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Human Rights Diligence Catching up to Anti-Corruption

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An April 29 announcement from Didier Reynders, the Commissioner for Justice of the EU may be the final step in elevating human rights due diligence to a business imperative, akin to anti-corruption diligence. Human rights diligence has been gaining steady momentum over the past several years, moved by many of the forces that propel anti-corruption diligence. These include national laws, civil and criminal legal risks, the wish to protect employees, access to financing and capital, and benefits operationally. The missing ingredient—perhaps the most important one—has been a broad legal requirement coupled with an enforcement mechanism that is similar to the anti-corruption framework that exists worldwide. The EU Commissioner’s pronouncement, building on domestic legal efforts across the continent, may provide that ingredient. According to Mr. Reynders, in early 2021, the Commission will present a legislative initiative compelling diligence throughout companies and their supply chains, with accompanying enforcement and civil liability provisions. This Article discusses how the dynamics that propelled anti-corruption diligence to become engrained in business activities have been growing in the human rights due context, and the significance of a compulsory regime throughout Europe in pushing human rights diligence to a similar level.

Anti-Corruption Diligence

Over the past 15 years, anti-corruption due diligence has become a core aspect of global business activities. While the U.S. Congress enacted the Foreign Corrupt Practices Act (“FCPA”) in 1977, it was only after the OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1997, and the UN Convention Against Corruption became effective in 2005,¹ that anti-corruption diligence began to grow in line with a dramatic shift in enforcement priorities. In 2006, there were some 14 FCPA enforcement actions. That jumped sharply in 2007, as the U.S. Department of Justice (“DOJ”) initiated 22 enforcement actions, and the Securities and Exchange Commission (“SEC”) initiated 21, starting an aggressive enforcement regime that continues to grow. In 2019, DOJ pursued 32 actions and the SEC 17, and \$2.9 billion was collected in corporate settlements, the largest total to date.

Consistent with the OECD Convention, DOJ and the SEC interpret the FCPA to require that companies pursue anti-corruption diligence in multiple contexts. These include: third-party diligence, especially government intermediaries or third parties affiliated with the government or government officials; diligence of prospective employees to assess whether they are PEPs (politically exposed persons); risk assessments, program testing and other types of program diligence; and diligence during investments, mergers and acquisitions, and transactions. Dozens of enforcement actions, including jail



time for individuals and massive fines and penalties for companies, have resulted from the failure to conduct diligence when there are known “red flags” that suggest bribery could be afoot.² Across the pond, the U.K. Serious Fraud Office (“SFO”) and other European law enforcement authorities also have increased their enforcement efforts, and TRACE International’s annual Global Enforcement Report provides that authorities in 37 countries had open corruption investigations at the end of 2019.³

While the active enforcement of domestic corruption laws has been a key driver for anti-corruption diligence, anti-corruption diligence has now become entrenched in a much larger legal and business framework. For example, corruption allegations have become a frequent defense by governments in the investor-state arbitration context.⁴ Similarly, multi-national businesses widely recognize the fundamental responsibility to keep employees safe, as the COVID-19 crisis has underscored, and accusations of corruption bring dramatic risks to the welfare of local personnel; in fact, we have seen many instances in the recent past where developing countries have manufactured corruption claims against individuals to pressure their employers.⁵ It is also now routine for financial institutions and investors to pursue details on corruption programs, risks and specific issues as part of their diligence exercises, making a weak corruption approach a threat to access to capital.⁶ The same is true in the M&A context, even in locales with lower risks of corruption, and thus where enforcement risks are not immediately evident. More and more governments and their development agencies also are conditioning diplomatic and export credit support on anti-corruption commitments and performance. Similarly, public procurements be they local, national, or international commonly contain anti-corruption/integrity rules.⁷

As these dynamics show, while enforcement risk was the spark that ignited the flame of anti-corruption diligence, and remains an important reason it is pursued, it is no longer the only reason. In fact, anti-corruption diligence has become assimilated into global business operations to a degree that should DOJ, the SEC, SFO, and other enforcement efforts were somehow to slow, anti-corruption diligence likely would continue unabated.

