



Growing Momentum

The implementation of mandatory human rights due diligence laws are taking place all over Europe

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On 29 November, a referendum will ask the Swiss electorate to decide whether Swiss companies should be subject to mandatory human rights due diligence. If passed, this would represent a significant strengthening of existing legislation; a move that chimes with rising expectations on multinational companies across the globe. The trend towards the adoption of mandatory human rights due diligence laws is taking place all over Europe, driven by the enactment of France's Corporate Duty of Vigilance law. Countries like the UK, the Netherlands, Germany and even

the EU itself are considering or have already put in place a legal duty to conduct human rights due diligence. This momentum demonstrates a growing intention to put companies at the forefront of the global urge to mitigate human rights abuses.

The Swiss Referendum

The referendum has been brought about by the actions of the Swiss Coalition for Corporate Justice. This comprises over 80 non-governmental organisations in Switzerland who have worked together to bring forward the Responsible Business Initiative (the RBI) in 2016.

Under the Swiss system of direct democracy, civil society groups can bring about proposals to amend the constitution. These requests are known as initiatives. An initiative must collect 100,000 signatures in order to be considered by Parliament. If Parliament disagrees with a proposal, counterproposals can be formulated. At this point, if the group bringing the initiative finds the counterproposal acceptable, no referendum is necessary. However, if a counterproposal is rejected, a referendum will be held, as is the case with the RBI. If the majority of the electorate and the majority of cantons (a 'double majority') vote in favour, the proposal to amend the constitution will pass.

The RBI is a far-reaching proposition. It aims to introduce mandatory human rights due diligence and impose direct liability on businesses for breaches of human rights and environmental standards. It is considered one of the most ambitious approaches to business and human rights worldwide.

Proposed Obligations

It is also innovative in a number of ways. First, it applies to all multinationals and SMEs involved in high-risk sectors such as mining and those companies trading raw materials like copper, gold, diamonds or tropical wood. Second, the due diligence obligation applies to Swiss companies' own activities both at home and abroad, as well as to the activities of other companies under their control. This includes Swiss companies' subsidiaries abroad and companies under the de facto economic control of a Swiss company.

Third, the RBI proposal introduces direct liability of Swiss companies for violations of human rights and environmental standards. This means that Swiss law would be applicable regardless of where the harm occurs allowing victims to seek redress and damages before Swiss courts.

Lastly, the burden of proof is shifted to some extent. Plaintiffs would need to demonstrate a wrongdoing causally linked to a damage,

as per the usual civil law approach to liability. Subsequently, in order to avoid liability, companies would need to prove that the requisite care to prevent such violations has been taken, or that the damage would have occurred even if all due care had been taken. The burden of proof is tailored as such so that plaintiffs do not face the great difficulty of gathering evidence to prove that the controlling company acted negligently.

The RBI is broadly supported by various circles. It is backed by 120 non-governmental organizations and a business committee of over 180 entrepreneurs, among others. The RBI is part of an international movement and a member of the European Coalition for Corporate Justice.

However, when put before the Swiss Parliament, it was rejected. A counterproposal was devised which would impose due diligence requirements for child labour and conflict minerals only. Additionally, it would not create liability for Swiss companies breaching human rights and environmental standards, only mandating some of them (public utility companies only) to undertake reporting activities.

Supporters of the counterproposal argue that its narrower scope is sufficient for Switzerland to level up to current legal changes across the world without hampering access of Swiss companies to the international market and putting an incommensurate burden on them. In the event that the RBI proposal is rejected during the popular referendum, it is likely that the counterproposal will be put forward and become the new responsible business legal standard in Switzerland.

Through this referendum, if adopted, Switzerland would be following an emerging global – and particularly European – trend towards mandatory human rights due diligence.

Following France

On the global stage, a number of countries are considering legislation that incorporates human rights due diligence, following the example set by France. The move towards greater human rights accountability for companies finds its origins in the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, two sets of non-binding responsible business conduct rules followed by a growing number of companies.

Today, the trend towards more precise liability provisions for corporate human rights abuse in international operations comes from the increasing pressure from civil society organisations. Such bodies argue that binding approaches to human rights due diligence are justified and necessary as a result of the corporate failure to really identify, mitigate and

address human rights risks effectively.

Civil society campaigns have been calling for mandatory due diligence laws in Austria, Belgium, Italy, Luxembourg, the Netherlands, Norway, Sweden and the UK. Additional momentum is also coming from some possibly unexpected quarters. ESG investors are starting to take corporate human rights performance into account when making investment decisions and are supportive of the need for mandatory human rights due diligence. In response to this growing multifaceted momentum, an international binding treaty is currently being discussed.

