On April 29, 2020, the European Commission announced plans to develop a legislative proposal by 2021 that will require EU companies to conduct mandatory human rights and environmental due diligence on their operations and global supply chains. If passed, the new law would also include provisions for corporate liability with possible sanctions imposed for non-compliance.

The European Commission’s announcement comes as part of wider efforts across the European Union to prevent human rights abuses and protect vulnerable workers, and comes in the same month as a call by over 100 institutional investors representing over US $4 trillion in assets under management for governments to introduce mandatory human rights due diligence.

The announcement follows the publication of a study conducted for the European Commission which focused on the due diligence requirements to identify, prevent, mitigate and account for abuses of human rights, including the rights of the child and fundamental freedoms, serious bodily injury or health risks, and environmental damage including with respect to climate. The report sets out various regulatory options and their possible impacts, and concludes that the introduction of mandatory due diligence requirements for companies would have the most significant impact on human rights and the environment, provided there is proper monitoring and enforcement.

At present it is unclear which companies will be subject to the mandatory due diligence requirements, the extent to which companies might need to report on their due diligence efforts, the possible enforcement framework and whether there will be any sanctions for breach of the requirements. The European Commission is due to start a public consultation on its proposed legislation in the coming weeks, which should provide insight and clarity on the implications for EU-based companies.

Regulators across the European Union are increasingly turning their focus to the potential adverse impacts caused by businesses on human rights and the environment. Companies conducting business in the EU would be well advised to consider proactively identifying the human rights and environmental impacts of their business and supply chains, begin to assess the effectiveness of their compliance programmes and due diligence procedures, and consider how they can demonstrate that they had adequate procedures in place to prevent human rights and environmental harms.

Will a new EU human rights due diligence law apply in the UK?

Given that the UK has left the European Union and the new human rights due diligence legislative proposals will be developed in 2021, after the agreed end of the transition period on December 31, 2020, it is likely that the new EU-wide legislation will not apply to UK-based companies (unless the UK government agrees otherwise).
Nonetheless, UK companies could see a “failure to prevent” human rights offence adopted in English law, grounded in the UN Guiding Principles on Business and Human Rights framework. The British Institute of International and Comparative Law published a report in February 2020 that advocates for the UK to introduce a corporate offence of failing to prevent human rights abuses, much like the existing failure to prevent bribery offence under Section 7 of the Bribery Act 2010 (UKBA).

A corporate offence of failing to prevent human rights abuses could require companies of all sizes to conduct risk-based due diligence and implement proportionate systems and controls to prevent human rights harms in the conduct of their own activities and the activities of their business relationships. Unlike the Section 7 UKBA offense, the conclusions of the BIICL report recommend that a failure to prevent human rights harms should result in civil rather than criminal liability, allowing victims to claim civil damages in English courts. In order to successfully defend such a claim, the relevant company would need to evidence that it undertook the due diligence required in the particular circumstances. Further consideration will need to be given as to how any new failure to prevent offence would be investigated and prosecuted, including whether it is necessary to establish a new enforcement body.

Under the existing legal framework in the UK preventing human rights abuses, the Modern Slavery Act 2015, companies doing business in the UK with revenues over £36 million are required to publish a statement on their websites setting out the steps they have taken during the previous financial year to prevent slavery and human trafficking in their businesses and supply chains. However, the existing framework does not require companies to adopt human rights prevention compliance systems and does not carry sanctions for companies who fail to take preventative steps. It is therefore likely that any new legislation as envisaged by the BIICL report will introduce more onerous obligations on companies conducting business in the UK.

Practices
Business & Human Rights
FCPA/Anti-Corruption

© 2021 STEPTOE & JOHNSON LLP. ALL RIGHTS RESERVED. ATTORNEY ADVERTISING.