



THE GLOBAL INITIATIVE
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ORGANIZED CRIME



Battling Human Trafficking:

A Scrutiny of Private Sector Obligations under
the Modern Slavery Act



April 2018

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Note from the Author

This report was originally drafted as an academic practice note and constituted a submission for a Master of Laws (LLM) completed with honours at the London based BPP law school in December 2017. I draw on a combination of desktop research, particularly focussing on academic legal analysis, and first-hand interviews with companies operating under the relevant regimes.

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The Responsible and Ethical Private Sector Coalition against Trafficking Initiative (RESPECT) was jointly established by the Global Initiative against Transnational Organized Crime, Babson College's Initiative on Human Trafficking and Modern Slavery and the International Organization for Migration. RESPECT aims to serve as the platform and knowledge hub that brings together and facilitates active engagement between the private sector and all other stakeholders in the fight against forced labour and human trafficking. Our goal is to equip business members with extensive resources grouped by industry, region and supply chain segment. Additionally, we will provide tailored tools to mitigate the risk of human trafficking in supply chains.

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Battling Human Trafficking: How Far Have We Come and Where Do We Go From Here?

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under the Modern Slavery Act

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Photo by Nils Krauer

1. Introduction

1.1 Overview

Modern slavery is a global problem estimated to affect over 40 million people, 16 million of those in forced labour in the private sector.¹ Forced labour in the private economy is estimated to generate \$150 billion in illegal profits per year,² with recent research finding that 71% of companies believe modern slavery is likely to be occurring in their supply chains.³ Multi-nationals from Nestle

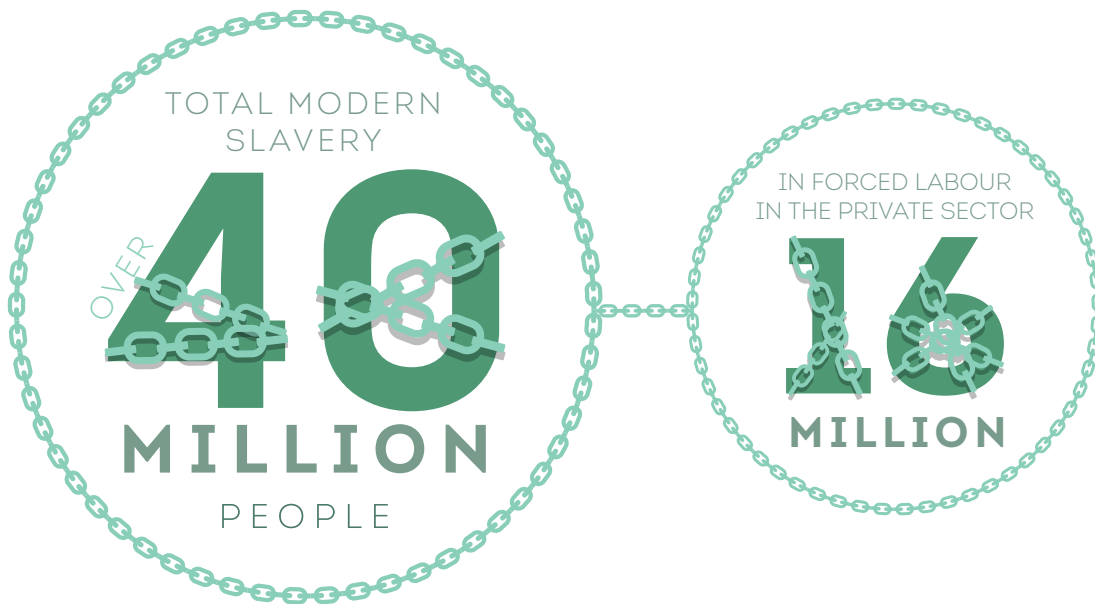


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1 International Labour Organization and Walk Free Foundation, Global Estimates of Modern Slavery: Forced Labour and Forced Marriage, 2017. Available at: http://www.ilo.org/global/publications/books/WCMS_575479/lang-en/index.htm.

