Legislation on responsible business conduct must reinforce the wheel, not reinvent it

by
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Supply chains spanning dozens of countries are now a feature of businesses large and small. However, global regulatory frameworks have largely not kept pace with these trends. Rule of law remains weak in many developing countries and significant uncertainty and enforcement issues continue to exist in transnational litigation and arbitration. Some international instruments, such as the Guidelines for Multinational Enterprises (the Guidelines) and the UN Guiding Principles for Human Rights and Business (UNGPs) have been important tools for filling these regulatory gaps. For example, the Guidelines establish an expectation that businesses behave responsibly throughout their supply chains, not just within their direct operations, extending to activity in potentially institutionally weak contexts where international standards and domestic laws may not be adequately enforced.

Recently domestic law has also begun to follow suit by introducing legally binding obligations. Section 1502 of the US Dodd-Frank Act provides that companies must report on whether they source certain minerals (tin, tantalum, tungsten and gold) from conflict areas. The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, which was adopted as an OECD Recommendation in 2011, was the first instrument to define responsibilities in this context and is explicitly referenced in section 1502. Currently the EU is considering introducing similar obligations in a proposal aimed at regulating the import of conflict minerals into the EU.

Another example in the extractives sector where non-binding initiatives have acted as the harbinger for binding law is revenue transparency. The Extractive Industry Transparency Initiative (EITI), founded in 2003 was one of the first efforts to encourage government and private sector reporting on revenue streams of extractive operations as a strategy for battling corruption. Section 1504 of Dodd-Frank, passed in 2010, requires that companies registered with the Securities and Exchange Commission (SEC) must publicly report how much they pay governments for access to oil, gas and minerals. The EU has since mandated similar obligations through Accounting and Transparency Directives - Norway and South Korea have expressed interest in doing the same.
After a Swiss motion proposing mandatory human rights and environmental due diligence for Swiss corporations was narrowly voted down in the Swiss Parliament, the Swiss Coalition for Corporate Justice announced that it will collect signatures for a popular initiative on the proposal. If they gather 100,000 signatures in 18 months, the measure will be put to a binding public referendum.

The 2015 UK Modern Slavery Act provides that commercial organisations must prepare a slavery and human trafficking statement annually detailing, among other matters, their due diligence processes in relation to slavery and human trafficking in their operations and supply chains.

The broadest scheme remains a French legislative proposal to mandate supply chain due diligence in accordance with the Guidelines. Companies with 5,000 employees or more domestically or 10,000 employees or more internationally would be responsible for developing and publishing due diligence plans for human rights, and environmental and social risks. Failure to do so could result in fines of up to EUR 10 million. If such a law is passed in France, it could generate spill-over effects within the EU. The rapporteur for this proposal, Dominique Potier, has indicated that he will push the European Commission to develop an EU directive along similar lines.

The move from soft to hard law is a concern for many businesses. However, when it concerns the more severe issues of responsible business conduct, the jump between the two is not that high. Many companies already have due diligence systems in place. This means that the playing field for the more progressive companies will be levelled. That was one of the reasons why many British businesses supported the Modern Slavery Act. In addition, the UN Guiding Principle 23(c) already provides specific guidance on how companies should manage the risks of the most severe impacts; it says that businesses should “Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate”.

Another concern that businesses may have is that all these proposals will create a mess of different hard and soft standards. A
proliferation of obligations (national, regional and international) has the potential to generate regulatory disarray and create challenges for businesses in navigating their obligations. Uniformity and clarity around obligations and expectations will be important for establishing a level playing field for business. A large imbalance or contradictions in obligations regarding due diligence or reporting across jurisdictions may unfairly penalise companies operating in multiple jurisdictions or subject to more onerous standards. In ensuring that standards are aligned, administrative burdens for business will be eased and competitive risks will be mitigated. Additionally, such laws must be drafted carefully in order to be practical and fairly enforceable. Presently the language included in both the French legislation and UK law is highly general and therefore the obligations under the law remain somewhat abstract.

In order to ensure that such regulation is realistic, reasonable and effective, the regulations and guidance that will accompany these laws should be developed on the basis of carefully drafted non-binding standards, such as the UNGPs and the Guidelines. They will also need multi-stakeholder input. In the context of the OECD, all due diligence guides interpreting the expectations of the Guidelines are developed in consultation with industry, government, civil society and worker organisations. This process has ensured that recommendations included in the guidance are endorsed by businesses, the ultimate users of the guidance, and that they are ambitious yet reasonable. Additionally, the role of non-binding instruments, as well as the organisations that crafted and implemented them should not be overlooked. The UN and OECD will be important sources of guidance on these issues.

Legislative proposals related to existing international instruments should not seek to reinvent the wheel, but to reinforce it. Existing instruments that are widely recognised and proven to be effective and reasonable should represent a foundation for their legally-binding counterparts.
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Original article: Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct, “Legislation on responsible business conduct must reinforce the wheel, not reinvent it”, OECD Insights blog, http://wp.me/p2v6oD-22T.