Human Rights Diligence

On a conceptual level, the steps associated with human rights and anti-corruption diligence differ. Unlike anti-corruption, the goal of human rights diligence is not to assess risks to the business, be they financial, reputational, or otherwise. It is also broader than just ascertaining actual, potential, or even perceived risks of negative human rights impact on stakeholders. Human rights diligence is in fact more accurately described as a continuous process of identifying and addressing adverse human rights impacts that may be connected to the business through its activities and relationships. It consists of four principles: (1) determining actual, potential and perceived risks of negative human rights impacts on stakeholders, including the likelihood, scale, scope, and irremediability of those impacts; (2) taking steps to prevent and mitigate those impacts; (3) evaluating the effectiveness of those steps; and (4) reporting externally, including to potentially affected individuals and groups.⁸

Although there are concrete distinctions between human rights and anti-corruption diligence, many of the same dynamics that have driven anti-corruption diligence are present in the human rights sphere. For instance, human rights abuses bring tangible domestic criminal and civil litigation risks. Domestic criminal laws often prohibit the acts that underlie human rights violations; torture is prosecuted as assault and battery, extrajudicial killings as murder, and enforced disappearance or arbitrary detention as kidnapping. Human rights abuses also are litigated in high-profile transnational tort lawsuits in a swath of home jurisdictions, including the U.S., Canada, the U.K., and elsewhere, and have led to meaningful damage awards and settlements.⁹ Likewise, as with anti-corruption, claims of human



rights abuse are raised in the international arbitration context, in support of claims and counterclaims, as well as such affirmative defenses as unclean hands.¹⁰ As with anti-corruption, human rights due diligence thus has been undertaken to help companies reduce the likelihood of these legal risks to the company and their employees, and in the mergers and acquisitions context, to avoid inheriting a host of challenging legal and operational risks.

Further, much like the anti-corruption context, investors and lenders are seeking information on human rights and other ESG-issues for lending and financing decisions. The U.S. Financial Crimes Enforcement Network (“FINCen”) has issued a detailed advisory for financial institutions listing red flags to assist in identifying suspicious financial activity potentially related to human trafficking,¹¹ and now includes on its Suspicious Activity Report (“SAR”) form a box to check whether potential suspicious activity may exist. The Financial Action Task Force has promulgated a lengthy report listing human trafficking risks and their connection to financial institutions.¹² Industry efforts also have deepened after the Australian government charged Westpac Bank with a staggering 23 million financial crimes and breaches, some of which facilitated transactions that enabled child exploitation in the Philippines. The CEO was fired, the bank faced a major stock drop, and it is facing potentially \$1 billion in fines, and civil and criminal penalties.¹³ Financial institutions, such as the 92 members of the Equator Principles Association, which include major banks and export credit institutions, also are increasingly insisting that companies conduct assessments of environmental and social risks before granting financing. The latest version of the Equator Principles framework, EP4, which will go into effect this year, demands that projects assess adverse human rights impacts.¹⁴ Access to capital, and potential regulatory actions, thus have been important in boosting human rights diligence.

Also similar to anti-corruption, governments increasingly are conditioning overseas support to companies, bilateral aid, and public procurement on human rights considerations. For the last several years, U.S. assistance to the governments of El Salvador, Guatemala, and Honduras has been conditioned on protection of human rights, among other concerns.¹⁵ In the corporate context, Canada conditions overseas governmental assistance and economic diplomacy on responsible human rights performance.¹⁶ Recently, the U.K. Government—which spends roughly £50 billion buying goods and services—issued a Modern Slavery Act Statement recognizing that the government is introducing “strong incentives” for suppliers to improve their human rights performance, and issuing a clear warning that suppliers whose human rights performance falls short may face an increased likelihood of being excluded from public contracts.¹⁷ The same is true in Australia, as the government will issue its own Modern Slavery Act Statement later this year, which it believes will “help mitigate modern slavery risks in public procurement and investments.”¹⁸ These governmental incentives and initiatives also have contributed to the growing prominence of human rights diligence.

