

BRIEFING NOTE No. 108

A smart mix for responsible business conduct:

DUE DILIGENCE LEGISLATION AND MULTI-STAKEHOLDER INITIATIVES

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There is an increasing awareness of the need to embed corporate responsibility for preserving human and labour rights as well as minimising environmental damage in the move towards responsible business conduct.

While some countries like the Netherlands and Germany have relied on multi-stakeholder initiatives, some others have introduced legislation to infuse this responsibility. However, the two tools should not be seen as a dichotomy. In fact, there may be a case to argue that the two can work together.

This briefing note looks at due diligence legislation in the UK and France. While there are significant differences, both share some similar challenges to compliance such as lack of information among businesses of the complex supply chain and the fact that individual companies cannot address systemic challenges in the supply chain.

Multi-stakeholder initiatives can serve different purposes for different actors involved. At the same time, they too may face challenges including lack of trust, multiplicity of standards and lack of harmonisation or insufficient coverage of firms and sectors in the economy.

By looking at the UK and France, the note argues that multi-stakeholder initiatives can complement legislation, despite or rather given its deficiencies, and even be mutually reinforcing if implemented side by side. For this to happen, every actor needs to play its part in promoting responsible business conduct.

1. Introduction

The concept of due diligence has gained prominence over the past few years. In the aftermath of the Rana Plaza tragedy (Bangladesh) it has become increasingly clear that more needs to be done to embed corporate responsibility for preserving human rights and maintaining certain minimum standards in business operations. Increasing concerns over climate change have pushed businesses to come up with innovative ways of minimising environmental damage while maintaining economic viability. The United Nations Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (and related general and sectoral OECD due diligence guidance for responsible business conduct) provide a reference framework for due diligence.

The need to enhance accountability of businesses by ascertaining the impact of their activities has taken different forms. In countries such as the UK, it is manifested in the Modern Slavery Act which aims at raising awareness on the risks of human and labour rights abuses and creating transparency in the supply chain¹. In France, under the Loi de Vigilance large companies are obliged to put in place a due diligence plan to take into account human, labour as well as environmental risks of their operations, and equally importantly, implement these plans effectively. With the State as the enforcer, legislation avoids depending solely on self-regulation by businesses. It is argued that legislation creates a level playing field for all firms that fall under the purview of the law.

On the other hand, countries like the Netherlands and Germany have opted for a different path - through national level focused sector groups several relevant actors from private, non-governmental and the public sphere come together to discuss issues around due diligence specific to the supply chains in the respective sectors and work towards a solution. Such sector/industry-specific platforms can give an opportunity for genuine discussions on some of the (systemic) challenges in the complex supply chains which companies may not be able to resolve by themselves. However, this requires trust between the different stakeholders which takes time to build. In order to retain credibility, members make certain commitments and the groups have set up targets in terms of coverage of the market they operate in² so that as many firms as possible abide by the agreed rules. Failing this, the government, an important stakeholder in these groups, may consider legislation.

The (dis)advantages of both instruments may seem obvious at first glance. But there are significant differences even within the two instruments (i.e. legislation and Multi-Stakeholder Initiatives, MSIs). It may be difficult to argue the relative success of legislation given that it has been introduced only recently. Lack of sufficient research on MSIs also makes it hard to categorically conclude whether they perform well in promoting responsible business conduct. However, is this dichotomy between the two options (mandatory compliance through legislation vs. voluntary through MSIs) essential? Are the two mutually exclusive, or do they have some complementarities that can be explored? If so, what are they? With this as the backdrop, this briefing note seeks to examine to what extent and how MSIs complement due diligence legislation. This is done by looking specifically at the UK and France³.

2. Legislations in the UK and France

The Modern Slavery Act (MSA) was introduced in the UK in 2015 to address some of the malpractices pertaining to human and labour rights which remain widespread⁴. While the Act aims at tackling the broader

¹ More specifically Article 54 on Transparency in Supply Chains of the Modern Slavery Act. Modern Slavery encapsulates slavery, servitude and forced or compulsory labour as well as human trafficking.

² For more information on this, please refer to van Seters (2018).

³ Based on desk research as well as a select number of semi-structured interviews with stakeholders including civil society organisations, academia and private enterprises.

