



Mandatory due diligence, taking stock and looking forward

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Discussion questions

- What is the current landscape of mandatory due diligence policy and how do these policies relate to one another?
- What are the key learnings and persisting challenges associated with different mandatory due diligence approaches?
- Are producing regions following the trends towards legislation, and are they seeing any changes by buyers as a result? How does national or regional legislation in OECD countries affect the level playing field?
- How should legislation be designed so that it avoids check-the-box approaches and encourages meaningful due diligence (e.g. that is risk-based, continuous and incorporates engagement with stakeholders)?

Background

Governments are a key driver for responsible business conduct due diligence.

There is a growing expectation of a more active role of governments in supporting the effective implementation of responsible business conduct (RBC) due diligence standards. While the [OECD Guidelines for Multinational Enterprises](#) do not target or provide specific recommendations for governments, they acknowledge the role of governments as a key driver for Responsible Business Conduct (RBC) and there is widespread recognition that RBC cannot be achieved without government taking part in these efforts. Government's role includes creating an enabling policy environment to support and promote responsible business practices¹. In doing so, governments are encouraged to pursue a range of policies to drive, facilitate and enable responsible business conduct by companies.² They may do so through a smart mix of complementary measures, comprising national and international, mandatory and voluntary elements to encourage RBC. While this note focuses on disclosure and due diligence legislation, legislation is just one of many policy tools available to governments to promote responsible business conduct. For example, other tools include trade policies and trade arrangements, export credits and direct lending, national and multinational development finance institutions, government-backed multi-stakeholder initiatives and public procurement.

¹ OECD Directorate for financial and Enterprise Affairs, Investment Committee, Working party on RBC “*Moving towards coherent responsible conduct policies*” October 2019
[https://one.oecd.org/document/DAF/INV/RBC\(2019\)3/en/pdf](https://one.oecd.org/document/DAF/INV/RBC(2019)3/en/pdf)

² The OECD Policy Framework for Investment

A growing number of governments have introduced RBC due diligence legislation.

Recent years have witnessed a significant increase in RBC due diligence legislation. From 2010 to 2019, legislation has been passed in California (USA), in the European Union, in the United Kingdom, in France, in the Netherlands and in Australia and is currently being considered in several countries.

Table 1. RBC Due Diligence Legislation in OECD Member Countries and the EU

FL / MS = Forced labour or Modern Slavery CL = Child labour

Country	Legislation	Year	Enacted	Issue focus	Reporting expectation	Publication of reporting ⁱ	Due diligence expectation
United kingdom	Modern slavery act	2015		FL/MS			
Netherlands	Child labour due diligence law	2019		CL			
France	Duty of vigilance law	2017					
Switzerland	Responsible business initiative	2016					
	Parliamentary initiative for MHRDD ⁱⁱ	2018					
European union	Non-financial reporting directive ⁱⁱⁱ	2014					
	Regulation on Sustainable Disclosures for Investors ^{iv}	2018			Policies ^v		
	Conflict Minerals Regulation ^{vi}	2017		Sector focus			
United states	California transparency in supply chains act	2010		FL/MS			
	US trade facilitation & enforcement act of 2015 ^{vii}	2016		FL/MS CL			
	Draft corporate human rights risk assessment, prevention, and mitigation act	2019					
Australia	Modern slavery act	2018		FL/MS			
	Modern Slavery Act New South Wales	2018		FL/MS			
Canada	Bill c-423 the modern slavery act	2018		FL/MS CL			
Hong Kong	Draft modern slavery bill 2017	2017		FL/MS			
Austria	"Social Responsibility Act ^{viii}	2018		FL/MS CL			

Notes: (i) Companies covered by the law are mandated to make their report publicly available; (ii) Counter proposal to Responsible Business Initiative; (iii) 2014/95/EU; (iv) 2018/0179(COD) - 24/05/2018 (v) Requires financial market participants to publish written policies on the integration of sustainability risks in investment decision making process; claiming products or services pursue sustainable investment objectives, obliging them to disclose information on the contribution of the investment decisions to the sustainable investment objectives. (vi) This regulation does not affect the garment sector but can represent a precedent as it is a successful conversion of voluntary self-certification into mandatory requirements stemming from the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and high risk areas. (vii) Update of the tariff act of 1930 (viii) Draft bill on social responsibility in the garment sector

Current RBC due diligence legislation can generally be categorised by disclosure vs. conduct requirements, issue-specific vs. broadly focused on BRC and type of enforcement.