2 Ibid.

3 Ashridge Executive Education, Hult International Business School, Corporate approaches to addressing modern slavery in supply chains: A snapshot of current practice Available at: <https://www.ashridge.org.uk/getattachment/Faculty-Research/Research/Current-Research/Research-Projects/Corporate-approaches-to-addressing-modern-slavery/Modern-Slavery-v3-named.pdf>



to Costco have faced class actions in US courts and, even where the case has been unsuccessful, suffered significant reputational damage.

The private sector is being held to account for human rights violations in their supply chains in an unprecedented manner. The Transparency in Supply Chains clause (TSC) in the Modern Slavery Act 2015 (MSA), which firmly placed obligations on a significant cross-section of the private sector for mitigating the risk of human trafficking in their supply chains (HTSC), is the UK's landmark legislation effecting this shift of responsibility onto business. The MSA is groundbreaking legislation, and a number of other jurisdictions are already following suit. Consequently, an analysis of the MSA yields a clearer understanding of the current trend in global regulation of human trafficking in supply chains.

The TSC requires companies falling within specified financial and geographic thresholds to publish an annual statement outlining the steps they have taken to mitigate the risk of HTSC (the "TSC Statement"). The aim of the TSC is to 'prevent modern slavery in organisations and their supply chains'⁴ by increasing the transparency and accountability of companies to both shareholders and consumers, thereby driving best practice in HTSC risk mitigation.

The TSC came into force in 2015, and most companies falling within scope have been required to publish the first TSC Statement in 2017 to cover the 2016 fiscal year. This is consequently a key moment to take stock and analyse the efficacy of the TSC against its stated purpose, to assess compliance and review how the structure of the TSC requirement could be tweaked to enhance impact.

⁴ Transparency in Supply Chains etc. A practical guide, Guidance issued under section 54(9) of the Modern Slavery Act 2015. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc_A_practical_guide_final_.pdf ("Government Guidance").

1.2 Background

The UN Guiding Principles on Business and Human Rights (the “Framework”), endorsed in 2011, emphasised the corporate responsibility to respect human rights, and required that businesses ‘seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships.’⁵ Prior to the Framework, the delineation between State and private sector responsibilities for human rights was blurred. The Framework introduced the distinction between the State’s obligation to *protect* human rights, and that of the private sector to *respect* them (broadly similar to the ‘do no harm’ doctrine).

Nevertheless, the private sector has typically continued to relegate human rights concerns to corporate social responsibility (CSR) initiatives outside the core mandate of the undertaking. However, an increase in regulatory demands, and a heightened risk of reputational damage, is starting to move human rights concerns to board room level.

To date the majority of regulation of HTSC risk has been voluntary, such as the OECD Guidance on Practical Actions for Companies to identify and address the Worst Forms of Child labour in Mineral Supply Chains,⁶ and limited to specific sectors, such as the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.⁷ Recognising that this has significantly hampered the effectiveness of such codes has led to a global trend in legislating against human rights violations in supply chains, of which the MSA is a forerunner.

3

The Gangmasters Licensing Act 2004 (GL Act), which came into force in 2006, constituted the first step in such legislation within the UK. The GL Act requires companies in (i) the agricultural sector; (ii) gathering shellfish, or (iii) processing any produce derived from (i) or (ii), to hold a license. Such a license would only be granted by the Gangmasters Licensing Authority (GLA) if the entities complied with employment standards required by law. In April 2017 the remit and powers of the GLA were widened to investigating labour abuses across the UK labour market, rather than merely in the agricultural and shellfish sectors.⁸ From this we can identify a growing awareness that labour abuse is prevalent not only in identified high risk sectors, but across the labour market, an awareness which shaped the TSC.

The UK Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013 (“Strategic Report Regulations”) introduced an obligation on quoted companies to publish an annual strategic report including information on human rights ‘to the extent necessary for an understanding of the development, performance or position of the companies business.’⁹ This came into force for financial years ending on or after 30 September 2013. A number of the requirements regarding the Strategic Report are echoed by those introduced by EU Directive (2014/95/EU)¹⁰ which, starting in January 2017, requires certain companies to include a ‘non-financial statement’ as part of their management report.

5 United Nations Human Rights Office of the High Commissioner, Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (2011). Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (the “Guiding Principles”).

