

BUSINESS AND HUMAN RIGHTS



GOVERNANCE & SUSTAINABILITY
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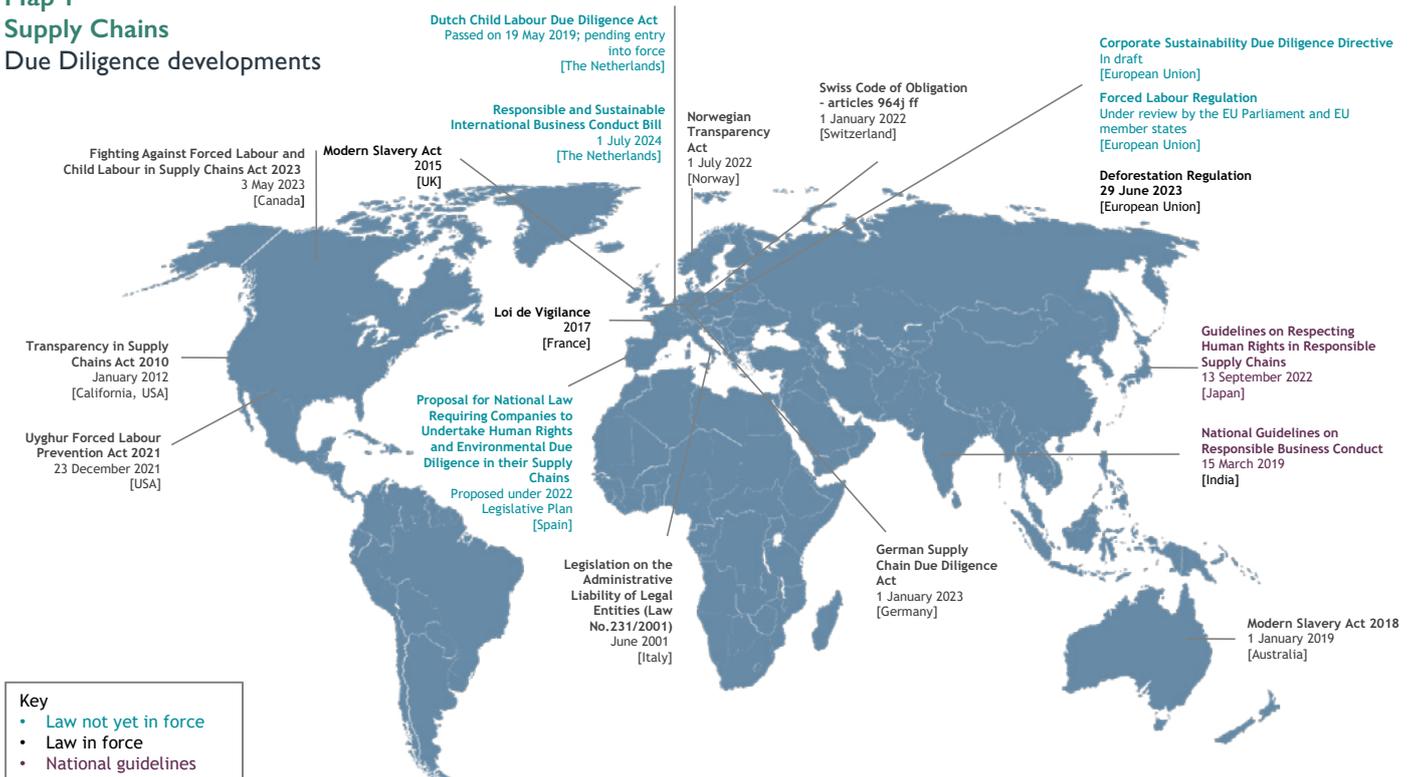
SETTING THE SCENE: BUSINESS AND HUMAN RIGHTS

Human rights have meteorically risen up the corporate sustainability agenda, propelled by stakeholder pressure, civil society and customer expectations of companies, increasing regulation and the risk of litigation. This article discusses the current expectations on businesses to address their human rights impacts, and issues on the horizon.