⁴ According to some estimates over 40 million people were trapped in some form of modern day slavery in 2016 while 152 million were subject to child labour ([ILO](#)). Profits from such forced labour amounts to US\$ 150 billion a year ([ILO](#)).

issue of modern-day slavery, Article 54 of the MSA refers to transparency in supply chains (TISC). The Loi de Vigilance introduced in France in 2017 on the other hand aims at tackling the issues not only around human and labour rights but also the environment and safety standards, and promoting responsible business conduct. The following table briefly lays out the salient features of (and differences between) the two legislations.

Table 1: Features of the Modern Slavery Act (UK) and the Loi de Vigilance (France)

	MODERN SLAVERY ACT (ARTICLE 54: TRANSPARENCY IN SUPPLY CHAINS, TISC)	LOI DE VIGILANCE
Adopted	2015	2017
Objective	Transparency in Supply Chains	Responsible Business Conduct
Focus	Human trafficking and slavery	Human rights, health and safety, and environment
Sectors	All	All
Scope	All businesses with an annual turnover of or exceeding £36 million Carries out business (or part thereof) in any part of the UK (about 9,000-11,000 companies)	Large businesses and companies with significant presence in France ⁵ (about 150-200 companies)
Targets	Parent company & its subsidiaries + their supply chains	Parent company & its subsidiaries + Suppliers & contractors
Monitoring	Reporting - slavery and human trafficking statement	Elaboration, disclosure and effective implementation of the 'vigilance plan'
Specific reporting requirements	Slavery and human trafficking statement with three minimum requirements (1. Link to the statement on the homepage of the company's website; 2. Signed by the director; 3. Approved by the Board of Directors) reporting on six areas: <ul style="list-style-type: none"> • Organisational and supply chain structure; • Company policies; • Due diligence processes; • Risk assessments; • Effectiveness of measures in place; • Training. 	<ul style="list-style-type: none"> • Pre-vigilance plans that identify, analyse and rank risks in the supply chain; • Procedures assessing the situation in subsidiaries, subcontractors and suppliers; • Actions to prevent and mitigate risks • Alert mechanism; • Monitoring scheme to follow up on the plan's implementation and effectiveness.
Stakeholder consultations	None	Plans to be developed in coordination with stakeholders
Penalties	Injunction	Notice and injunction Periodic penalties for non-compliance by court Civil liability

Source: Authors' own compilation

The legislations aim at mandatory compliance by companies towards the objectives set out by the MSA and Loi de Vigilance respectively. This would mean all companies that fall under the scope of the legislation abide by these procedures irrespective of what sector the company has operations in. While there may be some companies that have already taken active measures to address these risks, this may not be the case for *all*

⁵ French companies with 5,000 people in France, or 10,000 people in the world (Cossart et al., 2017).

companies. Legislation thus ensures a level-playing field by obliging all companies within its scope to abide by the procedures embedded (reporting in the case of MSA, or elaboration, disclosure and implementation of due diligence plan in the case of the Loi de Vigilance).

The passing of legislation in both the UK and France, notwithstanding significant differences as laid out in the Table 1 above, has increased awareness about human and labour rights issues and associated risks in the supply chain. However, understanding how to address these issues remains a challenge. One of the reasons why mandatory compliance is hindered is lack of sufficient knowledge among companies of the complex, fragmented and transnational supply chain of their business, which comes with substantial risks⁶. This is reflected in the UK in the low quality of the statements produced by companies as well as the fact that a significant proportion of firms have not yet produced one⁷. Similarly, in France, preliminary analysis by Shift suggests that companies produce basic statements without substantial identification of salient risks or explanation of the challenges faced in implementing their responsibility to upholding human and labour rights and protecting the environment⁸. While it is expected to consult with relevant stakeholders to put in place an effective plan, such consultations remain limited in their scope⁹.

Reports published by companies lack details which can serve in identifying some of the challenges with the implementation of due diligence¹⁰. Instead, they focus on their “achievements” with little accompanying details which can help identify and disseminate information on “good practices”. According to some civil society organisations (CSOs), this “cherry-picking” by companies deprives the exercise of becoming a learning experience in a field that is relatively new. It was also pointed out that in the UK companies may be reluctant to share more information on challenges faced on the ground due to legal concerns¹¹. In France, most companies rely on procedures that identify challenges which are rather general, and without information on the methodology for such identification¹².