In addition, perhaps even more than with anti-corruption, human rights violations can have profound business risks. In the U.S., the law prohibits importing goods produced in whole or part by forced labor, and the U.S. Customs and Border Patrol has been increasing its use of Withhold Release Orders (“WROs”), seizing goods when it receives information that forced labor may have been involved in their creation.¹⁹ There also have been numerous instances of boycotts, blockades, and business interruptions stemming from poor human rights performance, as a loss of social license to operate can be a death knell for an operation. One well-known study, focusing on the extractive sector, determined that the costs of shutting down operations for a major mining project are roughly US\$20 million per week, not to mention the potentially lasting impacts on individuals and communities that human rights violations can bring.²⁰ The study cited numerous discrete examples reflecting the enormous costs associated with social conflicts, including one operation where community-related



delays led to US\$750 million in project costs. Companies have recognized that human rights diligence can help avoid these kinds of operational difficulties. On the flip side, as the COVID-19 crisis has underscored, companies with strong due diligence systems tend to have greater resilience, and are better poised for a recovery.²¹

Mandatory Diligence

Finally, while all of these dynamics have been important in elevating corporate human rights diligence, there have been increasing calls to mandate it. Even before the COVID-19 crisis, many observers were predicting that mandatory human rights due diligence laws—requiring companies to identify, mitigate and report on salient human rights risks—would sweep Europe.²² Mandatory diligence laws already exist in France and the Netherlands.²³ They have been formally proposed in Norway, Austria, Denmark, and Switzerland. Government leaders in Belgium, Finland, Germany, Luxembourg, and elsewhere have stated that they would support mandatory diligence laws. Scores of major European companies, including more than 50 from Germany and 29 from the Netherlands, as well as more than 100 investors, have likewise voiced their support for mandatory human rights diligence laws.²⁴

As part of this clear momentum, earlier this year the EU published a lengthy study on regulatory options for due diligence legislation at an EU level.²⁵ While the study found support among leading European nations, the announcement this week from Commissioner Reynders may be the final step to advancing human rights diligence to the status of anti-corruption diligence. Commissioner Reynders stated that “voluntary action to address human rights violations, corporate climate and environmental harm ... has not brought about the necessary behavioural change,” and that only 30% of “businesses in the EU are currently undertaking due diligence which takes into account all human rights and environmental impacts.” Consistent with the forces motivating human rights diligence today, he noted that “70% of business survey respondents agreed that EU-level rules on a general due diligence requirement may provide benefits for business,” as they will bring “legal certainty and a single harmonized standard” across the EU and sectors. He further announced that he will next year introduce mandatory due diligence legislation as part of the Commission’s 2021 work plan, stating that the Commission will launch “public consultation” on the initiative in the coming weeks and table a proposal in the first quarter of 2021. Although he remained general in discussing the components of the requirement, and will include substantial input from the EU Trade Commissioner and others,²⁶ he stated:

- that the legislative objective will be to require that companies take affirmative steps to identify, prevent, mitigate, and account for human rights risks and impacts, including environmental matters;
- that, much like the French law, the EU law would apply to activities of companies and their subsidiaries, and extend through a company’s supply chains;
- the EU rule would require due diligence into potential and actual negative human rights impacts, and public reporting of the results of those efforts and how impacts are being addressed; and
- even more than the French law, the EU requirement would include strong enforcement mechanisms, as “a regulation without sanctions is not a regulation,” and access to remedy for victims through civil liability.



The German government immediately expressed its backing for the law, and there is little doubt that further governmental support will follow.

While the French Duty of Vigilance Law may be a starting point for a discussion, numerous obvious and important questions ultimately remain for an EU-wide requirement, which no doubt will be explored in-depth during consultations. That includes the standard of “diligence” that will be required, its jurisdictional reach to companies engaging in commercial activities in the EU but domiciled abroad, and what kind of enforcement and/or remedy mechanisms may be included. Depending on the answers to these questions, it may be possible to pursue integrated human rights and anti-corruption diligence, leveraging efficiencies in risk areas that often are contributing factors to the other.