This trend is also being intensified by the COVID-19 crisis which has shed light on some poor human rights practices in a number of multinational companies. Human rights abuses reported over the past few months range from an absence of social distancing and appropriate sanitary measures in warehouses to workers being underpaid in garment factories or being ordered to sleep on factory floors to complete orders.

At the wider EU level, the Commission is seeking to introduce a legal duty to conduct human rights due diligence, impose sanctions for

legal certainty, which companies wish to have.

For instance, on 2 September, 26 companies, business associations, and initiatives released a joint statement calling for EU-wide, cross-sectoral mandatory human rights and environmental due diligence legislation.

At the national level, France's Corporate Duty of Vigilance law requires companies which fall within its scope to establish a vigilance plan—i.e., identify and mitigate human rights and environmental risk—and it. They must also make both the vigilance plan and the effective implementation report public. To date, seven companies have been served a formal notice to comply with their vigilance obligations and three lawsuits have been brought.

The Netherlands recently adopted a child labour due diligence law. Germany is also drafting a law on mandatory human rights due diligence for German companies and their supply chains, which some major German companies support.

In the UK, the Government has just announced possible changes to the Modern Slavery Act. Key changes include mandatory reporting of due diligence processes in modern slavery statements,

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non-compliance and potentially allow victims of corporate abuse the right to obtain remedies.

The current EU requirement is mandatory disclosure. Large enterprises must include a non-financial statement reporting information about the development, performance, position, and impact of their activity relating to environmental, social, and employee matters; respect for human rights; anti-corruption; and bribery matters. The Commissioner for Justice, Didier Reynders, recently announced that the Commission will introduce a legislative initiative on mandatory due diligence for companies. This announcement was made in light of a recent study's findings which highlighted a need for EU-wide mandatory legislation, as voluntary measures do not prove sufficiently efficient to incentivise companies.

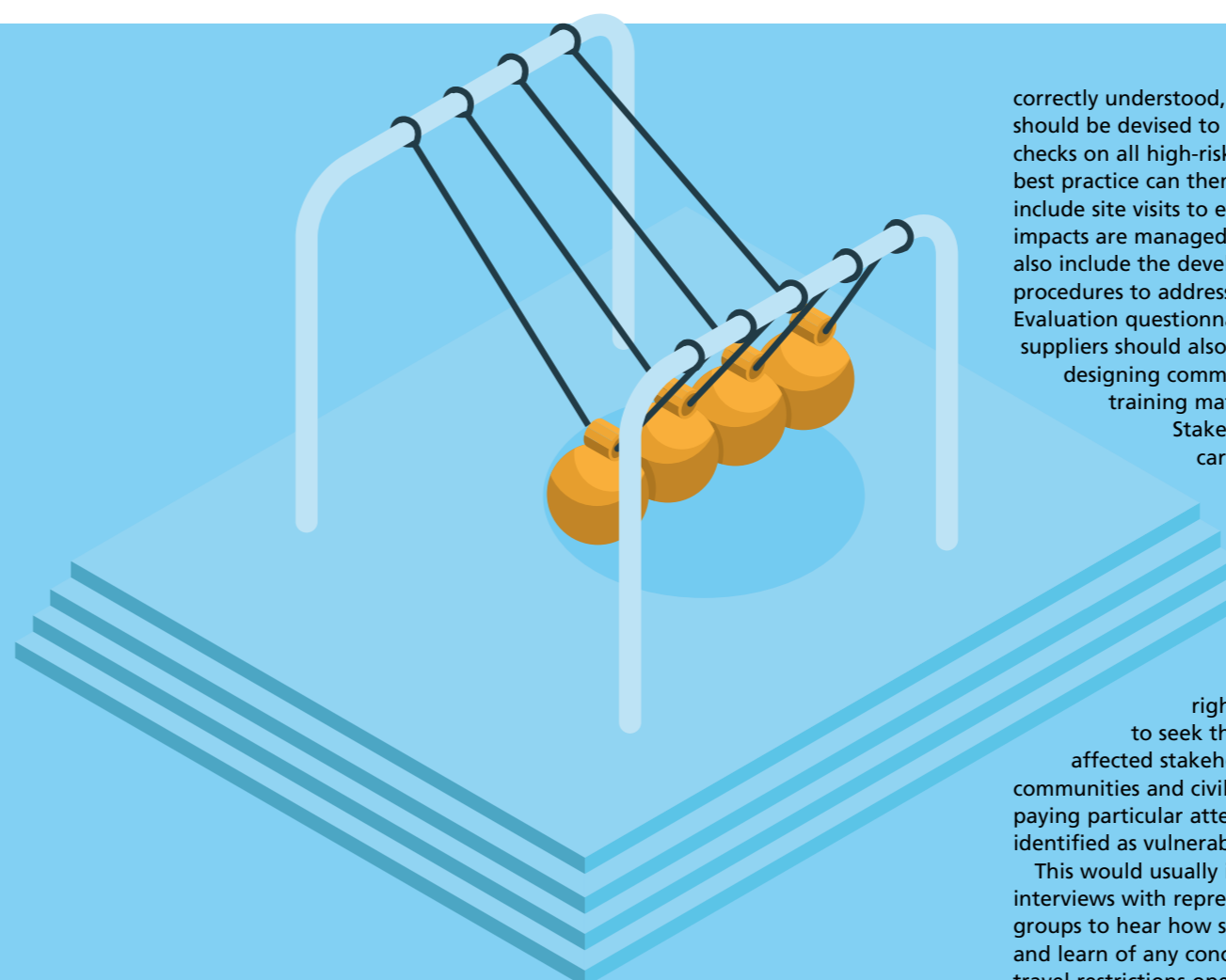
It is interesting to note that the RBI proposal aligns with the EU Commission's initiative. Both seek to introduce a legal duty to conduct human rights due diligence, to impose sanctions for non-compliance, and to consider allowing victims of corporate abuse to obtain remedies.