Rigorous implementation of the legislation is hindered by the lack of strong enforcement mechanisms. For instance, there is no government registry of companies expected to produce a statement or a due diligence plan in either country. While this may be due to other constraints faced by the government, in the absence of such a registry, it is difficult to determine whether the law is properly implemented. The UK government has enhanced its efforts towards consolidating a list of companies through the establishment of a Contacts Database where companies are encouraged to register and provided with guidance on reporting¹³.

The two legislations differ in scope and stringency as pointed out in the Table 1¹⁴. Some civil society organisations argue that the application of due diligence legislation that does not apply to all companies irrespective of size has its shortcomings since it is the duty of every organisation, irrespective of the size of

⁶ Some of these risks are laid out in Core Coalition (2016).

⁷ BHRRRC (2018a). According to the [Modern Slavery Registry](#), a publicly available resource tool through collaborative effort for tracking compliance with MSA (last accessed on February 8th, 2019), about 8,000 statements have been recorded, of the estimated 9,000-11,000 companies required to report, but only about 20% satisfy the minimum requirements mandated by the law. If subsidiaries are also counted the numbers that are needed to produce a statement rise to between 12,000 and 18,000 (BHRRRC, 2018b).

⁸ A [detailed analysis](#) of reporting by these companies will be published in summer 2019.

⁹ According to one interviewee, given the lack of clarity on who constitutes a relevant stakeholder, this clause remains open to interpretation. However, according to another interviewee, companies are obliged to consult trade unions to satisfy the statutory requirements of the alert mechanism.

¹⁰ BHRRRC (2018a and 2018b), Shift (2018). There are also instances where companies produce the same statement every year.

¹¹ BHRRRC (2018b). According to PWC (2018) companies fear a “naming and shaming” attitude by NGOs for greater transparency on their part, rather than “knowing and showing” which is more in line with the UNGPs approach.

¹² EDH (2018).

¹³ [UK Home Office ramps up Modern Slavery Statement Expectations](#). However, such efforts are somewhat thwarted by the lack of commitment from businesses who may be unwilling to register because it may lead to a presumption that they ought to comply.

¹⁴ According to ECCJ (2018) there are three generations of Human Rights and Due Diligence legislation namely those focusing on reporting obligations, those looking at full disclosure which include risk identification as well as preventative measures, and those that link these obligations to corporate liability. The Modern Slavery Act falls in the first generation of legislation according to this classification, while the French Loi de Vigilance falls in the third.

operations, to conduct business responsibly. Because it is viewed as both a financial as well as administrative burden, without a buy-in at the highest level, companies may not want to engage in due diligence measures unless explicitly mandated by law¹⁵. Implementing these measures across the numerous suppliers, that companies typically have in the current system, can significantly increase the cost burden on companies to the detriment of their competitiveness¹⁶. It is argued that the legislation in the UK lacks adequate stringency despite the fact that there have been clear precedents to ‘hard’ corporate laws (for instance, the Bribery Act of 2010)¹⁷. The need to revise the legislation to make it more stringent is also being recognised¹⁸. On the other hand, in France, where the level of stringency of the legislation is considerably higher, it remains unclear if the judicial system is equipped with the technical capacity to enforce the law and handle cases related to due diligence to effectively challenge companies¹⁹.

Moreover, it still remains to be seen whether mandatory compliance on due diligence brings about tangible progress on the ground. MSA aims to bring transparency in the supply chain through the publication of a statement. A statement produced by a company indicating that no measures have been in place to address abuses in the supply chain is still deemed compliant. While it ensures greater transparency in the supply chain, it is unclear whether this translates to improved living conditions for those facing abuse. In France, where the legislation comes with a clause of corporate (civil) liability, there are serious legal concerns to prove the efficiency of implemented measures which remains open to interpretation²⁰. This risks making due diligence a compliance driven (tick-the-box) exercise which may not be in the spirit of the law. While it can be argued that legislation across many countries²¹ could create a level-playing field for large businesses while remaining competitive, there is little documented evidence so far that implementing due diligence does in fact lead to positive outcomes on the ground.

3. Multi-stakeholder initiatives

Partnerships between different stakeholders - public, private, and non-governmental, sometimes complemented by knowledge institutes - are becoming increasingly relevant. These partnerships are viewed as a platform to bring together resources and achieve synergistic effects in addressing some of the complex economic, social and environmental problems²². There is no widely agreed upon definition of what constitutes an MSI. However, it can be understood as the “efforts to bring together various stakeholders - such as private corporations, civil society, government, and affected populations - to collaborate in addressing a specific issue, often related to corporate accountability”²³.