Regardless, such a law—broadly mandating human rights diligence for companies domiciled or doing substantial business in Europe, their subsidiaries, and their supply chains—may be the needed step in driving human rights diligence to the business imperative of anti-corruption diligence. Although many of the other dynamics that have motivated anti-corruption diligence exist in the human rights context, and human rights diligence increasingly has become integrated into legal and business operations, a far-reaching mandatory law has been lacking. However, even if a common EU approach fails to come to fruition, the vast support for mandatory diligence throughout the European governmental, business, and civil society communities almost certainly will lead to domestic legislation that has the same effect.

Conclusion

Anti-corruption diligence has become integrated into legal and business operations. While many of its driving forces have pushed human rights diligence to the fore, the primary distinction has been the kind of broad legal mandate that exists in a number of domestic legislations and the related enforcement efforts. That is about to change, whether at an EU level, or among its 27 countries. And lingering in the background, even beyond the EU, is a proposed UN Business and Human Rights Treaty that includes mandatory human rights diligence, driven by an intergovernmental working group that is set to hold its 6th session in the Fall. Human rights diligence is upon us, and it will be important to prepare.



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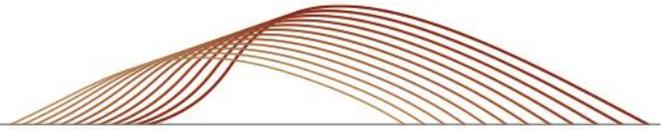
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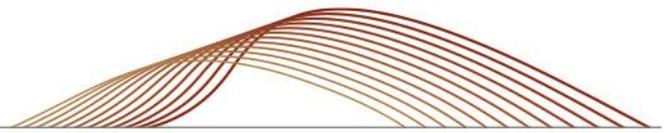
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- ¹ See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, at <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>. The OECD Convention has been signed by 44 countries, and it repeatedly references and discusses due diligence. The UN Convention Against Corruption, which has 140 signatories and 187 parties, similarly references the criticality of measures to prevent corruption. United Nations Convention Against Corruption, at https://www.unodc.org/unodc/en/corruption/tools_and_publications/UN-convention-against-corruption.html.
- ² See, e.g., Order, In the Matter of Quad/Graphics, Inc., Admin. Proc. File No. 3-19531 (Sept. 26, 2019), at <https://www.sec.gov/litigation/admin/2019/34-87128.pdf>; Order, In the Matter of Walmart, Inc., Admin. Proc. File No. 3-19207 (June 20, 2019), available at <https://www.sec.gov/litigation/admin/2019/34-86159.pdf>; Complaint, *SEC v. Teva Pharmaceuticals Ltd.*, No. 1:16-cv-25298 (S.D. Fla. Dec. 22, 2016); Plea Agreement, *United States v. Walmart, Inc.* (June 20, 2019); *In re: Bio-Rad Labs., Inc.*, Admin. Proc. File No. 3-16231 (Nov. 3, 2014); *States v. Kozeny*, 667 F.3d 122, 127-133 (2d Cir. 2011).
- ³ TRACE International, 2019 Global Enforcement Report, at 6, available at [https://cdn2.hubspot.net/hubfs/5002429/Promotional%20Materials/Global%20Enforcement%20Report%20\(GER\)/TRACE%20Global%20Enforcement%20Report%202019.pdf?_hstc=60209714.60701a22137d7438a7ba9855d19213a7.1578324930719.1587062248106.1588518405671.14&_hssc=60209714.2.1588518405671](https://cdn2.hubspot.net/hubfs/5002429/Promotional%20Materials/Global%20Enforcement%20Report%20(GER)/TRACE%20Global%20Enforcement%20Report%202019.pdf?_hstc=60209714.60701a22137d7438a7ba9855d19213a7.1578324930719.1587062248106.1588518405671.14&_hssc=60209714.2.1588518405671).
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- ⁶ See, e.g., BlackRock, Business Conduct and Ethics, at <https://www.blackrock.com/corporate/responsibility/ethics-and-integrity> ("we conduct appropriate due diligence on our business partners according to the risks they present, including corruption risk").
- ⁷ See Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad, at <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>.
- ⁸ See, e.g., OECD Due Diligence Guidance for Responsible Business Conduct (2018), at <http://mnequidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.
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- ¹⁰ See Human Rights and Environmental Disputes in International Arbitration, *Kluwer Arbitration Blog* (July 24, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/07/24/human-rights-and-environmental-disputes-in-international-arbitration>.
- ¹¹ See FIN-2014-A008 (Sept. 11, 2014).
- ¹² See FATF, Financial Flows from Human Trafficking (2018), at <http://www.fatf-gafi.org/media/fatf/content/images/Human-Trafficking-2018.pdf>.
- ¹³ See Michael Janda & Peter Ryan, "Westpac faces fines over 'serious and systemic' anti-money laundering breaches, AUSTRAC says," *ABC News*, Nov. 19, 2019, at <https://www.abc.net.au/news/2019-11-20/westpac-to-face-fines-anti-money-laundering-terrorism-breaches/11720474>.
- ¹⁴ See Equator Principles (July 2020), at <https://equator-principles.com/wp-content/uploads/2020/01/The-Equator-Principles-July-2020.pdf>.
- ¹⁵ See Peter J. Meyer, Congressional Research Service Report, U.S. Strategy for Engagement in Central America: Policy Issues for Congress (Nov. 12, 2019) at 1, 14.
- ¹⁶ See Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad, at <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>.
- ¹⁷ See UK Government Modern Slavery Statement, March 26, 2020, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875800/UK_Government_Modern_Slavery_Statement.pdf.
- ¹⁸ See <https://www.homeaffairs.gov.au/criminal-justice/Pages/modern-slavery.aspx>.



