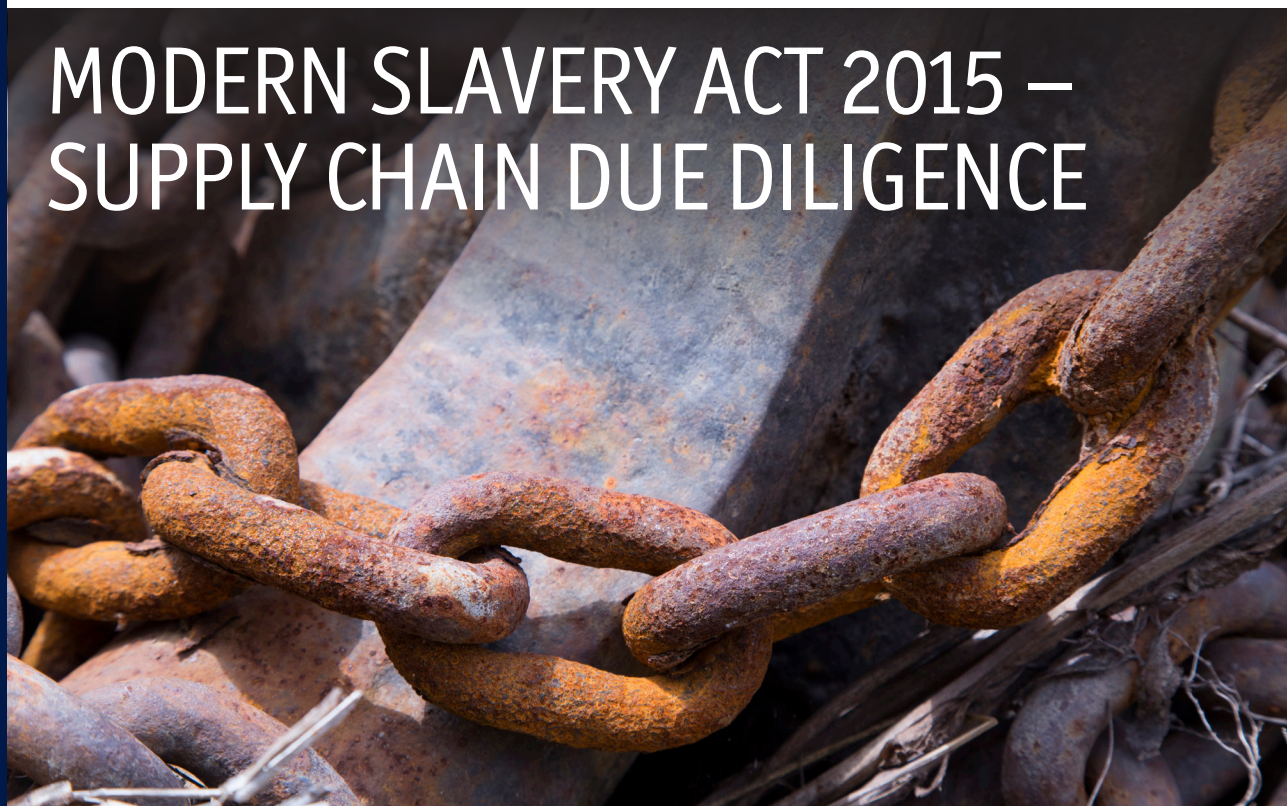
Regulatory

November 2015

MODERN SLAVERY ACT 2015 – SUPPLY CHAIN DUE DILIGENCE



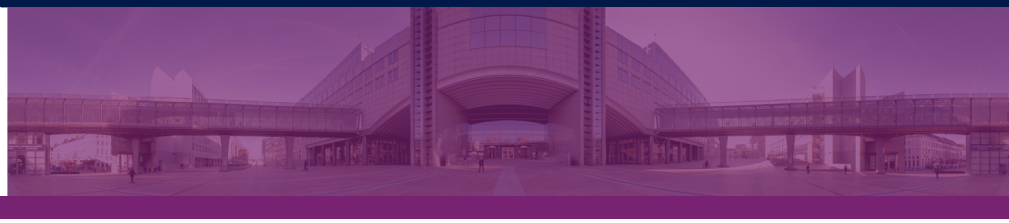
Guidance

The Modern Slavery Act 2015 (the Act) came into force in October this year, consolidating existing criminal offences in slavery and human trafficking and bringing in new rules on supply chain due diligence. The UK Government has now issued supporting guidance to the legislation.

All commercial organisations with an annual turnover of £36 million or more are required to publish a statement each financial year setting out the steps they have taken to ensure that there is no slavery and human trafficking in any part of their business or supply chains (section 54). If no steps have been taken, then this must be explicitly stated.