MSIs can be classified into several categories according to their functions, geographical scope, and so on. According to Gleckman²⁴, functional categories involve those MSIs that look at issues that are policy-oriented

¹⁵ Based on interview where it was highlighted that companies simply respond to queries on due diligence saying that they do not have a legal obligation to put measures in place.

¹⁶ This is in regards to both, a limited subset of (large) companies within the country that needs to comply with the law, as well as the fact that legislation is applied in only that country and not others which may be competitors

¹⁷ LeBaron (2017)

¹⁸ The [second interim report](#) of the independent [review](#) of the MSA recommends profound steps including the sanctions for non-complying companies, a central state-run repository of statements, removing the section which allows companies to be compliant even if they have no measures in place to address abuses, making it mandatory instead of advisable to report on specific areas of business, and expanding the scope to include the public sector.

¹⁹ According to an interviewee, large companies have great financial power in securing strong attorneys to represent their case and escape liability.

²⁰ According to an interviewee, while risks are prioritised and addressed through the plan, it is unclear if the authorities will look at it the same way.

²¹ A brief overview of regulations passed by countries on due diligence can be found [here](#) or [here](#). Moreover, the [UN intergovernmental working group on transnational corporations and other business enterprises with respect to human rights](#) is mandated with elaborating an internationally binding agreement.

²² Čavalić et al. (2018).

²³ MSI Integrity (2017).

²⁴ [Multistakeholderism: a new way for corporations and their new partners to try to govern the world](#)

(e.g. Kimberley Process for the management of blood diamonds), product or process-oriented (standard-setting by creating criteria for products or processes in international trade (e.g. International Social and Environmental Accreditation and Labelling Alliance, ISEAL), or project-oriented (to address implementation gaps in a sourcing country e.g. partnerships facilitated by the Sustainable Trade Initiative, IDH). They exist at different levels for instance, global (e.g. Fair Wear Foundation), regional (e.g. European Partnership for Responsible Minerals) or national (e.g. Stronger Together in the UK). They may or may not have active government participation. They may encompass several sectors (e.g. Global Reporting Initiative) or focus on one particular industry (e.g. Better Cotton Initiative). It can be concluded that MSIs perform various functions at the same time, and that these can evolve over time²⁵.

It is crucial to consider aspects of incentives and motivations, perceptions of trust, and power dynamics between the different stakeholders in order to gauge the relative success/failure of the MSI. Firms may join MSIs for reputational reasons, while CSOs may look for financial resources. However, both types of organisations are far from homogenous and can be mapped across a broad spectrum²⁶. For instance, firms that could be classified as *leaders* in terms of due diligence undertaken in their supply chain may see incentives in joining MSIs as these can prove an excellent platform to share their experience, or to have the “first-mover advantage”. Similarly, a large number of *learners* genuinely concerned about abuses in their supply chain and interested in putting in place effective practices to address them may also want to join to learn from others. At the same time *laggards* may have less interest in joining such initiatives²⁷. Some CSOs, while they may have insights on where the problems lie and possible solutions, cannot achieve their mission independently and hence see an advantage in joining MSIs. Some others may have a long history of working together with businesses and hence can act as an important interlocutor in discussions. Because they involve interaction between organisations and individuals with different personalities, values and culture there cannot be a one size fits all formula to making these collaborations work.

Trust remains an important building block to ensure the success of these initiatives. If businesses are unable to be forthcoming about some of the genuine challenges faced on the ground, the MSI loses its relative advantage of being a platform to learn and form constructive partnerships for continuous improvement. Similarly, it is also important to build credibility by having high political buy in and maintaining impartiality so that one party is not seen to be more favoured than others²⁸. While engagements should be honest and open, deliberations at such fora should nevertheless be non-confrontational in order to keep the different sides engaged and avoid alienating relevant parties. Pragmatism, whereby issues are discussed in an accessible language and result in concrete solutions that can be adopted by business, can also go a long way in making such initiatives successful. At the same time, it is important to realise that due diligence is an iterative exercise and a dynamic process. imply adopting and implementing actions adopted in MSIs does not absolve companies of the responsibility to continually monitor so as to detect and spot risks in an ever-changing supply chain.

