Anti-Slavery International, Amnesty International and others. Smaller CSOs and religious groups also endorsed transparency measures. When an initial draft bill was introduced in 2014 without supply chain transparency provisions, the transparency coalition put out a joint statement calling for transparency, which was signed by major multinational enterprises.

The transparency rules, based on the California model, were eventually passed into law. “Whereas the Californian version explicitly requires disclosure about issues such as verification, audits and certification, the Modern Slavery Act is more generic, only referring to ‘steps the organisation has taken ... to ensure that slavery and human trafficking is not taking place.’ However, both versions are similar in that companies that have not done anything to combat modern slavery in their supply chain only need to

¹¹³ LeBaron and Rühmkorf, *Domestic Politics*, 2017, 7.

¹¹⁴ LeBaron and Rühmkorf, *Domestic Politics*, 2017, 18.

¹¹⁵ LeBaron and Rühmkorf, *Domestic Politics*, 2017, 22.

¹¹⁶ CSJ Slavery Working Group, *It Happens Here: Equipping the United Kingdom to Fight Modern Slavery*, report, March 2013, accessed July 24, 2018, https://www.centreforsocialjustice.org.uk/core/wp-content/uploads/2016/08/CSJ_Slavery_Full_Report_WEB5.pdf, 221.

issue a statement that they had not taken such steps.”¹¹⁷ This leaves disclosure at the discretion of enterprises. The route ultimately chosen by UK legislators “essentially gives statutory backing to multinationals’ existing voluntary reporting.”¹¹⁸

Best practices

The Modern Slavery Act created the office of the Independent Anti-Slavery Commissioner, who recently called on government to exclude non-compliant companies from public procurement contracts. The Commissioner is appointed by the Home Secretary with the duty to encourage good practice in the prevention, detection, investigation and prosecution of slavery and human trafficking offences, as well as the identification of victims. In discharging those duties the Commissioner may make reports; make recommendations; carry out research; provide information; promote education and training; consult and cooperate with public authorities such as police and immigration officials. The Commissioner can suggest, with Home Secretary approval, matters to report on, or can report on matters requested by the Home Secretary, who can omit from the final report information deemed a national security risk or that which would compromise the safety of an individual or compromise an investigation or prosecution. (The same powers apply to equivalent ministers in Scotland, North Ireland and Wales.) The Commissioner reports to the minister, not directly to Parliament, leading some to question the true independence of the office.¹¹⁹

The Commissioner can request the assistance and cooperation of any public authority, which is required to comply “so far as reasonably practicable.”¹²⁰ The Commissioner cannot intervene in any specific case, but can consider individual cases in the process of drawing general conclusions.

The current Commissioner’s two-prong strategic plan was focused on obtaining support for victims of human trafficking and slavery, as well as increasing law enforcement and criminal justice responses to these problems. The Commissioner’s mandate does not include investigation but rather supporting investigations by encouraging good practice in addressing modern slavery. The language of the Act does not provide the Commissioner with the power to compel testimony or evidence.¹²¹ The first Commissioner resigned in May 2018.

¹¹⁷ *Modern Slavery Act 2015 (UK)* in LeBaron and Rühmkorf, *Domestic Politics*, 2017, 20.

¹¹⁸ LeBaron and Rühmkorf, *Domestic Politics*, 2017, 21.

¹¹⁹ Gary Craig, “The UK’s Modern Slavery Legislation: An Early Assessment of Progress,” *Social Inclusion* (open access) 5, no. 2 (2017), doi:10.17645/si.v5i2.833.

¹²⁰ *Modern Slavery Act 2015 (UK)*.

¹²¹ *Modern Slavery Act 2015 (UK)*.

California Transparency in Supply Chains Act (2010)

California state senate Bill 657 was signed into law in 2010 and came into effect in 2012. The Transparency in Supply Chains Act added amendments relating to human trafficking and slavery to the state Civil Code and the Revenue and Taxation Code. It is considered one of the first legislative attempts to address the governance gaps created by complex global supply chains in which securing domestic and international human and labour rights protection and enforcing these standards transnationally remains a major challenge for domestic governments.

The sector-specific Act requires any retailer or manufacturer with annual global gross receipts of more than \$100 million USD that “does business” in California to disclose on its website or through written disclosures any actions taken to “eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale.”¹²² The stated purpose of the law is to educate consumers on ethical purchasing from companies that responsibly manage their supply chains, thereby improving the lives of victims of human trafficking and slavery.¹²³

Scope

Only retailers and manufacturers, as determined by the California State Tax Classification, are required to comply with the Act. It’s estimated about 2,500 companies as of 2017 are covered by the Act, which requires those companies to publicly disclose a “conspicuous and easily understood” document on the homepage that describes the actions taken to address human trafficking and slavery within the supply chain. The intention is for the document to be easily accessed by anyone, including trade unions, workers, consumers and investors.¹²⁴ In the document, companies subject to the Act are required to disclose their efforts in five areas: verification, audits, certification, internal accountability, and training. They must also disclose “to what extent, *if any*” the company: engages in the verification of supply chains to evaluate and address risks of human trafficking and slavery and whether this verification was conducted by a third party; conducts audits of suppliers to assess compliance with company standards for human trafficking and slavery and whether the audits were independent and unannounced; requires direct suppliers to certify materials comply with laws regarding slavery and human trafficking; maintains internal accountability standards and procedures for employees or contractors regarding slavery and human trafficking; provides company employees and management training on slavery and human trafficking.¹²⁵

¹²² Business and Human Rights Resource Centre, Modern Slavery in Company Operations and Supply Chains: Mandatory Transparency, Mandatory Due Diligence and Public Procurement Due Diligence, report, September 2017, accessed July 24, 2018, https://www.business-humanrights.org/sites/default/files/documents/Modern_slavery_in_company_operation_and_supply_chain_FINAL.pdf, 8.

¹²³ Business and Human Rights Resource Centre, Modern Slavery, 2017, 8.

¹²⁴ Business and Human Rights Resource Centre, Modern Slavery, 2017, 8.

¹²⁵ *California Slavery in Supply Chains Act 2010* (U.S.A.).

Companies are deemed to be “doing business” in the state of California in accordance with the Section 23101 of the Revenue and Taxation Code: the enterprise is actively engaging in any transaction for the purpose of financial or pecuniary gain or profit and the enterprise is organized or commercially domiciled in California. The requirements of the Act are not extended to subcontractors and companies are not prevented from hiring subcontractors that have track records suggesting the use of slavery and human trafficking.¹²⁶

Process within law

As of 2012, California companies with more than \$100 million USD in gross receipts were required to publish their disclosure. A 2017 analysis that included 3,200 companies suggested most companies do comply, but with the bare essentials of the Act: “some information is made easily accessible to consumers, but the number of companies fully complying with all the points of focus included in the Act is significantly lower. Generally, information provided is of a superficial nature.”¹²⁷ Companies that publish information going beyond the suggested parameters of the Act typically had already addressed the sustainability of their supply chain: “The California Act did not motivate these companies to drastically change their approach. Rather, the Act seems more of an instrument to show these efforts to the wider public rather than an instrument that has forced change.”¹²⁸

Like the UK Modern Slavery Act, which is based on the California transparency model, neither requires companies report on the actual prevalence or known incidences of modern slavery and neither introduces a positive obligation for companies to adopt any policies or practices to ensure their operations or supply chains are free from human trafficking or slavery.¹²⁹ Companies are in compliance with the law if they simply disclose they have taken no steps to address slavery or human trafficking. Meanwhile, “Transparency is strengthened substantially if governments require companies to report on risks identified, and their due diligence plans that address modern slavery risks in their operations and supply chains.”¹³⁰ In addition, the Act does not specify how often a company needs to update its statement, and the Act does not include provisions to make public the companies that are subject to the disclosure requirements. Without such a list, it may be difficult for stakeholders and consumers to hold companies accountable the way the Act envisions.