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- ¹⁹ See, e.g., “BP Issues Detention Orders against Companies Suspected of Using Forced Labor,” Oct. 1, 2019, at <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-detention-orders-against-companies-suspected-using-forced>.
- ²⁰ See Rachel Davis & Daniel Franks, Costs of Company-Community Conflict in the Extractive Sector (2014), at 19, at https://www.csr.uq.edu.au/media/docs/603/Costs_of_Conflict_Davis-Franks.pdf.
- ²¹ See Introductory Remarks by Commissioner Phil Hogan at OECD Global Forum on Responsible Business Conduct (May 19, 2020), at https://ec.europa.eu/commission/commissioners/2019-2024/hogan/announcements/introductory-remarks-commissioner-phil-hogan-oecd-global-forum-responsible-business-conduct_en.
- ²² See, e.g., IHRB, Top 10 Business and Human Rights Issues, <https://www.ihrb.org/library/top-10/top-ten-issues-in-2020>.
- ²³ For instance, France’s Duty of Vigilance Law. Adopted in 2017 applies to large multinational companies—specifically (a) those headquartered in France that employ at least 5,000 employees in France, or at least 10,000 employees worldwide (including through direct and indirect subsidiaries), or (b) foreign companies headquartered outside France, with French subsidiaries that employ at least 5,000 employees in France. Companies subject to the law must establish mechanisms to prevent human rights violations and environmental impacts throughout their chain of production, including those of their subsidiaries and companies under their control. These mechanisms must be reported each year as part of a “vigilance plan.” See Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre (Mar. 27, 2017).
- ²⁴ See List of large businesses, associations & investors with public statements & endorsements in support of human rights due diligence regulation, <https://www.business-humanrights.org/en/list-of-large-businesses-associations-investors-with-public-statements-endorsements-in-support-of-human-rights-due-diligence-regulation>.
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- ²⁶ See Introductory Remarks by Commissioner Phil Hogan at OECD Global Forum on Responsible Business Conduct (May 19, 2020), at https://ec.europa.eu/commission/commissioners/2019-2024/hogan/announcements/introductory-remarks-commissioner-phil-hogan-oecd-global-forum-responsible-business-conduct_en.