There are several MSIs in both the UK and France that look at due diligence in line with the UNGPs or the OECD Guidelines for Multinational Enterprises²⁹. These initiatives can create a platform to achieve several objectives. They help create greater awareness of the complexities of the supply chain and associated risks, and advocate the importance of implementing due diligence measures. There are initiatives to bridge the gap between the broader objectives identified in these reference frameworks (UNGP or OECD Guidelines) and actual implementation by companies by adopting standards that embed these guidelines. This intermediate step can serve as a guiding tool for companies undertaking due diligence. Some other initiatives focus on specific topics like responsible recruitment to address issues related to forced labour.

²⁵ Van Huijstee (2012).

²⁶ These aspects are elucidated further in ECDPM (2015).

²⁷ [JP Nicols](#) uses this classification to determine enterprises' drive for innovation.

²⁸ According to MSI Integrity (2017) several MSIs over-represent a stakeholder group (e.g. CSOs, or businesses) in their primary decision-making bodies. This can affect perceptions of power distribution within the MSI.

²⁹ It remains out of the scope of this note to report on or assess all the different MSIs in the two countries.

The plethora of MSIs has certainly succeeded in raising awareness of the concept of due diligence. It has also helped to point out risks in sectors hitherto unknown to many (e.g. construction), and a realisation that abuses exist in almost all industries. Nevertheless, the complexity and lack of sufficient information of the supply chain also means that not *all* risks are identified³⁰.

Another issue is that of maintaining coherence and harmonisation in different standards, in the absence of which compliance by businesses can present practical challenges. Similarly, membership to MSIs does not automatically mean that companies are compliant with adopted standards or broader framework of the UNGPs or OECD Guidelines even though they can assist companies in the implementation of due diligence³¹.

An important drawback of engagements in MSIs is their limited coverage. There are several sectors and industries in an economy which may not be covered despite the presence of numerous MSIs. Furthermore, while they aim to ensure certain minimum (labour or environmental) standards, affected communities are sometimes conspicuously missing in these discussions. Not all MSIs include representation from the trade unions or any form of formal representation of workers' rights. Similarly, representation from local communities or indigenous groups is also not always present in such discussions.

Thus, MSIs, while providing a platform for tailored discussions around issues of due diligence, often in specific value chains, remain limited in scope in terms of coverage (number of firms in the particular sector, number of sectors in the economy, presence of relevant stakeholders). They are also a resource-intensive exercise. Such initiatives require significant financial means as well as time and human resources to convene relevant parties and provide a platform to debate and discuss issues. Given the complexity, it can be a time-consuming exercise to find solutions and requires the continuous engagement of all parties concerned, which may not always be the case.

There is also a dearth of research to assess the relative success of MSIs to promote responsible business conduct. Monitoring and evaluation (M&E) in the field has proved difficult. While a lot needs to be learnt in the field of M&E of partnerships and MSIs in general³², the effect of due diligence practices on improving conditions on the ground has also yet to be uncovered³³.

4. Complementarity between legislation and MSIs

The foregoing sections outline some of the features of the legislation in the UK and France respectively, and provide an overview of the objectives of MSIs while discussing some important factors to make these platforms work. This section will in turn examine possible complementarities between legislation and MSIs.

Both legislation and MSIs can aim at promoting responsible business conduct, albeit through different means. Legislation can help ensure that minimum standards are adhered to by a large number of businesses (including the laggards). MSIs can promote a learning environment whereby new and better practices can be put in place (for leaders and learners). These platforms can, and do, also facilitate concrete projects in an effort to address some of the risks in sourcing countries.

³⁰ BHRRC (2018a).

³¹ This view is echoed by not only NGOs like [Global Witness](#) but also organisations like the [OECD](#).

³² [Partnerships for sustainable development: the monitoring and evaluation challenge](#) provides important insights in this regard.

³³ An evaluation of four MSIs by MSI Integrity resulted in the publication of reports for two MSIs, while the requests to publish the other two were declined by the governing bodies of the respective MSIs (indicating lack of transparency). From one of the published draft evaluations, it is clear that the MSI is only partially able to fulfill its mandate on improving living conditions.

While legislation can create the compulsion to do business responsibly, companies alone may not be equipped to put systems in place that can achieve this. While legislation tends to be in line with the OECD guidelines, it often does not provide practical tools to help companies abide by them. MSIs can act as an important bridge in providing companies with the guidance to fulfill their duties and facilitate other collective actions for more sustainable value chains. At the same time, MSIs cannot substitute legislation. While they can be a useful tool in enhancing the implementation of due diligence, they cannot act as an enforcement mechanism.