Human rights: the intersection with business

The requirement for companies to consider the relevance of human rights to their business activities is relatively recent. The 1948 Universal Declaration of Human Rights set the foundation for states' responsibilities to protect and fulfil human rights. It was not until 2011, when the Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights (**UNGPs**), that the expectation for business to respect human rights was formally articulated.

Map I
Supply Chains
Due Diligence developments



Over time, businesses have recognised that a failure to respect human rights can have significant consequences. In addition to reputational impacts, various mechanisms have been used to hold companies to account, whether through the complaints mechanism under the OECD Guidelines for Multinational Enterprises (**OECD Guidelines**), or through innovative cases brought in the courts. To add to the mix, in recent years there has been an expansion, especially in the EU, of laws requiring companies to undertake human rights and environmental due diligence (**HREDD**) in addition to laws already requiring disclosure of human rights impacts (Map 1).

Moreover, in an increasingly socially conscious society accompanied by social media channels, some companies are marketing their ‘good human rights records’ to attract customers and obtain financing.

WHAT'S COMING IN 2024?

2024 will be a busy year for businesses and human rights. We expect developments to include:

1. entry into force of the **EU Corporate Sustainability Due Diligence Directive (CS3D)** which will require companies to conduct human rights and environmental due diligence following the European Parliament and Council recently reaching a provisional agreement;
2. a greater focus on **corporate disclosures** relating to businesses’ human rights impacts, their verification and accuracy in light of underlying processes;
3. further, **deeper integration of human rights considerations in business processes**, such as in supply chain management, due diligence when entering and exiting markets, in M&A activity and in risk management systems (with risk assessment of both the impacts of human rights on the business, and the impact of the business on human rights – the **double materiality approach**);
4. an increased business **focus on the rights of vulnerable or marginalised** people (such as children and indigenous communities), socioeconomic rights (e.g. the right to a living wage) and rights at risk when operating in conflict-affected regions;
5. maturing understanding of companies’ **responsibility for delivering remedies** for human rights violations associated with their operations;
6. continuing **challenges for multinationals navigating differing ESG approaches** across markets, for example, the US vs. EU approach, and any divergence of the CS3D from the UNGPs and OECD Guidelines;
7. **increased pressure on SMEs** to meet stretching human rights compliance requirements if they are part of the value chain of companies with obligations under the new HREDD laws; and
8. continued **claimant-led litigation** seeking to use (and expand) existing legal mechanisms to hold companies to account for alleged human rights violations.

We deep dive into two of these developments – mandatory human rights due diligence under the CS3D and continued claimant-led litigation – below.

Mandatory human rights due diligence

The CS3D aims to bring about a fundamental shift in corporate responsibility by mandating policies and processes for effective HREDD. This initiative strives to enhance corporate accountability and increase available data on human rights impacts, addressing issues such as child labour, slavery, deforestation and pollution. Prescribed actions will range from establishing a due diligence policy to identifying adverse impacts and taking steps to prevent, cease or remedy them.

Following negotiations between the EU institutions since June, on 14 December 2023, the European Parliament and Council reached a provisional deal on the CS3D. This deal finalises the position on points of disagreement between the EU bodies, but leaves some details to be finalised in the ensuing drafting process. The negotiations were focussed on, among other things, the employee number and turnover thresholds for application, directors’ obligations and civil liability. The final text is still to be finalised and formally adopted (expected 2026 or 2027), after which member states will have two years to transpose the CS3D into national law. As always, member state legislatures can add to or strengthen the CS3D in the transposition process, but cannot fall below its standards.