Disclosure vs. duty of conduct

Broadly, due diligence legislation can be categorised as follows: those related to the mandatory disclosure and transparency of information and those relating to mandatory due diligence and other conduct requirements.³ The main distinction being that disclosure law does not include a requirement to take any affirmative steps in addressing RBC impacts.⁴

- **Transparency and disclosure legislation** requires companies to disclose risks they identify and whether they are taking or have taken any action to address those risks. To comply with this type of legislation, companies may have to follow certain standards and good practice when disclosing risks, but are not required to necessarily change their conduct, for example by addressing those risks. The idea behind this legislation is that it allows the market, including investors, consumers and civil society, to better assess companies.⁵ Examples of legislation focused on transparency and disclosure include the UK Modern Slavery Act, the EU Non-financial disclosure directive, the Transparency Supply Chains Act in California or the Australian Modern Slavery Act.
- **Mandatory due diligence legislation and other conduct requirements** require companies to adhere to new forms of conduct and market practice, normally to prevent or mitigate RBC impacts and also to report on them. Examples of mandatory due diligence legislation include the French Duty of Vigilance law, which requires very large French companies and other companies with a substantial presence in France to publish and implement a “vigilance plan” and account for how they address human rights impacts in their global operations.⁶ The Dutch Child Labor Due Diligence Law⁷ requiring Dutch-registered companies and companies delivering products or services to the Dutch market to declare that they have carried out due diligence on the risk of child labour in their supply chains is likewise an obligation of due diligence. The Dutch Bill likewise asks companies to carry out an action plan in line with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines.⁸

In the United States, the 2015 update of the Tariff Act of 1930⁹, which closed a loophole by prohibiting the importation of merchandise produced by forced or child labour into the US, is a requirement of conduct in that companies are not permitted to import products produced by forced or child labour. Companies can demonstrate that they are meeting the requirements of the legislation by demonstrating the due diligence that they have conducted, thus due diligence is implied as it is a factor that can aggravate or mitigate the violation.

³ Ending child labour, forced labour and human trafficking in global supply chains, ILO, OECD, IOM, UNICEF - Geneva, 2019.

⁴ Impacts on matters covered by the OECD Guidelines which include adverse impacts related to disclosure; human rights; employment and industrial relations; environment; combatting bribery, bribe solicitation and extortion; and consumer interests. OECD (2018), *OECD Due Diligence Guidance for Responsible Business Conduct*

⁵ *Ending child labour, forced labour and human trafficking in global supply chains*, ILO, OECD, IOM, UNICEF - Geneva, 2019.

⁶ France, Duty of Vigilance Law <https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/loi/texte>

⁷ Denmark, Child Labour due diligence law https://www.eerstekamer.nl/behandeling/20170207/gewijzigd_voorstel_van_wet

⁸ Lexology, Eversheds Sutherland Bitáns, “Modern Slavery: The Advent of Legislation Affecting Corporations” December 2019 https://www.lexology.com/library/detail.aspx?g=164dd149-498b-4ff8-a6c7-bc9b3af9cd6b&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2019-12-03&utm_term

⁹ US Trade Facilitation and Trade Enforcement Act⁹

Issue specific vs. broader RBC

Disclosure and conduct requirements can further be categorised by the scope of issues covered by the legislation.

- **The majority of existing due diligence legislation has an issue focus**, meaning that business is expected to disclose or conduct due diligence on a particular issue. To date, due diligence issue focused legislation has concerned forced labour/modern slavery (e.g. the UK Modern Slavery Act, the Australian Modern Slavery Act) or child labour (e.g. the Dutch Child Labor Due Diligence Law). Under the update to the US Tariff act 1930 both forced labour and child labour are inspected. Legislation can also be sector focused, such as the EU Conflict Minerals regulation.
- **In a few cases, legislation includes a broader scope across a range of RBC issues** – including labour, human rights and the environment. The Duty of vigilance law (France), the EU Non-financial disclosure directive, the EU regulation on disclosures relating to sustainable investments and sustainability risks and the Swiss initiative for Responsible business are examples.