The Act indicates the “exclusive remedy for a violation (of the disclosure provisions) shall be an action brought by the Attorney General for injunctive relief.” The Attorney

¹²⁶ Marieke Koekkoek, Axel Marx, and Jan Wouters, “Monitoring Forced Labour and Slavery in Global Supply Chains: The Case of the California Act on Transparency in Supply Chains,” *Global Policy* 8, no. 4 (November 2017), doi:10.1111/1758-5899.12512, 524.

¹²⁷ Koekkoek et al, *Monitoring Forced Labour and Slavery*, 2017, 524.

¹²⁸ Koekkoek et al, *Monitoring Forced Labour and Slavery*, 2017, 525.

¹²⁹ Business and Human Rights Resource Centre, *Modern Slavery*, 2017, 10.

¹³⁰ Business and Human Rights Resource Centre, *Modern Slavery*, 2017, 10.

General is provided by the Franchise Tax Board a non-public list of retailers and manufacturers subject to the law in November each year.

Stakeholder engagement

Transparency legislation is inherently based on stakeholder engagement, but only as end users. This can be understood as “outcome transparency,” which refers to openness about the outcome of actions by first and “is important in the context of accountability mechanisms where stakeholders use disclosed information to hold actors accountable to their commitments.”¹³¹ This information can then be instrumentalized by stakeholders in order to hold companies to account in the form of protests, boycotts or legal action, and at a more general level, to retroactively judge and assess a company’s efforts. This type of outcome transparency is most effective when a) information is available to apply to standards in the stakeholders’ assessment of the efforts, and b) when these stakeholders can effectively raise a dispute or impose sanctions.¹³²

The main assumption in the Act is that the cost of non-compliance will cause reputational damage to an enterprise through pressure from consumers or CSOs, or other stakeholders. This assumption is based on stakeholders having access to appropriate information with which to create pressure. To date, it appears consumer behaviour has not been affected by the Act.¹³³

Although under the Act, the California Attorney General is provided a list of companies each year, the list is not public. CSOs have estimated 3,336 companies do business in California, work in a manufacturing or retailing industry, and meet the threshold annual revenue, thus were subject to the law in 2016. One analysis found 48 per cent of companies are non-compliant and 47 per cent did not have a statement in a conspicuous location on the website.¹³⁴ The efficacy of outcome transparency is then curtailed in California, where stakeholders cannot obtain a list of applicable companies, where companies may remain non-compliant with impunity and where redress is the sole purview of the Attorney General.

Remedy

State law already outlaws human trafficking and allows victims to bring a civil action for actual, compensatory and punitive damages, injunctive relief, or any combination of those remedies.¹³⁵

Companies do not face a monetary penalty for failing to disclose but could receive an order to take specific actions to bring the enterprise into compliance. The California Act

¹³¹ Koekkoek et al, *Monitoring Forced Labour and Slavery*, 2017, 523.

¹³² Koekkoek et al, *Monitoring Forced Labour and Slavery*, 2017, 523.

¹³³ Koekkoek et al, *Monitoring Forced Labour and Slavery*, 2017, 525.

¹³⁴ Chris Bayer and Jesse Hudson, *Corporate Compliance with the California Transparency in Supply Chains Act: Anti-Slavery Performance in 2016*, report, March 7, 2017, accessed July 24, 2018, https://static1.squarespace.com/static/5862e332414fb56e15dd20b9/t/58bf06e346c3c478cf76d619/1488914152831/CA-TISCA.v.24_secured.pdf, 5.

¹³⁵ *California Slavery in Supply Chains Act 2010* (U.S.A.).

does not grant private citizens or interested parties the right to apply for a civil action, and has no civil consumer enforcement provision. But several major companies have faced class action lawsuits based on the content of their disclosures, including Costco, Hershey and Nestlé, in which claimants alleged that the companies falsely represented their supply chains and products as untainted by modern slavery, which claimants argued violated consumer protection and unfair competition statutes in California.¹³⁶ However, the cases were dismissed. The California Act may have actually created a “safe harbour” in which companies are shielded from liability when they truthfully comply with the disclosure requirements of the law, as held by the California court dismissing the case against Nestle in 2015, indicating that “disclosure is only required by companies to the extent provided for in the California Act and no further.”¹³⁷ It was further decided in these cases the information disclosed did not have to represent the actual effort undertaken, but could represent “aspirational efforts” to address modern slavery and human trafficking on the part of the enterprise.¹³⁸

In 2015, the Attorney General sent out informational letters to all relevant companies, released a legal guidance clarifying best practices for compliance, and notified consumers about how to report suspected non-compliance. It is unclear how many companies, if any, have been subject to an injunction to date. As of 2014, two years after the law went into effect, zero companies had been served with an injunction.¹³⁹ One legal analysis by a former California deputy Attorney General suggests the most likely injunctive relief applied to a case of non-compliance would be ordering a company to add the information to their website, under threat of contempt of court charges.¹⁴⁰

Gaps

The California Act is essentially driven by free market principles. The Act declares that “consumers and businesses are inadvertently promoting and sanctioning these crimes through the purchase of goods and services that have been tainted in the supply chain... Absent publicly available disclosures, consumers are at a disadvantage in being able to distinguish companies on the merits of their efforts to supply products free from the taint of slavery and trafficking. Consumers are at a disadvantage in being able to force the eradication of slavery and trafficking by way of their purchasing decisions.”¹⁴¹ This leaves enforcement up to the market, based on the premise that compliance is a source of competitive market advantage. Despite its potential value, the Act’s disclosure requirements are not compatible with the ways in which consumers typically make purchasing decisions, especially at the point of sale, and this type of

¹³⁶ Business and Human Rights Resource Centre, *Modern Slavery*, 2017, 10.

¹³⁷ Business and Human Rights Resource Centre, *Modern Slavery*, 2017, 11.

¹³⁸ Koekkoek et al, *Monitoring Forced Labour and Slavery*, 2017, 525.

¹³⁹ Prokopets, *Trafficking in Information*, 2014, 374.

¹⁴⁰ Benjamin Greer and Jeffrey Purvis, "Corporate Supply Chain Transparency: California's Seminal Attempt to Discourage Forced Labour," *The International Journal of Human Rights* 20, no. 1 (2016), doi:10.1080/13642987.2015.1039318.56, 63.

¹⁴¹ *California Slavery in Supply Chains Act 2010* (U.S.A.).

immediate access would be required for the Act to truly influence consumer behaviour.¹⁴²

Definitions such as “direct supplier” and reference to laws in “country or countries in which (the enterprise is) doing business” are employed in the Act without further definition and could refer to both immediate and subcontracted business relationships, leaving companies with the discretion to interpret the term in a way that is narrow and precludes fulsome disclosure.¹⁴³

Without enforcement, penalty or statutory sanctions, “companies, in particular non-public-facing companies, may not feel the pressure to report, much less implement robust due diligence processes.”¹⁴⁴ One analysis showed that, by 2015, less than one third of 500 enterprises determined to be subject to the Act had made available a disclosure statement that was in compliance with the law.¹⁴⁵ There is no dedicated agency that tracks or measures compliance. And while the content of the disclosure statements has led to attempts to hold companies accountable under other consumer laws, these attempts have failed: “So far it seems obtaining legal remedies against companies inspired by information obtained due to the California Act is near impossible.”¹⁴⁶ One analysis described the Act’s “loose ends,” recommending policy-makers consider the details such as frequency of reporting and auditing when drafting transparency legislation.¹⁴⁷

Finally, while the Act aims to counter and even eradicate the use of modern slavery and human trafficking, it does not pursue the protection of labour or human rights in general, which contradicts the UN Guiding Principles that are based on the notion that human rights are inalienable and indivisible in the recognition that corporate activity has the potential to violate any and all human rights. It also does not apply to non-retail or non-manufacturing enterprises.