Through the complementary in legislation and MSIs, every stakeholder has an important role that is more nuanced in order to create a learning environment. Active participation by businesses, that tend to dominate a given sector as well as massive amounts of global financial assets, is needed to translate intergovernmental agreements and declarations like the UNGPs into concrete actions that can ensure sustainable development³⁴. At the same time, given the complexity of the supply chains and challenges related to due diligence, businesses cannot resolve these issues alone. Through MSIs, apart from mitigating reputational risks, they have a platform to discuss these challenges rather than simply focusing on achievements as alluded to earlier. It would require engagement from all aspects of business beyond just the CSR, compliance or legal department, as is still the case in many companies³⁵. CSOs can play the role of bridging some of the risk identification and due-diligence implementation gaps by recording good practices and disseminating information. Their local network and knowledge can be valuable to understand the issues at hand. They can also provide certain legitimacy to the multi-stakeholder platform and avoid green-washing. Government are also important stakeholders in such MSIs, not only as the signatories of the UNGPs but also as important purchasers of goods and services themselves. Moreover, they can also engage with sourcing countries through development cooperation and political dialogue to create a more enabling environment for responsible sourcing. Government as the enforcer of legislation ensure that standards are raised across the board and non-compliant companies face consequences. Pragmatism whereby complex issues are deconstructed in an accessible language, and concrete actions are designed in order to help businesses implement due diligence, is needed in order to keep all stakeholders engaged. Representation from affected parties can help to understand local concerns.

Underlying these roles is the element of trust which cannot be taken for granted. The experiences of the UK and France in terms of businesses and CSOs working side by side show different trends. For instance, whereas the UK has had a longer history of partnership and collaboration, there is considerable mistrust between the two sides in France. This has significant impact on the quality of interactions between the two. In fact, it may even be argued that it is precisely the lack of trust towards private industry that led to the adoption of a stringent law in France³⁶. In contrast, the UK did not adopt a more stringent law despite there being precedents like the Bribery Act mentioned earlier.

It is also important to acknowledge the limits of complementarity between legislation and MSIs. While one may expect MSIs to compliment legislation in enhancing compliance, there is limited evidence yet to prove this. For instance, the objective of MSA is to ensure *transparency* in the supply chain³⁷. Compliance is measured against the publication of the Modern Slavery Statement. MSIs like Stronger Together or Ethical Trading Initiative on the other hand encourage their members to go beyond this and engage in responsible recruitment, or responsible procurement. While this goes beyond ensuring transparency in the members' supply chains, these MSIs do not explicitly focus on compliance with the legislation by members through the publication of the Modern Slavery Statement, not least because these initiatives pre-date the legislation. A similar case can be argued in the case of France. While the more stringent legislation focuses on the preparation, disclosure and implementation of the vigilance plan by companies, none of the MSIs that

³⁴ [Multistakeholderism: a new way for corporations and their new partners to try to govern the world.](#)

³⁵ EDH (2018).

³⁶ Evans (2018).

³⁷ This is different than implementing due diligence. There are increasing calls, from BHRRC (2018b) among others, for the legislation to go beyond transparency to taking action by undertaking mandatory due diligence.

companies participate in explicitly focus on legal and procedural aspects to ensure they comply with the legislation in France. This does not mean that MSIs cannot complement legislation in this aspect. There are indeed instances of implementation guidelines produced by certain NGOs (if not MSIs) helping companies in their reporting effort.

Finally, considerable attention needs to be paid to monitoring and evaluation, to better understand the relative strengths of either instrument. This can help revise existing legislative and MSI approaches and inform new measures, in these two countries and beyond.

5. Concluding remarks

While the concept of due diligence is not new, its implementation remains far from an exercise in perfection. Exchanges and new tools to facilitate due diligence in recent years have resulted in a steep learning curve for all stakeholders including civil society, governments and businesses. However, financial and administrative burden that due diligence implementation can impose could discourage a greater uptake of these measures, among many other factors. There is an urgent need for businesses to shift their value proposition towards sustainability. Given that innovation has been the driver of competitiveness and key to success for the private sector for living memory, companies can play a crucial role in finding new ways and means by which their responsibility to uphold human rights and minimise environmental damage can be fulfilled in a cost-effective way. This requires continuous engagement as well as commitment from companies rather than simply regarding due diligence as a cost on their business. Outsourcing it to third parties or leaving it to a CSR officer/team, may be sufficient to meet statutory requirements of the law. But without active participation from all areas of the business to understand and address the underlying issues, it can make due diligence a compliance-driven (tick-the-box) exercise. While making the 'business' argument for due diligence may convince companies³⁸, the fact that it is also their moral responsibility to ensure that their profits do not come at the expense of human rights or environmental sustainability should act as an impulse enough to take due diligence more seriously.