Box 1. Emerging circular economy policy

While governments globally have been regulating the inputs, processes and products to mitigate the environmental impacts of the apparel sector for years, emerging policies are now focusing on establishing circularity in the sector. While such policies are distinct from due diligence legislation to date, they nonetheless touch on the lifecycle of a product and therefore may have implications on company due diligence. Examples of emerging policies include the following:

- In December 2019 the **European Commission** launched its Green Deal to drive towards a climate neutral EU by 2050.¹ The Roadmap and Action Plan for the Green Deal includes a “Circular Economy Action Plan, including a sustainable products initiative and particular focus on resource intensive sectors such as textiles, construction, electronics and plastics” to be developed in 2020.²
- In December 2019, **France** passed an anti-waste law that bans the destruction of non-food goods.³ This law makes the practice of discarding or incinerating unsold clothing items illegal as of late 2021 or 2023 depending on the sector. The law was passed within the framework of France’s Roadmap for the Circular Economy, through which France seeks to reduce the amount of non-hazardous waste sent to landfills by fifty-percent by 2025.⁴
- In 2016, the **Netherlands** launched a Government-wide programme for a Circular Dutch Economy by 2050.⁵ The Implementation programme includes a plan to achieve “a significant closed-loop supply of textiles by 2030.”⁶ The Netherlands is also establishing a textile policy programme and a Denim Deal alongside research into the possibilities of introducing new business models to counter ‘fast fashion.’⁶

Sources: (1) A European Green Deal, https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en (1) Annex to the Communication on the European Green Deal Roadmap - Key actions, https://ec.europa.eu/info/sites/info/files/european-green-deal-communication-annex-roadmap_en.pdf; <https://www.gruener-knopf.de/kriterien.html> (5) (6) <https://hollandcircularhotspot.nl/wp-content/uploads/2019/09/Circular-Economy-Implementation-Programme-2019-2023.pdf>

Enforcement

The responsibility and mechanisms for enforcing legal compliance varies substantially across jurisdictions. Broadly and across legislation, formal monitoring and evaluation efforts are generally limited and not all laws include an active enforcement of the competent authority. Non-governmental organisations often play a role in informal monitoring on implementation by businesses. There are a number of differences on purpose, monitoring and enforcement of legislation, but they can be generally classified by type of penalty.

Injunctive relief

The purpose of these laws is limited to the requirement of disclosure about a specific issue or risk. Under the UK Modern Slavery Act¹⁰, the Australia Modern Slavery Act¹¹ and the California Transparency in Supply Chains Act¹², the duty to issue a statement is enforceable by the relevant authority that can seek a court injunction if a firm is deemed to be non-compliant. The appointed authority in each of the above has the exclusive authority to enforce the act if companies fail to produce a statement, the government does not consider whether companies are disclosing accurate and up-to-date information.

Administrative and criminal sanctions

The Netherlands are the first to mandate the appointment of a specific regulator to oversee the Dutch Child Labour Due Diligence Law¹³ and its enforcement, and to allow victims and stakeholders to file complaints with this regulator. This law creates criminal sanctions which may be imposed on directors of companies which fail to conduct human rights due diligence. They include specific sanctions for failure to comply but do not aim at guaranteeing access to remedy for affected people. Only complaints from third parties will trigger enforcement by submitting concrete evidence that the company's products or services were produced with child labour as there is no active enforcement of the law. While administrative and criminal sanctions are in place, the law does not result in a specific corporate civil or criminal liability provision if there is violation.¹⁴

Civil or criminal liability

Civil liability: Under the French law¹⁵, no public institution has been appointed to monitor the quality of the vigilance plan but any person with standing may ask the court to order the company to comply with its obligations, and if the company does not set up the vigilance plan according to the law and if a prior formal notice remains unheeded, a judge can issue an injunction (companies may be subject to civil liability). The law expressly establishes liability on the basis of the general tort of negligence and offers a remediation mechanism.