Policy coherence

The Dodd-Frank Wall Street Reform and Consumer Protection Act adopted in 2010, around the same time as the California Act, introduced three new rules on disclosure, including: due diligence undertaken to address conflict minerals in the supply chain, including a third-party audit, relating to the extraction of conflict minerals originating in the Democratic Republic of Congo or adjacent countries; health and safety measures in those mining operations; payments made to foreign governments in the development of oil, natural gas and minerals.¹⁴⁸ In 2018, the U.S. Congress voted to repeal certain parts

¹⁴² Alexandra Prokopets, “Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010,” *Hastings International and Comparative Law Review* 37, no. 2 (2014), 367.

¹⁴³ Prokopets, *Trafficking in Information*, 2014, 361.

¹⁴⁴ Business and Human Rights Resource Centre, *Modern Slavery*, 2017, 11.

¹⁴⁵ Business and Human Rights Resource Centre, *Modern Slavery*, 2017, 13.

¹⁴⁶ Koekkoek et al, *Monitoring Forced Labour and Slavery*, 2017, 525.

¹⁴⁷ Koekkoek et al, *Monitoring Forced Labour and Slavery*, 2017, 522.

¹⁴⁸ Koekkoek et al, *Monitoring Forced Labour and Slavery*, 2017, 526.

of Dodd-Frank that regulated large financial institutions, but left the disclosure requirements intact. Section 1504, the financial disclosure for payments to host countries, was suspended for two years in 2017.

A former proposed federal bill, HR 3226 Business Supply Chain Transparency on Trafficking and Slavery Act, would have required certain companies to submit an annual report to the U.S. Securities and Exchange Commission describing steps taken to identify and address forced labour, slavery, human trafficking and the worst forms of child labour within their supply chains. The federal bill died before coming to a vote at the end of the 2016 Congressional session.

In 2016, the U.S. Trade Facilitation and Trade Enforcement Act was signed into law, which removed a clause from the 1930 Tariff Act permitting the importation of goods produced with forced labour as long as they could not be produced in the U.S. in sufficient quantities to meet domestic demand. Removing this loophole in effect makes it illegal to import goods produced with forced labour.¹⁴⁹ If customs officials determine or reasonably suspect the goods violate the new law and the importer cannot show acceptable due diligence, the imports can be seized.

The Federal Acquisition Regulation on government purchasing provides that all contractors must follow the Contractor Code of Business Ethics and Conduct that bars criminal conduct but does not address human rights specifically. Former president Obama signed an executive order in 2012 prohibiting federal contractors, contractor employees, subcontractors, and subcontractor employees from engaging in any modern slavery or human trafficking practices. It is unclear if this executive order will be repealed by the Trump administration.

Only in extreme causes as determined by the U.S. export credit agency's president, "should the Export-Import Bank deny applications for credit for non-financial or noncommercial considerations," including human rights.¹⁵⁰ On the other hand, the U.S. Overseas Private Investment Corporation (OPIC) is governed by the Foreign Assistance Act, and as such must take into account in the conduct of its programs in a country in consultation with the U.S. Department of State and consider all available information regarding the respect for human rights and fundamental freedoms and the impact a funded program will have on those rights and freedoms. All projects supported through OPIC insurance, loans or investment guarantees face a review of the adequacy of associated risk management systems to address identified environmental and social risks and impacts and are appropriate to the size and nature of the project. The Department of State can advise OPIC to decline funding a project based on the human rights review. Projects considered high risk may face additional review and include, for

¹⁴⁹ Business and Human Rights Resource Centre, *Modern Slavery*, 2017, 16.

¹⁵⁰ *Export Import Bank Act* amended 2015 (U.S.A.)

example, projects in sectors or regions with known human rights or labour rights abuses.

Between 1993 and 2016, the U.S. signed 13 free trade agreements with 19 countries, including the North American Free Trade Agreement, currently under review with Canada and Mexico. In NAFTA, labour issues were agreed in a side deal, in which the only provision enforceable with sanctions is a party's "persistent pattern of failure ... to effectively enforce its occupational safety and health, child labor or minimum wage technical standards," where that failure is trade-related and covered by mutually recognized labour laws, whereas all commercial provisions are enforceable.¹⁵¹ The North American Agreement on Labour Cooperation sets out to promote various internationally-accepted labour rights, but does not create minimum standards. In U.S. bilateral trade deals, the focus has almost exclusively remained on labour rights. In the Trade Promotion Act of 2002, which gives the executive certain powers to fast-track trade deals, the words "human rights" are not included, although trade objectives in the Act are stated as the promotion of respect for worker rights and the rights of children consistent with the ILO's core labour standards.¹⁵²

Path to legislation

Fitting for a state law signed into effect by former governor and former action movie star Arnold Schwarzenegger, the chief sponsor of the bill was actress and human rights activist Julia Ormond, founder of ASSET, the Alliance to Stop Slavery and End Trafficking. ASSET was the source and organizer of the Act and later collaborated with UK-based CSOs in the development of the UK Modern Slavery Act.

Governor Schwarzenegger was "pressured to veto the bill on the grounds that it would kill California jobs. He stated: 'It's not a job-killer, it's a life saver.'"¹⁵³ The bill was authored by California Democratic Senator Darrell Steinberg. He and other California senators were lobbied by human rights organizations such as ASSET to introduce supply chain legislation. Business groups opposed the legislation, arguing it could harm their reputations, and fought to make the provisions in the bill voluntary.¹⁵⁴ Senator Steinberg deflected the criticism of the bill, noting that the law itself required only disclosure, not specific action, making it less onerous and costly than depicted by opponents.

Best practices

The California Act influenced the development of the proposed federal bill, though it did not ultimately pass into legislation. That law would have required companies to file their disclosures with the Securities Exchange Commission, making them publicly available

¹⁵¹ *North American Agreement on Labour Cooperation* 1993 (Canada, U.S.A., Mexico)

¹⁵² *Bipartisan Trade Promotion Authority Act of 2002* (U.S.A.)

¹⁵³ Bayer and Hudson, *Corporate Compliance*, 2017, 4.

¹⁵⁴ Mark Lifsher, "Firms Oppose California Bill to Disclose Policing of Labor Practices," *Los Angeles Times*, August 13, 2010, accessed July 24, 2018, <http://articles.latimes.com/2010/aug/13/business/la-fi-slave-labor-20100813>.

through an SEC database. The aim of the law was to break the corporate “legally-protected denial” of modern slavery with a “foot-in-the-door law,” which was not publicly supported by any California-based company.¹⁵⁵

Despite the weaknesses in the law, “California became the first governmental entity to codify supply chain disclosures.”¹⁵⁶ According to one estimate, 20,000 companies have since become obligated to report what measures they take, *if any*, to eradicate modern slavery in supply chains.¹⁵⁷

CSOs have applauded the Act for its attempts to require large companies to more fully consider the impacts of business operations on human trafficking, but have continued to call for greater transparency and disclosure.