Many companies are supportive of this impulse. EU-wide regulation would indeed enhance

together with details of how risks are identified and mitigated. In addition, companies covered by the Act would be required to publish their statements on a digital reporting service and the signing director would need to sit on the board.

These examples clearly show the growing legal obligation for companies to demonstrate their duty of care and properly take account of any adverse impacts on human rights. Mitigating these impacts should be a primary concern for any organisation. Many strive to do this and would welcome any move towards a global standard on human rights. Others may see these changes as a helpful means of ensuring that appropriate systems can be devoted to protecting human rights and environmental standards.

Nevertheless, it is widely expected that human rights due diligence, either mandatory or voluntary, will become established best practice. Companies are more than ever encouraged to follow good business practice. Not only does this ensure that any duty of care is upheld, it also strengthens reputation, creates a competitive advantage and, increasingly, contributes to positive ESG scores which can significantly



correctly understood, a due diligence programme should be devised to carry out the necessary checks on all high-risk areas and ensure that best practice can then be implemented. This may include site visits to evaluate how human rights impacts are managed in all operations but will also include the development of policies and procedures to address human rights impacts. Evaluation questionnaires for affiliates and suppliers should also be considered as well as designing communications programmes and training materials.

Stakeholder interviews should be carried out to test how systems are working on the ground and establish whether there are any concerns. Meaningful engagement with all stakeholders is critical to the successful mitigation of human rights risks. Companies need to seek the views of all potentially affected stakeholders including workers, communities and civil society organisations, paying particular attention to any groups identified as vulnerable to risk.

This would usually involve face-to-face interviews with representatives from these groups to hear how systems work on the ground and learn of any concerns. However, the current travel restrictions operating in many countries may make this more challenging. Consequently, steps should be taken to conduct interviews via video conferencing platforms or by training local staff or consultants to carry this out. Capacity building is an important part of stakeholder engagement. By sharing knowledge, building human rights expertise and embedding best practice, companies can successfully raise awareness of these issues and mitigate harm.

Many businesses are committed to respecting human rights and working hard to avoid any adverse impacts. It is clear however, from the cases we see and the proposed legislative changes, that more work is needed. At the recent United Nations Virtual Forum on Business and Human Rights however, speakers felt that progress has been made and momentum is there to drive change forward. Accountability for adverse human rights impacts is moving up the agenda. Many businesses see this simply as the right way to operate, making it easier to embed the right practices and behaviours throughout the value chain. Embracing due diligence and understanding the salient risks will be critical to getting this right. *Disclaimer: The referendum took place on 29 November.*

enhance the company's ability to access capital. These all are positive benefits that should outweigh any perceived challenges.

Key Steps

There are a number of steps that companies should consider if they want to ensure they are following best practice. Much of this is already expected as a voluntary demonstration of the duty of care, and to act in accordance with the UNGPs. But the chances are this will soon become a legal requirement almost certainly in Europe and very likely further afield, so any progress made now will help ensure future compliance is already in hand.

Risk assessments: companies can only understand the negative impacts they may have on human rights if they have carried out a company-wide risk assessment to make sure that all their salient risks are properly and carefully identified. This can be a complex process and where necessary, should include a risk-map of the supply chain to ensure that all high-risk suppliers are also properly identified.

Due diligence: once the salient risks are