6 Available at: <https://mneguidelines.oecd.org/OECD-Practical-Actions-for-WFCL-in-Mining.pdf>

7 Available at: <http://www.oecd.org/corporate/mne/mining.htm>

8 The Immigration Act 2016 reformed the GLA to become the Gangmasters and Labour Abuse Authority and extended the powers of the GLA.

9 The UK Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013.

10 Amending the EU Accounting Directive (2013/34/EU).



A number of the requirements regarding the Strategic Report are echoed by those introduced by EU Directive

This 'statement' must, among other things, report on human rights matters, and key risks in the company's operations which could cause an adverse impact. Many commentators are sceptical of the impact of such reporting, however the more compelling argument is that this upsurge in non-financial reporting evidences a changing approach to the role of the private sector in human rights, requiring companies to play a more pro-active role than they have historically been required to do, as evidenced by the increasing compliance with the SEC Conflict Minerals Regulations.

During the consultation phase for the TSC, both NGOs and business argued that the Companies Act requirement created an uneven playing field due to its narrow application.¹¹ The TSC was therefore, unlike The California Transparency in Supply Chains Act (California TSA) which was introduced as a result of consumer pressure, primarily introduced due to business and investor demand and is significantly broader in scope than any prior legislation governing supply chain risk mitigation.

The momentum in pushing for supply chain transparency continues to grow: it is expected to be one of the core themes of Germany's presidency of the G20 in 2017 and may be an element of the Commonwealth Heads of Government meeting in 2018. In light of this businesses should be aiming for full compliance as the TSC heralds a new intensity of public and regulatory scrutiny of private sector supply chains.

¹¹ Home Office, Modern Slavery and Supply Chains Consultation (2015), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448201/2015-02-12_TISC_Consultation_FINAL.pdf.



1.3 Structure

This report will outline the obligations imposed on business by the TSC, analysing the efficacy of the TSC against its stated aims, looking beyond compliance statistics to whether the TSC has prompted a change in attitudes in the private sector towards mitigating HTSC risk. Firmly placing the TSC within the context of a dynamic regulatory landscape, and analysing the changing role of the private sector in mitigating human rights, specifically human trafficking violations, identifies the TSC as a significant development in the path to eradicating labour abuse from supply chains, and hints at likely next steps.

Private sector performance to date highlights weaknesses in the TSC's content and structure, leading us to question the efficacy of the comply or explain approach and whether adequate redress has been provided for. Threading in cross-jurisdictional comparative analysis sheds further light on areas where the TSC can be strengthened, and pitfalls that can be learnt from different approaches.

This leads to a set of recommendations for next steps in enhancing the role of the private sector, and top tips for professionals supporting businesses achieve compliance ("Practitioners"). Drawing on a broad range of academic literature, stakeholder consultation material and primary research through interviews with the private sector, this report seeks to equip practitioners to play a pivotal role in ensuring businesses fully understand their obligations under the TSC, and are empowered to play the pro-active role in tackling HTSC the TSC begins to carve out.

2. Overview of private sector obligations under the MSA

2.1 Scope of obligations

2.1.1 Financial thresholds

The TSC applies to all companies who supply goods or services and whose total turnover exceeds GBP36 million. This marks a significant expansion from both comparative regimes in other jurisdictions,¹² and existing human rights reporting regimes within the UK, such as those in the Companies Act 2013, which are limited to listed companies, and represents a victory for NGOs lobbying for a wider application. The threshold mirrors that for 'large companies' in the Companies Act 2006, which, pursuant to the Strategic Report Regulations, are required to publish a strategic review, constituting non-financial reporting focusing on risks facing the business. For quoted companies this review must encompass social, community and environmental issues. In choosing to marry the financial threshold under the MSA to this, human trafficking is posited as another key risk facing the company which must be reported on. This posits the mitigation of HTSC at the centre of a company's structure, affecting its very profitability, rather than as a second tier CSR concern. The author suggests that one marker of the success of this approach would be a market shift towards reporting on human rights violations risk in key transactional and marketing documents like prospectuses.



12 The California Transparency in Supply Chains Act 2010 applies only to companies in the retail and manufacturing sector with annual worldwide gross receipts in excess of US\$100 million. The French 'Duty of Vigilance' Law applies only to establishments employing over 5,000 persons in France, or over 10,000 persons in France and abroad and is expected to affect circa 100 companies.