Australia Modern Slavery Bill (2018) (in process)

In 2017, the Australia Parliament’s Joint Standing Committee on Foreign Affairs formally began considering the adoption of a modern slavery law, seeking best practices internationally and in particular examining the UK’s Modern Slavery Act.¹⁵⁸ In June 2018, the Modern Slavery Bill was introduced and passed first reading. Modern slavery encompasses human trafficking, slavery and slavery-like practices such as servitude, forced labour and debt bondage, as well as the worst forms of child labour.

Scope

The proposed law would be based on the UN Guiding Principles that, although acknowledging their non-legally binding nature, Australia encourages businesses to apply in their operations. For example, the language of risk is borrowed from the Guiding Principles: “the ‘risks’ of modern slavery practices are intended to mean the potential for an entity to cause, contribute to, or otherwise be directly linked to, modern slavery practices through their operations and supply chains.”¹⁵⁹

The proposed Act would require entities based or incorporated in, controlled from or carrying on business in Australia that have an annual revenue of more than \$100 million AUS to report annually on the risks of modern slavery in their operations and supply chains, and actions to address those risks. The requirements also apply to government corporate entities and companies with revenue of more than \$100 million. If a company controls other companies, such as subsidiaries, the consolidated revenue of the group is considered the determinant. The reports would be filed in a public registry to be

¹⁵⁵ Bayer and Hudson, *Corporate Compliance*, 2017, 3.

¹⁵⁶ Greer and Purvis, “Corporate Supply Chain Transparency,” 2016, 55.

¹⁵⁷ Bayer and Hudson, *Corporate Compliance*, 2017, 4.

¹⁵⁸ Business and Human Rights Resource Centre, *Modern Slavery*, 2017, 8.

¹⁵⁹ Parliament of the Commonwealth of Australia, *Modern Slavery Bill Explanatory Memorandum*, publication, June 2018, accessed August 7, 2018, http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6148_ems_9cbeaf3-b581-47cd-a162-2a8441547a3d/upload_pdf/676657.pdf;fileType=application/pdf, 20.

known as the Modern Slavery Statements Register, which would be freely and publicly accessible online. An estimated 3,000 entities are covered by the proposed Act.

The Commonwealth of Australia itself is considered a “reporting entity,” and must produce an annual Modern Slavery Statement on behalf of all non-corporate Commonwealth entities that meet the revenue criteria. Joint statements from trusts, controlling companies, or parent companies are also permitted.

Process within law

Within six months of the end of the financial year, the reporting enterprise will submit a “modern slavery statement,” approved by the principal governing body of the company, such as its board of directors, and signed by an authorized person.

The statement must include the following in relation to each entity covered by the statement: a) identify the reporting entity; b) describe the structure, operations and supply chains of the reporting entity; c) describe the risks of modern slavery practices in the operations and supply chains of the reporting entity, and any entities that the reporting entity owns or controls; and d) describe the actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address those risks, including due diligence and remediation processes; and e) describe how the reporting entity assesses the effectiveness of such actions; and f) describe the process of consultation; and g) other information deemed relevant.¹⁶⁰ The statements would be made available on the Modern Slavery Statements Register, and the government minister can choose whether or not to include statements that fall short of the criteria noted above. Companies who do not meet the revenue threshold can voluntarily submit a statement and apply to have it included in the registry.

Otherwise, a formal administrative guidance has not been released as of August 2018, when the Bill entered second reading.

Stakeholder engagement

The government conducted a two-phase consultation process with industry, civil society groups and other interested stakeholders, including unions. The Joint Standing Committee on Foreign Affairs, Defence and Trade received 196 submissions, from industry, worker representatives, governments and CSOs. Government submissions were likely to be neutral, CSOs were likely to support legislation, industry representatives generally supported disclosure though not necessarily new regulation, and union submissions were strongly in favour of legislation.¹⁶¹

The low number of submissions from consumer groups (16) can be seen as confirmation that modern slavery is invisible to most people, which has led generally to

¹⁶⁰ *Modern Slavery Bill 2018* (Australia).

¹⁶¹ Katherine Christ and Roger Burritt, "Current Perceptions on the Problem of Modern Slavery in Business," *Business Strategy & Development* 1, no. 2 (June 2018), accessed August 7, 2018, doi:10.1002/bsd2.15, 110.

“considerable ignorance and non-engagement.”¹⁶² The low number of union submissions (6) can be seen as, according to one analysis, related to the “relative powerlessness of employee representatives in Australia to engage with modern slavery in global supply chains. Most unions focus on workers employed in Australia where few instances of slavery are evident and the relative importance of the issue is low in comparison with trying to secure decent working conditions for members. Reduction of modern slavery is one cause where local unions need to be encouraged to work with international unions to effect change in the law, in codes and practices of business.”¹⁶³

A formal statement of support published by the government for the new Bill was signed by human rights advocacy agencies, educational institutions and religious groups, but not trade unions.

The words “stakeholder,” and “union” do not appear in the final wording of the Bill.

Remedy

There are no penalties associated with non-compliance. The Act would not create new tort definitions or liabilities and is not associated with new duties of care. The explanatory notes for the proposed law indicate that “under international law, the Australian Government is also obliged to take necessary steps, including through the adoption of laws, policy and other appropriate measures, to prevent and combat human trafficking and slavery (including slavery-like practices) and ensure an effective remedy for victims. Such necessary steps may include regulating non-state actors under its jurisdiction, including businesses,” and government intervention is indeed consistent with the Guiding Principles, which require businesses to “respond to human rights impacts that are directly linked to their operations, products or services.”¹⁶⁴ Australia supports this in principle, but stresses the Guiding Principles are non-legally binding domestically. The role of government in this proposed law is seen as one of encouragement — “equip and enable” — not enforcement.

The government acknowledges the several limitations of the Act: small- and medium-size enterprises are exempt; its effectiveness may be undermined by poor compliance, whether due to lack of awareness or wilful ignorance; and stakeholder perceptions the regulation is too strong or not strong enough, causing calls for additional reform and uncertainty.

Gaps

As in the UK, the Australian law will not include punitive penalties, and the government will not proactively enforce the law but rather monitor “general compliance,” meaning that non-complying companies will be subject only to “public criticism.”¹⁶⁵

¹⁶² Christ and Burritt, *Current Perceptions of Modern Slavery*, 2018, 111.

¹⁶³ Christ and Burritt, *Current Perceptions of Modern Slavery*, 2018, 111.

¹⁶⁴ Parliament of the Commonwealth of Australia, *Modern Slavery Bill Explanatory Memorandum*, 2018, 38.

¹⁶⁵ Commonwealth of Australia, *Modern Slavery in Supply Chains*, 2017, 17.

Companies would be required to report on their general approach to due diligence and remediation, but not on specific responses to particular incidents or cases of modern slavery, nor are they statutorily required to undertake due diligence or remediation.¹⁶⁶

Unlike the UK, the Act would not create an Independent Anti-Slavery Commissioner.

Policy coherence

A comprehensive legal response to human trafficking and slavery was introduced in 2003, including specialized police investigation teams, stronger criminal penalties, a victim support program. The proposed Act, using the same Criminal Code definitions, would encourage the business community to take action through a regulatory framework.

