

In Brief

Human Rights Due Diligence

October 2018

What is Due Diligence?

Due diligence (DD) is the care exercised by a reasonable prudent person in comparable circumstances. **Tort law** understands DD as a standard of reasonable care. **Business law** understands DD as the care a prudent person would exercise in the examination and evaluation of risks affecting a business transaction.

What is Human Rights Due Diligence?

Human Rights Due Diligence (HRDD) refers to the policies and process with which an entity can identify, prevent, mitigate and account for how it addresses adverse impacts. The process includes assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. HRDD is an on-going, proactive and reactive, and process-oriented activity; it is to be carried out throughout the entire life-cycle of operations, products and services. The process of due diligence is supported by international declarations, guidelines and conventions, both in terms of its conceptual basis and practical application.

Key International Instruments:

- *United Nations Guiding Principles on Business and Human Rights*
- *OECD Guidelines for Multinational Enterprises*
- *OECD Due Diligence Guidance for Responsible Business Conduct*
- *Sector Specific OECD Due Diligence Guidelines*
- *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*

From International Norms to Domestic Legislation

While a number of international instruments call for companies to conduct human rights due diligence throughout their business operations and supply-chains, there is widespread recognition that government action will ultimately determine the extent to which companies conduct effective HRDD. A number of countries have, or are in the process of, embedding responsible business conduct and HRDD into domestic law. Two broad categories of domestic laws that address the corporate responsibility to respect human rights are:

- **Mandatory reporting/disclosure laws:** California Transparency in Supply Chains; UK Modern Slavery Act; and Australia Modern Slavery Act
- **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

Reporting and transparency requirements are widely recognized by civil society and trade unions as the least effective. Although the underlying assumption is that enterprises will attempt to avoid or address adverse impacts if they are made public, there is no proof of this being the case, and reporting laws do not address civil liability in the case of harm.

A Canadian Approach to Human Rights Due Diligence

There is consensus among trade unions that the French and Swiss models represent the best-in-class approach to embedding HRDD into domestic law. In order for future HRDD legislation in Canada to meet this level and be truly effective, it must:

- include all human rights, not a limited set;
- require for mandatory human rights due diligence, disclosure of business operations and supply chains, and public procurement provisions;
- refer to the human rights due diligence standards set forth in the UNGPs for BHR, the OECD MNE Guidelines, the ILO Tripartite Declaration for MNEs, and the OECD Due Diligence Guidance;
- provide for corporate liability;
- facilitate access to civil and criminal remedy for victims of human rights abuse.

	Scope	Rights	Remedy	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	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	Mandatory due diligence	Not included
UK (2015)	Companies with a total turnover of £36 million	Modern slavery	Not included	Reporting	Injunction to comply
California	Retailers and manufacturers with gross revenue of \$100 million USD	Modern slavery	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	Reporting	Not included
Netherlands (2017 – in process)	TBD	Child labour	Not included	Mandatory due diligence	Fines up to €820,000; third party complaint system
German (potential)	“Large” companies	All human rights	Duty of care	Mandatory due diligence	Regulatory authorities and inspection; exclusion from state subsidy