2.1.2 Geographic reach

The geographic reach of the TSC extends to any body corporate or partnership which ‘carries on a business, or part of a business, in any part of the United Kingdom.’¹³ Government guidance on what constitutes ‘carrying on a business in the UK’ unhelpfully states that entities that do not have a ‘demonstrable business presence’ in the UK shall not fall within scope, and that a ‘common sense approach’ must be applied.¹⁴

However, the fact that the financial threshold determining applicability is calculated on global revenue reveals an intention to give the MSA a global reach. This is further indicated by the fact that what constitutes ‘slavery and human trafficking’ shall be defined by the MSA regardless of where it takes place.¹⁵

2.2 Content Requirements

The TSC requires that businesses falling within the scope of the MSA:

- A. state the steps taken to ensure human trafficking is not taking place in supply chains or any part of its business; or
- B. state that no such steps have been taken by the organization.¹⁶

The TSC details six broad categories of information regarding a company’s business and supply chains which ‘may’ be included in the TSC Statement, namely:

- A. the organization’s structure, business and supply chains;
- B. HTSC policies;
- C. HTSC due diligence;
- D. HTSC risk analysis;
- E. effectiveness in ensuring there is no HTSC; and
- F. HTSC staff training programmes, (together, the “Information Categories”).¹⁷

13 Section 54(12) MSA.

14 Government Guidance. See supra note 2.

15 S1 and 2 MSA, and Government Guidance (see supra note 2.).

16 Section 54 (4) MSA.

17 Section 54 (5) MSA.





The MSA dictates that the company's board of directors, partnership or equivalent governing body must authorize and sign the annual TSC Statement, which must be published on the entity's website.¹⁸

2.3 Oversight

The Secretary of State has oversight of the MSA, and may enforce MSA obligations on businesses by seeking an injunction at the High Court.¹⁹ If the relevant entity fails to comply with the injunction, the court may issue a contempt of court order, which carries an unlimited fine. The directors of an organization, if found in contempt of court, may face imprisonment. It is extremely unusual for a High Court injunction to constitute the only sanction of a regulatory breach. In light of this, many commentators expected the Government to introduce further financial penalties by way of subsequent secondary or primary legislation, however Government Guidance published suggests that the Government intends to rely largely upon the risk of reputational damage.

18 Sections 54 (6) and (7) MSA.

19 Section 54 (11) MSA

3. Analysing TSC Statements: Compliance to Date

Compliance of companies with the TSC has, to date, been disappointing. A review of 27 FTSE 100 statements conducted by BHRRC in 2017 concluded that the standard of reporting across the Information Categories was low, with circa 50% scoring within the lowest three tiers of a ten tier quality indicator.²⁰ However, research by Ergon Associates found that statements are ‘generally longer and slightly more detailed than one year ago’, lending some support to the Government’s prediction that statements would improve year on year.²¹

When analysed against the Information Categories, criteria three (Due Diligence and Risk Assessment) and four (Effective Action Taken to Address Modern Slavery) are least well understood,²² particularly concerning given the enshrinement of due diligence at the core of the Framework. Companies typically delineate relevant policies in broad terms – Nationwide, the world’s largest building society, illustrates the type of language used across the lower band of statements in stating it shall carry out ‘appropriate due diligence’ and ensure any work undertaken is ‘proportionate to the services to be provided and the risks involved.’²³ Compliance with the fourth criteria fell within tier one of BHRRC’s ten tier scale, with most companies failing to identify processes implemented to detect risk, or consequences were breaches identified.²⁴ Stronger statements identified weaknesses in current processes, such as the ease by which serious abuses such as passport confiscation can be masked in audits, and detailed steps taken in high risk areas to mitigate risk, together with sanctions applicable for breach.²⁵ However, these were disappointingly few. Ergon Associates reported that there had been ‘little improvement in most companies’ reporting of due diligence processes and outcomes’, with the majority only ‘minimally’ addressing risk assessment processes.²⁶

Suspicious uniformity across many statements suggested that companies had failed to tailor the content of the statement to their supply chains, and that instead a market standard was emerging.²⁷

Many critics have ascribed low compliance to a lack of desire to comply, however this is only partially true. Non-financial reporting remains relatively new for all companies, and entirely novel for those falling outside the scope of previous requirements, leading to widespread confusion in the market regarding how to achieve compliance. Strong guidance from practitioners across the board is therefore key.