This regulatory action is consistent with the other responses from the Australian government to supply chain issues: the Commonwealth Illegal Logging Prohibition Act 2012 requires importers to implement risk management systems to address the risk of illegally harvested wood. The Commonwealth Workplace Gender Equality Act 2012 requires certain non-public sector entities to submit annual reports to the Workplace Gender Equality Agency under a range of equality indicators.¹⁶⁷

Modern slavery is defined in the Bill to include overseas conduct in order to overcome the jurisdictional limitations of the Criminal Code offences such that, for the purposes of the Act, “the definition of ‘modern slavery’ includes trafficking in persons, slavery and slavery-like offences that occur outside Australia and are not perpetrated by an Australian citizen, resident or body corporate. For example, this ensures that the Bill would cover a forced labour offence in a foreign country, where this conduct takes place in a reporting entity’s overseas supply chains.”¹⁶⁸

Australian rules for procurement do not address human rights or labour rights with any specific reference to the ILO or other instruments.

The Australian Export Finance and Insurance Corporation (Efic) has a policy and procedure for environmental and social review of transactions, and Efic publishes an online registry for “Category A” projects worth 10 million SDR (Special Drawing Rights, an international finance currency) or proposed for a “sensitive area” and deemed to have potential for significant adverse environmental or social impacts. As an OECD export credit agency, Efic is bound by the Common Approaches and voluntarily extends the principles they embody to all transactions, possibly declining applications if the potential impacts do not satisfy applicable international benchmarks. Approval at the Efic Board level is required for Efic to support a transaction associated with a Category A project located outside Australia.

¹⁶⁶ Parliament of the Commonwealth of Australia, *Modern Slavery Bill Explanatory Memorandum*, 2018, 20.

¹⁶⁷ Commonwealth of Australia, *Modern Slavery in Supply Chains*, 2017, 13.

¹⁶⁸ Parliament of the Commonwealth of Australia, *Modern Slavery Bill Explanatory Memorandum*, 2018, 8.

Australia most recently signed the Trans-Pacific Partnership, in which the parties affirmed their obligations as members of the ILO, including those stated in the ILO Declaration on Fundamental Principles and Rights at Work, and agreed to adopt and maintain statutes relating to the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour and a prohibition on the worst forms of child labour; the elimination of discrimination in respect of employment and occupation; as well as agreeing to adopt and maintain statutes governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. Signatories must also encourage enterprises to voluntarily adopt corporate social responsibility initiatives on labour issues. Labour provisions are left to the dispute settlement mechanism of the agreement.

Path to legislation

The Australian Joint Standing Committee on Foreign Affairs, Defence and Trade first recommended in 2013 that the government should legislate transparency in supply chains. That year, the Joint Standing Committee on Foreign Affairs, Defence and Trade tabled a report entitled *Trading Lives: Modern Day Human Trafficking*. While this predates all national due diligence laws in effect or now being debated, at least one civil society organization appeared before the committee to recommend due diligence as envisioned by the OECD as the basis for any new mandatory requirements to address modern slavery in imported goods.¹⁶⁹ The Committee ultimately recommended government undertake a review to establish anti-trafficking and anti-slavery mechanisms appropriate for Australia and that the review be conducted with a view to introducing transparency laws.¹⁷⁰ The only mention of the UN Guiding Principles, first released in 2008, in the Committee report was that Australia's activities in the UN did include support for their adoption. In 2017, the Multi-Stakeholder Advisory Group on Implementation of the United Nations Guiding Principles on Business and Human Rights suggested that their further implementation in Australia could potentially be achieved in the short term by the introduction of a transparency law, and in the medium term by mandatory due diligence laws following the French example.

As part of Australia's National Action Plan to Combat Human Trafficking and Slavery 2015-19, a National Roundtable on Human Trafficking and Slavery was established, along with an expert Supply Chains Working Group with relevant stakeholders from business, civil society and government agencies. The Working Group recommended in 2016 government introduce a modern slavery in supply chains reporting requirement

¹⁶⁹ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Trading Lives: Modern Day Human Trafficking*, publication, 2013, accessed August 7, 2018, https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jfadt/slavery_people_trafficking/report.htm, 86.

¹⁷⁰ Joint Standing Committee on Foreign Affairs, *Trading Lives*, 2013, xviii.

through legislation.¹⁷¹ The Justice Minister announced in 2017 the government would enact an Australian Modern Slavery in Supply Chains Reporting Requirement, and would hold a public consultation process with business groups and civil society organizations, led by the Attorney General. The desire was to create a law as “simple, sensible and effective as possible.”¹⁷²

During the extensive consultation process, several civil society organizations drafted submissions recommending a more robust due diligence regime than reporting requirements alone, including UNICEF, Amnesty International, the Australian Catholic Religious Against Trafficking in Humans, the Australian Council of Trade Unions, United Voice and Oxfam Australia.

The government’s consultation paper acknowledged but dismissed the option of introducing due diligence requirements as opposed to reporting and transparency requirements alone: “(due) to the regulatory impost (imposition) of these approaches, the Australian Government is not implementing due diligence requirements or broader human rights-based reporting.”¹⁷³ The public consultation paper only considers the impacts of reporting and transparency, and suggests the government’s primary objective is to “equip and enable the business community to respond to modern slavery risks and maintain responsible and transparent supply chains, without imposing a high regulatory burden ... A reporting requirement will have a proportionate, targeted and light touch regulatory impact and will only apply to large businesses.”¹⁷⁴

During the public consultation process, some civil society organizations recommended a lower revenue threshold as low as \$25 million, or \$50 million to align with the UK; some civil society organizations recommended a broader scope than modern slavery alone; almost all recommended punitive penalties for non-compliance. None of these were incorporated into the final wording of the Bill.¹⁷⁵

The Bill is expected to pass into legislation in December 2018.

Best practices

Prior to introducing the modern slavery bill, the government of Australia had not provided guidance or awareness-raising materials about modern slavery to the business community and lacked a “government-sponsored mechanism to enable the business community to inform consumers, investors and other bodies about their efforts to address modern slavery.”¹⁷⁶ The state of New South Wales has had in effect since 2005 the Ethical Clothing Trades Extended Responsibility Scheme, which requires retailers

¹⁷¹ Commonwealth of Australia, *Modern Slavery in Supply Chains Reporting Requirement: Public Consultation Paper and Regulation Impact Statement*, issue brief, August 16, 2017, accessed July 24, 2018, <https://www.homeaffairs.gov.au/consultations/Documents/modern-slavery/modern-slavery-supply-chains-reporting-requirement-public-consultation-paper.pdf>.

¹⁷² Commonwealth of Australia, *Modern Slavery in Supply Chains*, 2017, 5.

¹⁷³ Commonwealth of Australia, *Modern Slavery in Supply Chains*, 2017, 9.

¹⁷⁴ Commonwealth of Australia, *Modern Slavery in Supply Chains*, 2017, 21.

¹⁷⁵ Parliament of the Commonwealth of Australia, *Modern Slavery Bill Explanatory Memorandum*, 2018, 51.

¹⁷⁶ Commonwealth of Australia, *Modern Slavery in Supply Chains*, 2017, 9.

and suppliers to report on measures taken to ensure decent working conditions and to share information with each other and with unions regarding “outworkers,” who make clothing outside of the traditional factory environment. But this initiative only applies to garments, and only those made within Australia. As such, the bill would fulfil what was described by the Australian Human Rights Commission as the business community’s “aspiration and commitment to address human rights impacts in their supply chains,” and desire for “strategies and processes to trace, monitor and address such risks.”¹⁷⁷ In its own words, the Australian government’s priority is to equip and enable businesses to develop responsible supply chain practices and provide an avenue for the reputational advantage a business could achieve through the transparency of their efforts in this regard, as well as consistency and stability of reporting standards.