The agreement reached between the European Parliament and Council settles the scope of the CS3D to include large EU companies that have more than 500 employees and a net worldwide turnover of €150 million. Those with over 250 employees and a turnover of more than €40 million will also be in scope if at least €20 million of that turnover is generated in designated high-risk sectors (e.g. textiles, agriculture and mineral trading). Non-EU companies and parent companies with equivalent turnover in the EU will also be in scope but they are expected to have at least three years from the CS3D coming into force to comply. The financial sector will initially be out of scope in respect of their financial services (but in scope in relation to their own operations and upstream activities), subject to a review clause for possible inclusion in future based on an impact assessment. Companies that are not directly in scope are likely to be impacted by virtue of being in the value chain of an obligated company undertaking its due diligence.

With regard to civil liability, the deal establishes a five-year period for interested parties (including trade unions and civil society organisations) to bring damages claims and caps the cost of proceedings for claimants. Member state supervisory authorities will be empowered to launch investigations, impose fines of up to 5% of the company’s net worldwide turnover, implement injunctive measures and to “name and shame” companies that fail to comply.

The CS3D is intended to complement other supply chain diligence instruments, such as the EU Deforestation Regulation and Conflict Minerals Regulation and to cover both human rights and environmental issues, recognising their connected impact. This integrated approach poses a challenge to businesses that are more used to treating environmental and social impacts separately. Methodologies will need to be established: currently, data for climate emissions and diversity are quantitative; human rights, for example, is typically assessed using qualitative data.

Many hope the CS3D will harmonise domestic HREDD laws that have already emerged across some member states. If the finalised directive falls short of stakeholder expectations, companies settling for the lower, regulatory bar may nonetheless face challenge, as may insufficient or inconsistent implementation across EU member states.

Innovative claims based on existing laws

In 2024, we will continue to see claims in England (i) seeking to incrementally expand duties to hold companies to account (e.g. through test cases on the scope and application of tortious and statutory duties to ESG issues); (ii) seeking to test the accuracy, or more likely the inaccurate or misleading nature of disclosures made by corporates; or (iii) brought under foreign law seeking to impose or expand liability for the conduct of corporates, their subsidiaries and suppliers across the globe. Increased public regulatory enforcement action against corporates is likely to fuel this trend.

However, continued attempts to stretch legal boundaries for harm suffered abroad may be tempered by the challenges presented by the post-Brexit jurisdiction rules. Previously, English courts were sometimes required by EU law to hear litigation involving English companies, even where the claims involved foreign subsidiaries, claimants or law, or where the conduct occurred wholly overseas. For newly filed cases, the English courts have reverted to looking to identify the “natural forum” to hear the claim and whether the parties can achieve substantial justice in the jurisdiction with the closest connection to the dispute. We expect to see cases testing the attitude of the English courts given the availability of litigation funding to support such claims. In all such cases, businesses’ legal risks may extend beyond English legal duties, to duties imposed by the laws

of the countries relevant to their subsidiaries and suppliers.

TAKING ACTION: ADDRESSING THE HUMAN RIGHTS IMPACTS OF YOUR BUSINESS

Early corporate accountability laws, such as the UK’s Modern Slavery Act, focussed on driving change through disclosure alone. Increasingly, developing laws (like the CS3D) require corporate action including and based on due diligence.

Seeking advice on how the various laws will apply to an organisation, and then implementing robust internal policies and processes to conduct, report and act on due diligence will be important first steps. Governance processes to monitor progress and escalate issues are essential, as is cross-business coordination to ensure that risk, compliance, legal, procurement, communications, and other teams are consistent in their activities and messaging to minimise risk and scope for claims. Good governance and processes that enable corporates to identify and respond to challenges effectively are likely to provide the best defence.

How a business impacts human rights will vary based on its sector, geography and activities. However, in an increasingly multinational world operating with global value chains and increasing regulation and scrutiny of human rights impacts, now more than ever is the time for businesses to take note and take action.

CONTACT US TO FIND OUT MORE

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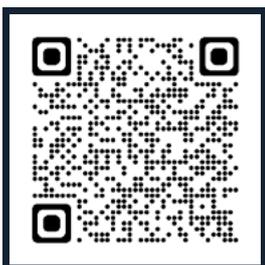
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