20 Business & Human Rights Resource Centre, FTSE 100 At the Starting Line: An analysis of company statements under the UK Modern Slavery Act, October 2016. Available at: <https://business-humanrights.org/sites/default/files/documents/FTSE%20100%20Modern%20Slavery%20Act.pdf> (“BHRRC Analysis”).

21 Ergon Associates, MSA One year on, April 2017. Available at: http://www.ergonassociates.net/images/stories/articles/msa_one_year_on_april_2017.pdf

22 BHRRC Analysis. See supra note 16.

23 Nationwide Slavery and Human Trafficking Statement 2016. Available at: <http://www.nationwide.co.uk/about/corporate-information/slavery-human-trafficking-statement>

24 BHRRC Analysis. See supra note 16.

25 Ibid, and Mothercare Slavery and Human Trafficking Statement 2016. Available at: http://www.mothercareplc.com/~/_media/Files/M/Mother-Care/documents/msa-statement-fy16-final-8-July-002.pdf

26 Ergon Associates, MSA One year on, April 2017.

27 Including Ergon Associates (ibid), which noted that similarities remain, one year on.





Image: Compliance by Nick Youngson, licensed under CC BY-SA 3.0

Government Guidance emphasizes that companies are expected to improve their TSC Statements with each annual reiteration – in key elements of due diligence this has not, with some key exceptions, materialised. Ergon Associates identifies a high risk that as TSC Statements become more routine the ‘default position could be anodyne statements that deal only in generalities.’²⁸ Similarly, the Anti-Slavery Commissioner, in a blistering critique of compliance, labelled most TSC Statements mere “reiterations of generic human rights policies.”²⁹ It is now, where the obligation is relatively new, that practitioners must play a key role in ensuring this risk does not materialise.

Practitioners should leverage access to key players in company hierarchies to achieve top-down compliance. A recent study found that CEO engagement with modern slavery had doubled in the UK, showing the MSA’s impact in elevating the dialogue regarding modern slavery to the board room.³⁰ A report commissioned by the Australian Government recommending a Modern Slavery Act similar to the MSA be introduced, cited this increase in CEO awareness as key evidence of the MSA’s success.³¹ Analyses of the TSC’s impact should thus review both compliance with the TSC and its impact on private sector dialogue on supply chain human rights risks, which yields a more positive outlook ignored by many critics.

28 Ibid.

29 Independent Anti-Slavery Commissioner, Annual Report 2015-16.

30 Ethical Trading Initiative and Ashridge Business School (2016), How have companies responded to the UK Modern Slavery Act one year on? Available at: <https://www.ashridge.org.uk/faculty-research/research/current-research/research-projects/corporate-leadership-on-modern-slavery/>

31 Modern slavery and global supply chains Interim report of the Joint Standing Committee on Foreign Affairs, Defence and Trade’s inquiry into establishing a Modern Slavery Act in Australia (August 2017). Available at: http://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024092/toc_pdf/Modern-slaveryandglobalsupplychains.pdf;fileType=application%2Fpdf

4. Pinning the Blame: Shortcomings in the HST

4.1 Comply or Explain

Since the publication of the Cadbury Code in 1992, the ‘comply or explain’ approach has shaped corporate governance across the EU. This has been transcribed into a human rights context by the Framework which pushed companies to ‘know and show’ that they respect human rights. The TSC constitutes ‘meta-regulation’ a term coined by Parker to mean ‘any form of regulation...that regulates any other form of regulation. Thus it might include legal regulation of self-regulation.’³² Parker vaunts the ‘space’ this approach grants companies in deciding how best to tackle their responsibilities, and business lobbyists argued that companies should be given the maximum flexibility in deciding how to structure their TSC Statements as this would encourage in-depth analysis by each company as to how best to comply.