While the bill is based on the UK Modern Slavery Act; however, where the UK law only suggests topic areas covered by the reporting requirement, the Australian law proposes that applicable enterprises be required to report against the set of four criteria. On the other hand, similar to the UK law, entities “will also have the flexibility to determine what, *if any*, information they provide against each of the four criteria and whether to include any additional information.”¹⁷⁸

The Modern Slavery Statements Register would be freely and publicly accessible online. However, a list of all companies that meet the criteria will not be made available under the Act. Finally, the proposed Act would require government to submit its own modern slavery statement covering Commonwealth procurement if government companies meet the revenue threshold.

Netherlands Child Labour Due Diligence Law (2017) (in process)

The Dutch House of Representatives adopted the Child Labour Due Diligence Law in 2017. Since then, it has remained under scrutiny in the Senate. The specifics of the law, if passed, will likely be made public through a General Administrative Order (GAO), a legal instrument issued by the government executive branch after a law’s approval in the upper house.

Scope

The law would apply to companies registered in the Netherlands and those registered elsewhere that deliver products or services to the Dutch market twice or more a year. Other sectors or types of companies determined to be low risk for child labour could be exempted in the GAO. Observers suggest other limitations will include company size to reduce the reporting burden for small- and medium-size enterprises.

¹⁷⁷ Commonwealth of Australia, Modern Slavery in Supply Chains, 2017, 9.

¹⁷⁸ Commonwealth of Australia, Modern Slavery in Supply Chains, 2017, 16.

Process within law

Companies covered by the law will be required to submit a statement to Dutch regulatory authorities declaring they have carried out due diligence related to child labour throughout their supply chains. The regulator, which will publish the statements, is likely to be the Dutch Consumer and Market Authority though this will be defined in the GAO. The specific requirements of the statement and its contents will be set by the GAO.

As proposed, the law would only require the statement to be submitted once, not annually as with the UK's Modern Slavery Act, the French Duty of Vigilance Law or the EU non-financial reporting directive.

For the purposes of this law, due diligence includes a first assessment whether there is a "reasonable presumption" that an enterprise's goods and services have been produced using child labour. The law makes reference to the joint International Organization of Employers-International Labour Organization's Child Labour Guidance for Business, which is based on the UN Guiding Principles. If during assessment this reasonable presumption arises, the company is expected to create an action plan to prevent child labour in line with international guidelines.¹⁷⁹ As yet, there are no specific requirements or quality specifications for the plan. "Hence, the expectation is not that the company provide a guarantee that child labour does not occur in the supply chains, but that the company has done what can reasonably be expected to prevent this from happening."¹⁸⁰

Once passed, the law would come into effect in 2020.

Stakeholder engagement

The law does not directly address stakeholder engagement. The text of the proposed law itself has not been published in English, and the GAO that would define several parameters of the legislation has not been released.

Remedy

A non-compliant company may receive a fine of €4,100, which could be increased if the company receives further complaints and if the regulatory authority's instructions are not followed.

If the law passes as proposed, there will be no active enforcement by the regulatory authorities, who will rely on a third-party complaint system. Any person can file a complaint to the regulator "on the basis of concrete evidence that the company's products or services were produced with child labour," after first filing a complaint with

¹⁷⁹ MVO Platform, *Frequently Asked Questions about the New Dutch Child Labour Due Diligence Law*, issue brief, accessed August 8, 2018, <https://www.business-humanrights.org/sites/default/files/documents/FAQChild Labour Due Diligence Law.pdf>, 2.

¹⁸⁰ MVO Platform, *Frequently Asked Questions*, 2018, 2.

the company itself. If the complainant finds the company response inadequate, they can escalate the case to the regulator.¹⁸¹

If the regulator then determines the company has not conducted appropriate due diligence, the company could receive legally-binding instructions and a timeline within which to address the regulator's demands, or risk a fine. If a company is fined twice within five years, the corporate director responsible could face jail time. At the most extreme, failing to follow the due diligence law and instructions could lead to imprisonment and fines of €820,000 or 10 per cent of the company's annual turnover.¹⁸²

Gaps

It remains unclear from the proposed law how enforcement will take place, and how the regulator will assess whether due diligence was sufficient or whether child labour has in fact occurred. In addition, the law in its current iteration requires only a "plan of action" not necessarily the eradication of child labour from a supply chain. The law does not address other forms of human rights or labour abuses, such as modern slavery.

Policy coherence

In 2018, the Foreign Trade Minister Sigrid Kaag announced in a letter her ministry expected 90 per cent of the large companies in the Netherlands to endorse the OECD Guidelines for Multinational Enterprises in their international activities by 2023.¹⁸³

Dutch policy also encourages the development of voluntary, multi-stakeholder International Responsible Business Conduct agreements, known as covenants, in 13 high-risk sectors. In 2018, sector-wide agreements on banking and textiles/garments and three sub-sector agreements on vegetable proteins, forestry, and gold had been reached. The agreements are based on recommendations of the Social and Economic Council of the Netherlands released in 2014.

The amended Dutch Public Procurement Act entered into force in 2016 to transpose the obligations under 2014/24/EU. A sustainable procurement policy had been in place since 2008, in which companies can fulfill the social conditions set by the government through joining a reliable multi-stakeholder supply chain certification body, or by conducting a risk assessment.¹⁸⁴

Export credit agency Atradius DSB is responsible for carrying out a due diligence risk analysis of applications for insurance. Companies seeking insurance must sign a declaration agreeing to abide by the OECD Guidelines. Failure to provide the necessary

¹⁸¹ MVO Platform, Frequently Asked Questions, 2018, 2.

¹⁸² MVO Platform, Frequently Asked Questions, 2018, 2.

¹⁸³ MVO Platform, "Dutch Government Puts Trade Objectives above Responsible Business Conduct Policies," news release, June 12, 2018, accessed August 13, 2018, <https://www.mvoplatform.nl/en/dutch-government-puts-trade-objectives-above-responsible-business-conduct-policies/>.

¹⁸⁴ Government of the Netherlands, *National Action Plan on Business and Human Rights*, report, April 2014, accessed August 13, 2018, <https://www.business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf>, 17.

information will preclude a company from the export transaction with Atradius DSB. The Netherlands follows due diligence procedures as set out in the OECD Common Approaches for export credit agencies.

Under the 2014 National Action Plan, the Dutch government notes that “state-controlled companies are expected to comply with the (OECD) Guidelines and to report on their CSR policies.”¹⁸⁵ In addition, CSOs have asked the state to incorporate the UN Guiding Principles in trade and investment agreements to achieve clarity and coherence with other Dutch laws. Currently most EU trade agreements include investor-state dispute settlement mechanisms that are perceived by some as undermining the state ability and duty to protect human rights.¹⁸⁶

Path to legislation

The legislative initiative was led by Labour MP Roelof Peter van Laar, who publicly advocated for the bill, including distributing a petition that was supported by the general public and some large companies. The law passed with a large majority in the legislature’s lower chamber.¹⁸⁷

The proposed law’s stated goal is protection of Dutch consumers from purchasing products produced using child labour. The Senate has challenged this, stating the ultimate objective should be combating child labour.¹⁸⁸ Indeed, the law as proposed addresses only child labour and does not require companies to consider other forms of human rights or labour abuses.