Criminal liability: Under the Update of the Tariff Act¹⁶, importers that cannot demonstrate due diligence may be subject to exclusion or seizure by the US Customs and Border Protection (CBP) and violations of the regulation may lead to criminal investigation of the importers. Depending on the nature of their misconduct, violators may be subject to criminal and civil penalties. Where legislation is pursued, governments are encouraged to align with existing recommendations on due diligence, consider

¹⁰ UK Modern Slavery Act <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>

¹¹ Australia Modern Slavery Act <https://www.legislation.gov.au/Details/C2018A00153>

¹² Transparency in Supply Chains Act <https://oag.ca.gov/SB657>

¹³Denmark, Child Labour due diligence law https://www.eerstekamer.nl/behandeling/20170207/gewijzigd_voorstel_van_wet

¹⁴Lexology, Dutch Child Labour Due Diligence Law, July 2019, <https://www.lexology.com/library/detail.aspx?g=7ea77664-d4a4-4c0b-b1db-46c40ba630f3>

¹⁵Duty of Vigilance Law <https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/lo/texte>

¹⁶ US Trade Facilitation and Trade Enforcement Act <https://www.congress.gov/bill/114th-congress/house-bill/644/text>

effectiveness criteria for due diligence, seek to mitigate conflicting requirements for companies and enable recognition of existing collaborative initiatives.

Learnings

Supply chain transparency and due diligence laws are a relatively recent phenomenon, and in some cases are still not in force, so their effectiveness in driving overall impact has not yet been evaluated in full. Nonetheless, some preliminary lessons can be gleaned. Some studies have found that legislation has increased awareness among businesses, notably senior business leaders and in some cases has catalysed action to prevent and address risks, including through collaboration with stakeholders.¹⁷

However, while regulations can be a strong inducement for companies to carry out due diligence, they can also pose challenges in the area of implementation. The requirements of mandatory due diligence legislation vary across jurisdictions and therefore can create various and divergent understandings of what due diligence means in practice¹⁸. Additionally, this can duplicate processes and increase the administrative burden on companies. In consultations on the 2020-2022 programme of work for the OECD's sector project on responsible supply chains in the garment and footwear sector, business members pointed to policy coherence on mandatory due diligence expectations as one of their top concerns.¹⁹ In addition to the above, where flexibility is not adequately integrated, legislation lead to de-risking through disengagement from particular sourcing countries, by companies or to reporting a bare minimum in order to avoid legal liabilities. The best means of monitoring and enforcing legislation also remains a point of learning that requires further research.

Where mandatory due diligence is pursued, governments are encouraged to consider the following good practice:

- **Legislation builds on existing negotiated and government-backed interpretations of due diligence**, including the OECD Due Diligence Guidance for Responsible Business Conduct and sector-specific guidance, where relevant.
- **Legislation incorporates the overarching components of due diligence**, including that due diligence: is preventative; involves multiple processes and objectives; is commensurate with risk (risk-based); can involve prioritisation (risk-based); is dynamic; does not shift responsibilities; concerns internationally recognised standards of RBC; is appropriate to an enterprise's circumstances; can be adapted to deal with the limitations of working with business relationships; is informed by engagement with stakeholders and involves ongoing communication.
- **Legislation enables recognition of industry and multi-stakeholder collaboration** while also ensuring such collaboration is aligned with due diligence expectations. Within this context, the OECD Alignment Assessment process can support the recognition of industry and multi-stakeholder initiatives and provide governments with a neutral evaluation of how initiatives incorporate and align with OECD due diligence guidance.
- **Legislation seeks to align with existing regulatory requirements**, to the extent possible, to support a level playing field for companies across jurisdictions.

¹⁷ Hult International Business School (HIBS) and Ethical Trade Initiative (ETI). 2016. *Corporate Leadership on Modern Slavery: How have companies responded to the UK Modern Slavery Act one year on?* (United Kingdom). Available at: www.ethicaltrade.org/sites/default/files/shared_resources/corporate_leadership_on_modern_slavery_full_report_2016.pdf.

¹⁸ Global Forum on responsible Business Conduct, session note "Promoting due diligence: the role of governments" June 2018 <https://mneguidelines.oecd.org/global-forum/2018-GFRBC-Session-note-Role-of-Government-for-DD.pdf>

¹⁹ OECD Directorate for financial and Enterprise Affairs, Investment Committee, Working party on RBC "Moving towards coherent responsible conduct policies" October 2019 [https://one.oecd.org/document/DAF/INV/RBC\(2019\)3/en/pdf](https://one.oecd.org/document/DAF/INV/RBC(2019)3/en/pdf)