This obligation extends to all companies (listed or private) and partnerships carrying on a business in the UK, regardless of where they were incorporated or formed. The guidance stresses that the determination of whether an organisation is "carrying on a business" in the UK will be carried out by applying a common sense approach. Having a "demonstrable business presence" will be necessary and not merely having a UK subsidiary (if it operates completely independently of the parent or group companies).

However, the guidance also states that for the purposes of the turnover test, companies that are carrying on a business in the UK should include their "subsidiary undertakings" (including those operating wholly outside the UK). The turnover over of parent companies and other group companies which are "managed on a unified basis" must be included in the calculation, as the threshold applies to the whole organisation which is carrying on a business in the UK. So, smaller UK companies (with turnover below £36 million) will need to take account of their parent and sister companies operating internationally. In such cases the guidance states that the parent company can publish one statement for the group, provided that it covers the steps that each of the subsidiary organisations has taken in the relevant financial year.

Compliance statements

There are six areas of information that the Act states may be included in the statement under section 54(5):

a. *The organisation's structure, its business and supply chains.*

b. *Its policies in relation to slavery and human trafficking.*

c. *Its due diligence processes in relation to slavery and human trafficking in its business and supply chains.*

d. *The parts of its business and supply chains where there is risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk.*

e. *Its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate.*

f. *The training about slavery and human trafficking that is available to its staff.*

This list is merely an indication of the type of material organisations may wish to consider discussing in their statements and is not binding. However, the statement must have high level approval and be published on the organisation's website. If the business does not have a website, it must provide a copy of the statement to anyone who requests one in writing within 30 days of that request.

Failure to produce a statement may result in proceedings being brought by the Secretary of State for an injunction requiring that organisation to comply; failure to comply with this order would be a contempt of court, punishable by an unlimited fine. Equally as important to any business as a fine will be the loss of reputation arising from them being seen to equivocate on such a clear ethical issue.

Supply chain verification

It is noticeable that the Act does not mandate any third party verification of supply chains. Under section 54(5) (e) an organisation is left to determine *"indicators as it considers appropriate"*.

The recent guidance has underlined that the Act's intention is to promote internal incentives for employees that ensure proper supply-chain monitoring: *"The direction and focus of particular performance incentives (such that Sourcing Directors should buy the lowest cost products, that can be shipped in the fastest time) may influence and create modern slavery risk if not managed carefully"*.

The Act provides a framework within which businesses themselves decide how best to evidence their compliance with the spirit of the legislation, with the underlying assumption that they will over-achieve, or as the Guidance says *"the provision seeks to create a race to the top"*. Whether or not this will emerge in reality it is too early to tell.

Conflict mineral supply chains

Some industries already have far more onerous supply-chain obligations. In particular, over the last five years, there has been a drive to stamp out the trade in certain conflict minerals – minerals that originate in war-torn countries, whose sale prolongs violent conflict and whose production is often by forced labour. Companies which currently supply or consume these minerals will already be familiar with stricter forms of supply-chain due diligence which derive from a number of legislative and trade initiatives, some examples of which are as follows:

- The UN Kimberley Process, which was the first conflict mineral initiative covering the global trade in rough diamonds.
- Section 1502 of the US Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (the Dodd-Frank Act) covering the trade of cassiterite (tin ore), wolframite, (tungsten ore), columbite-tantalite (tantalum ore) and gold, when originating from the Democratic Republic of Congo (DRC) and nine adjoining countries.
- The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, in use primarily around the DRC region, and which provides non-binding advice which companies are encouraged to show compliance with.

Outside the US supply chain audits have largely been voluntary and primarily enforced via trade associations. For example, the Electronic Industry Citizenship Coalition (EICC), supported by the Information Technology Industry Council (ITIC), ensures that technology companies properly audit the supply chains of their component inputs. Other industries affected by conflict minerals are the automotive and aerospace sectors.

Future EU initiative

Pressure from manufacturers has so far prevented the EU from imposing audit obligations on a wider range of businesses. However this may be about to change: earlier this year the European Parliament voted in favour of a draft Regulation that would oblige EU based importers of conflict minerals to develop a compliance policy and, crucially, to have their due diligence process audited by an independent third party and made publicly available. Most importantly, the draft captures all purchasers or suppliers of all products/components that contain these minerals – from the raw material to the finished retail product, not just the refiners or traders of the bulk mineral. The number of businesses caught could be enormous, given that these minerals are used in the fabrication of electrical components used in a large number of consumer products.



Supply chain transparency

It is clear from the Modern Slavery Act, the conflict minerals campaign, recent scandals on horse meat and fashion label sweat-shops, that the global trend is towards a more open and rigorous analysis of where and how the goods and services we consume are produced. The cost of meeting these regulatory obligations is something that businesses cannot avoid.

Related publications

Partner Daniel Martin looked at reporting requirements under the new legislation in the September edition of our Dispute Resolution Bulletin. The full article can be found here: **http://www.hfw.com/Dispute-Resolution-Bulletin-September-2015#page_0**

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