The Stop Child Labour coalition supports the proposed law and provided expertise in the drafting of the bill as well as recommendations to strengthen certain aspects of the bill, such as basing the definition of child labour on ILO conventions and on disclosure of the statements, which were introduced through legislative amendments and adopted.¹⁸⁹

During voting on the proposed Child Labour Due Diligence law, the Dutch Parliament considered but ultimately postponed a second, complementary, motion that would have required the government to prepare “legislation aimed at combating forced labour and modern slavery, in line with the ILO protocol and objective 8.7 of the Sustainable Development Goals.”¹⁹⁰ The Foreign Trade and Development minister called the motion

¹⁸⁵ Government of the Netherlands, National Action Plan, 2014, 16.

¹⁸⁶ Rachmi Hertanti and Aurora Aravena Søna, *Human Rights as a Key Issue in the Indonesia-EU Comprehensive Economic Partnership Agreement*, Briefing Paper, September 2017, accessed August 13, 2018, <https://www.somo.nl/human-rights-key-issue-indonesia-eu-comprehensive-economic-partnership-agreement/>.

¹⁸⁷ MVO Platform, Frequently Asked Questions, 2018, 3.

¹⁸⁸ MVO Platform, Frequently Asked Questions, 2018, 1.

¹⁸⁹ Stop Child Labour, “Child Labour Due Diligence Law for Companies Adopted by Dutch Parliament,” news release, February 14, 2017, India Committee of the Netherlands, accessed August 13, 2018, <http://www.indianet.nl/170208e.html>.

¹⁹⁰ Stop Child Labour, news release, 2017.

“sympathetic” but “a bit premature” and asked the motion be held until further consideration could be undertaken.¹⁹¹

The Child Labour bill passed the House of Representatives in February 2017 and debated in the Senate in December 2017. According to the CSO, MVO Platform, several senators were skeptical of the bill’s effectiveness. The Labour Party postponed the final vote and it is unclear whether new mechanisms will be introduced in response to the critiques.

The business community generally supported a legal framework addressing child labour in an open letter signed by two dozen multinational enterprises that do business in the Netherlands, suggesting the OECD Guidelines as a model and noting “the Dutch government has the authority to impose a duty of care on all companies through legislation to prevent the supply of products created by child labour. All products and services on the Dutch market must comply with the 100% child labour free standard.”¹⁹²

Best practices

The law requires not only reporting and transparency but is likely to include some form of mandatory due diligence to identify, prevent, mitigate and account for child labour throughout supply chains. The law also extends due diligence beyond an enterprise’s direct operations or first-tier suppliers to the broader supply chain where there is a “reasonable suspicion” products or services may be produced using child labour. However, it is unclear as of August 2018 whether this law will be adopted.

German legislative proposal: Corporate Responsibility and Human Rights

The German government established due diligence as an expectation for business as part of its 2016 National Action Plan on Business and Human Rights. The NAP, led by the Federal Foreign Office, sets out the government’s expectation for all German businesses to implement human rights due diligence, structured around five core elements based on the UN Guiding Principles. The German state has also committed to strengthening its own human rights obligations in areas such as public procurement, granting of subsidies, development cooperation and external trade promotion. If less than half of all Germany-based companies have not voluntarily implemented human rights due diligence by 2020, the government will consider further action, such as legislation.¹⁹³

¹⁹¹ Stop Child Labour, news release, 2017.

¹⁹² Tony’s Chocolonely, “A Law on the Duty of Care for Child Labour Seriously Tackles the Issue of Child Labour,” news release, October 3, 2017, accessed August 13, 2018, [https://www.business-humanrights.org/sites/default/files/documents/171002 Joint Business letter in support of Dutch child labour HRDD law_EN.pdf](https://www.business-humanrights.org/sites/default/files/documents/171002%20Joint%20Business%20letter%20in%20support%20of%20Dutch%20child%20labour%20HRDD%20law_EN.pdf).

¹⁹³ Federal Republic of Germany, *National Action Plan Implementation of the UN Guiding Principles on Business and Human Rights 2016 – 2020*, publication, 2016, accessed August 13, 2018, [https://www.business-humanrights.org/sites/default/files/documents/NAP Business Human Rights_English\(1\).pdf](https://www.business-humanrights.org/sites/default/files/documents/NAP%20Business%20Human%20Rights_English(1).pdf).

At this time, there are no official legislative proposals for responsible business conduct in Germany. Civil society organizations including Amnesty International, Bread for the World, Germanwatch and Oxfam Germany commissioned an expert panel to produce and hypothetical proposal for a “HRDD Act.”¹⁹⁴

Scope

Along with documentation and transparency rules, the “HRDD Act” would oblige companies to carry out a risk analysis and to develop preventive and remedial measures. The proposal suggested a whistleblower system and compliance officer for enforcement. The Act would only apply to “large” domestic companies with a principal place of business in Germany, excluding small and medium-size enterprises unless operating in a high-risk sector or conflict area.

The risk analysis, preventive and remedial measures would apply not just to direct operations and first-tier suppliers but to the entire supply chain. Supervision and enforcement could be the responsibility of state or federal authorities, and include such measures as: reviewing documents to ensure the risk analysis or the appointment of a compliance officer has taken place, a risk-based approach or one based on spot-checks or inspections.¹⁹⁵

Process within law

Because the “HRDD Act” is a hypothetical proposal from non-government organizations and not a legislative or executive state body, there is no fixed process. Rather, the “HRDD Act” suggests best practices for potential mandatory human rights due diligence legislation that would likely require large enterprises or those facing human rights risks to offer some mixture of document disclosure and transparency, regulatory enforcement including injunctions and fines, as well as civil liability. None have been considered in a fulsome way.

Stakeholder engagement

The hypothetical “HRDD Act” suggests that if “grave risks” become evident, a company must investigate and, as a rule, “consult those concerned ... In many countries, companies cannot rely on information from local authorities, but have to form their own view of the situation and investigate complaints from CSOs or the affected population.”¹⁹⁶ Prevention mechanisms may also involve various stakeholders, such as educating and informing suppliers and employees about trade unions, the inclusion of working conditions in purchase conditions, reasonable auditing procedures, and participation in multi-stakeholder initiatives. Remedial measures may include

¹⁹⁴ Remo Klinger et al., *Corporate Responsibility and Human Rights Legal Text and Questions and Answers on the Human Rights Due Diligence Act Proposed by German NGOs*, Legislative Proposal, June 15, 2017, accessed August 13, 2018, <https://germanwatch.org/de/download/18575.pdf>.

¹⁹⁵ Klinger et al., *Corporate Responsibility and Human Rights*, 2017, 6.

¹⁹⁶ Klinger et al., *Corporate Responsibility and Human Rights*, 2017, 3.

establishing accessible mechanisms for the filing of complaints, which often involve worker representatives such as trade unions.