Today, in principle all agree that responsible business is needed but disagreement exists on how to promote these practices. Some are strong supporters of due diligence legislation, while others are in favour of voluntary MSI. This briefing note has moved away from this widespread dichotomy and has described why and how due diligence legislation and MSIs can potentially be complementary in promoting responsible business conduct.

In arguing the complementarity between legislation and MSIs, the note also points to the role and significance of every stakeholder involved to make this process work. It is important to make the process more participatory to ensure a learning environment. Greater effort needs to be made to ensure representation from those groups who are ostensibly being represented. At the same time, it is also essential to realise the limitations of these processes. While due diligence can act as a deterrent to abuses in the supply chain, it cannot resolve all problems in sustainable development which is highly multi-faceted. For instance, due diligence practices alone cannot resolve the problems of lack of education and health facilities, or corruption (in areas other than those directly concerning businesses) in some of the source countries. This requires other policies to be developed or better implemented to close the circle. Hence, while due diligence may not be a silver bullet, it can potentially make an important contribution towards sustainable development. A smart mix of due diligence legislation and MSIs is a promising approach in this regard.

³⁸ According to the Ethical Corporation (2018), more companies are convinced of driving sustainability innovations which can positively impact their revenues going forward.

Bibliography

- Business and Human Rights Resources Centre. 2018a. Modern Slavery Reporting: Case Studies of Leading Practices. London, UK.
- Business and Human Rights Resources Centre. 2018b. FTSE 100 & Modern Slavery Act: From Disclosure to Action. London, UK.
- Byiers, B., Guadagno, F., and Karaki, K. 2015. From Looking Good to Doing Good: Mapping CSO-Business Partnerships. Discussion Paper No. 182, ECDPM, Maastricht, the Netherlands.
- Cossart, S., Chaplier, J., and Beau de Lomenie, T. 2017 The French Law on Duty of Care: A Historic Step Towards Making Globalisation Work for All. *Business and Human Rights Journal*, 2 (2017) pp 317-323.
- Čavalić, A., Mahmutović, I., Čabro, S., and Husaković, D. 2018. Cross-Sectoral Partnership and Corporate Social Responsibility. London, UK.
- Core Coalition. 2016. Beyond Compliance: Effective Reporting under the Modern Slavery Act - a civil society guide for commercial organisations on the transparency of the supply chains clause.
- EDH and B&L Évolution 2018. Application of the Law on the Corporate Duty of Vigilance: Analysis of the First Published Plans. Paris, France.
- European Coalition for Corporate Justice. 2018. ECCJ Position Paper: Key Features of Mandatory Human Rights Due Diligence Legislation, Brussels, Belgium.
- Evans, A. 2018. Hope for Reform: Strengthening Corporate Accountability in Global Supply Chains.
- LeBaron, G. 2017. The Domestic Politics of Corporate Accountability Legislation: Struggles over the 2015 Modern Slavery Act, *Socio-Economic Review*, Vol. 0, No. 0, 1-35.
- MSI Integrity and the Duke Human Rights Center at the Kenan Institute for Ethics 2017. The New Regulators? Assessing the Landscape of Multi-Stakeholder Initiatives.
- PWC. 2018. Strategies for Responsible Business Conduct. Commissioned by the Ministry of Foreign Affairs, the Netherlands 2018.
- The Ethical Corporation. 2018. The Responsible Business Trends Report 2018.
- The Shift Project. 2018. Human Rights Reporting in France: A Baseline for Assessing the Impact of the Duty of Vigilance Law. New York, USA.
- Van Huijstee, M. 2012. Multi-stakeholder Initiative: A strategic guide for civil society organisations. SOMO, Amsterdam, Netherlands.
- Van Seters, J. 2018. Multi-stakeholder initiatives on garments and textiles in Germany and the Netherlands: towards achieving collective impact? Briefing Note No. 100, ECDPM, Maastricht, the Netherlands

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