Remedy

There are several potential mechanisms for enforcement and penalty that could be utilized by the state: administrative orders and fines, or exclusion from foreign trade incentive programs, subsidy allocations or public procurement. While the “HRDD Act” would not introduce new liability rules, it would newly define a standard of care applicable to tort claims.¹⁹⁷ The due diligence requirements could be formulated as a so-called “overriding mandatory rule.” This concept refers to a “compulsory provision, compliance with which is regarded by a state as so important for protection of the public interest — in particular its political, social or economic organization — that it is to be applied to all cases that fall within its scope of application, irrespective of the law otherwise applicable,” such as international private law.¹⁹⁸

As such, tort law would complement the public law approach of enforcement: “The procedural approach of the human rights due diligence obligation is particularly well suited for public-law arrangements and enforcement. While tortious liability is dependent on the claims of aggrieved parties, a management obligation such as the one here foreseen can be supervised by the German authorities and, in the event of a violation, penalized. With a public-law regulatory model, the difficulties of proof associated with civil law liability do not arise, because no concrete occurrence of damage has to be proved and in general no investigation is required abroad.”¹⁹⁹

Gaps

It is difficult to assess any gaps in the hypothetical “HRDD Act,” as it has not been enacted or proposed by government, which “expects” but does not require due diligence. A report from CSOs that participated in multi-stakeholder consultation for the German NAP, criticized the final draft that established due diligence as an expectation for business, noting CSOs “expected the government to move away from the failed model of purely voluntary self-commitment and legally require German companies to discharge their human rights responsibilities in their activities and business relationships abroad.”²⁰⁰

Policy coherence

Since 2010, the German federal, state and local authorities have been cooperating in the framework of the Alliance for Sustainable Procurement, chaired by the German federal government, that aims to “contribute to a significant increase in the percentage

¹⁹⁷ Klinger et al., *Corporate Responsibility and Human Rights*, 2017, 5.

¹⁹⁸ Klinger et al., *Corporate Responsibility and Human Rights*, 2017, 6.

¹⁹⁹ Klinger et al., *Corporate Responsibility and Human Rights*, 2017, 7.

²⁰⁰ Amnesty International, GermanWatch et al, *No Courage to Commit: Comments of German Non-governmental Organisations on the German Government’s National Action Plan on Business and Human Rights*, issue brief, February 6, 2017, accessed August 13, 2018, https://www.cora-netz.de/wp-content/uploads/2017/03/2017-02-06_German-NAP_NGO-Comments.pdf, 2.

of sustainable goods and services among the purchases made by public bodies,” through voluntary information sharing and standards. Companies using forced labour or child labour in German domestic production can be disqualified from receiving public contracts.²⁰¹ The NAP includes a pledge to consider human rights due diligence in procurement at a later date.

Germany follows the OECD Common Approaches when granting export credit. Under the NAP, the government also committed to examining its subsidy assessments in the context of the requirements set out in the UN Guiding Principles, examine existing assessment procedures for export credit in the context of the same, and boosting the capacity of the National Contact Point to become the central grievance mechanism for external trade promotion projects.²⁰² The NAP also indicates a willingness to increase the number of enterprises in which it holds a majority share that apply the German Sustainability Code, including the responsibility to respect, and report on, human rights.

However, with the exception of export credit, these provisions remain potential: “Not even state-owned companies face binding requirements for human rights due diligence in their operations abroad. Nor are companies excluded from federal public contracts, subsidies or foreign trade promotion if they have disregarded their due diligence obligations. It is still nearly impossible for affected people from the global South to hold German companies responsible for participating in human rights violations.”²⁰³

The Canadian-European Comprehensive Economic and Trade Agreement (CETA) includes the provision that signatories commit to “respect and promote internationally-recognized labour rights and principles, as set out in the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work of 1998. This includes the right to freedom of association and collective bargaining, the abolition of child labour, the elimination of discrimination in respect of employment and occupation, and the elimination of forced or compulsory labour. The Parties have also committed to promote health and safety at work, acceptable minimum employment standards, and non-discrimination in respect of working conditions, particularly for migrant workers.”²⁰⁴ Parties are required to consider submissions from the public and work with civil society organizations on labour-related matters, and can request consultations and a panel review of any issues arising under any chapter, including labour. The labour obligations are binding and enforceable. However, German observers have suggested that CETA may actually impede the implementation of the UN Guiding Principles in EU member states and in Canada because, despite the labour provisions and domestic right to regulate, the investment arbitration and dispute mechanism may negate these advances.²⁰⁵

²⁰¹ Federal Republic of Germany, National Action Plan, 2016, 21.

²⁰² Federal Republic of Germany, National Action Plan, 2016, 25.

²⁰³ Amnesty International et al, No Courage, 2017, 2.

²⁰⁴ *Comprehensive Economic and Trade Agreement*, 2016 (Canada-EU).

²⁰⁵ Amnesty International et al, No Courage, 2017, 8.

Path to legislation

In 2016, the German Green Party presented a motion asking Parliament to introduce legal human rights due diligence requirements. It was not adopted. The Social Democratic Party included due diligence as part of its 2017 electoral platform, promising the ongoing implementation of the NAP's expansion of corporate responsibility, including human rights due diligence, transparency obligations, social protection for decent work, and public procurement policies compliant with international environmental, social and human rights standards.²⁰⁶ The SPD platform also included a desire to include in bilateral trade agreements implementation of shared provisions for human rights, ecological concerns, consumer policy and social standards such as the ILO core labor standards, with concrete complaints, review and sanction mechanisms.²⁰⁷ The SPD won just 20 per cent of the votes but formed a coalition with the ruling Christian Democrats.

The path to human rights due diligence legislation is not clear; German state monitoring will indicate whether the government is satisfied with the level of due diligence and if not, whether and what type of legislation it will consider or introduce.

Best practices

While other domestic laws regarding responsible business conduct may focus on addressing specific human rights risks such as child labour or modern slavery, the hypothetical "HRDD Act" would cover all human rights espoused in international agreements, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as other international agreements regarded as the core standards of international human rights protection, including the eight conventions of the International Labour Organization (ILO). The "HRDD Act" also covers not only large corporations but small -and medium-size enterprises operating in high-risk sectors or conflict areas. The Act suggests not only public enforcement but a new standard of care for tort claims, opening multiple avenues for remedy.

If, after monitoring, it is discovered that less than 50 per cent of German companies with more than 500 employees have not implemented human rights due diligence, the NAP permits domestic legislation in this area.²⁰⁸ Further, the NAP explicitly recommends the adoption of the UN Guiding Principles, which envision human rights as indivisible and the responsibility to respect those rights as shared among large, medium and small enterprises, recognizing the process of due diligence is undertaken "commensurate with

²⁰⁶ Social Democratic Party of Germany, *Time for More Justice: Our Government Program for Germany*, Electoral Platform, 2017, accessed August 13, 2018, https://www.spd.de/fileadmin/Dokumente/Bundesparteitag_2017/Es_ist_Zeit_fuer_mehr_Gerechtigkeit-Unser_Regierungsprogramm.pdf, 113, unofficial translation.

²⁰⁷ Social Democratic Party of Germany, *Time for More Justice*, 110, unofficial translation.

²⁰⁸ Federal Republic of Germany, *National Action Plan*, 2016, 12.

their size, the sector in which they operate, and their position in supply and value chains.”²⁰⁹

Conclusion

As illustrated, no domestic business and human rights law currently enacted or under debate can be considered an ideal type. Legislation exists on a spectrum of rigour and enforcement, from highly structured requirements for mandatory human rights due diligence to transparency rules that merely encourage and enable reporting on what measures, if any, an enterprise undertakes to fulfill its duty to respect human rights throughout its operations and supply chains.

Most laws are predicated, either explicitly or implicitly, on established international principles and instruments of soft law, but vary in terms of their scope, rights addressed, remedy, stakeholder engagement, due diligence vs. transparency requirements and enforcement measures. Because these laws are so new in most cases, any determination of efficacy in preventing or mitigating human rights and labour abuses will necessarily be forthcoming at a later date.

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²⁰⁹ Federal Republic of Germany, National Action Plan, 2016, 7.

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