However, the ‘comply and explain’ approach should typically be bolstered by other forms of regulation. In the UK Corporate Governance Code the bulk of provisions adhere to this ‘comply or explain’ framework, however they are governed by mandatory overarching principles. The Strategic Report Regulations made the existing comply and explain disclosures in the UK Corporate Governance Code mandatory for quoted companies, reflecting a desire to enforce compliance.³³ Although widely lauded, implementing ‘comply and explain’ without such bolstering has, in the author’s view, created space for lax (rather than ‘in-depth’) compliance and a limited uptick in supply chain due diligence.

The EU Directive 2005/29 on unfair commercial practices (“UCPD”), implemented in the UK by the Consumer Protection from Unfair Trading Regulations 2008 as amended by The Consumer Protection (Amendments) Regulation 2014 (SI 2014/870) (“CPRs”), offers a novel strengthening of meta-regulation. The UCPD stipulate legislative sanctions for breaches of self-regulation when crystallised in the form of codes. Breach of a code which the business states it adheres to can in itself be evidence that the company has misled the consumer. This retains the ‘space’ Parker values in the meta-regulatory approach, but provides external regulatory mechanisms to enforce compliance

32 Parker, “Meta-regulation” in *The New Corporate Accountability* (2007).

33 The Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013.

The Strategic Report Regulations made the existing comply and explain disclosures in the UK Corporate Governance Code mandatory for quoted companies, reflecting a desire to enforce compliance

with self-regulation. Arguably a misleading TSC Statement could be sanctioned under the UCPD or CPRs, however, as discussed more fully below, such an approach faces significant hurdles and is likely to be inappropriate in most cases. This is particularly true given the current trend of including scarce and broad content in the TSC Statement, rendering them uninformative rather than misleading.

4.2 Non-Prescriptive Approach

The TSC does not mandate that companies disclose against the Information Categories, rather suggesting companies ‘may’ wish to include such information. This is far weaker than the requirement in the California TSA, which prescribes that companies disclose against five categories – verification, audit, certification, internal accountability and training.

The California TSA boasts slightly better compliance with its content requirements: a 2015 study found that 53% of companies had complied with all five content requirements,³⁴ while a 2017 report measuring 2016 compliance put the figure at 60%, suggesting compliance is improving.³⁵ While compliance with the California TSA remains low, adherence to the content principles is notably higher than that of the TSC, although in part attributable to the longer time companies have had to comply, it arguably suggests that mandating disclosure against the Information Categories could yield results.

The role played by business in crafting the TSC likely had a significant impact on its light touch approach, as businesses fought to retain maximum flexibility for complying with the TSC, and to minimize the administrative burden of compliance. Businesses argued that this would permit them to direct resources to targeting supply chain risks, rather than ensuring compliance with complex regulatory requirements.³⁶ Being too prescriptive as to the content of the TSC Statement could, it was argued, stifle innovation and turn compliance into a ‘tick-box exercise’, a risk recognised by the Anti-Slavery Commissioner.³⁷

The California TSA boasts slightly better compliance with its content requirements: a 2015 study found that 53% of companies had complied with all five content requirements

34 Know the Chain (2015), Five Years of the California Transparency in Supply Chains Act. Available at: https://ktdcvlab.wordpress.com/wp-content/uploads/2015/10/KnowTheChain_InsightsBrief_093015.pdf

35 Chris Bayer and Jesse Hudson, Development International (2017), Corporate Compliance with California Transparency in Supply Chains Act: Anti-Slavery Performance in 2016. Available at: https://static1.squarespace.com/static/5862e332414fb56e15dd20b9/t/58bf06e346c3c478cf76d619/1488914152831/CA-TISCA.v.24_secured.pdf.

36 Home Office, Modern Slavery and Supply Chains Consultation (2015), Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448201/2015-02-12_TISC_Consultation_FINAL.pdf.

37 Independent Anti-Slavery Commissioner, Annual Report 2015-16.

In light of performance, the efficacy of such an approach has been called into question by critics. Further, the Information Categories are similar to the non-financial reporting obligations contained in EU Directive (2014/95/EU) and the requirements in the Strategic Report Regulations. This weakens the 'administrative burden' argument levied by business. Considering the above, mandating disclosure against the Information Categories, thereby bolstering the comply and explain approach, would yield more detailed, tailored HST Statements while imposing minimal additional administrative requirements.

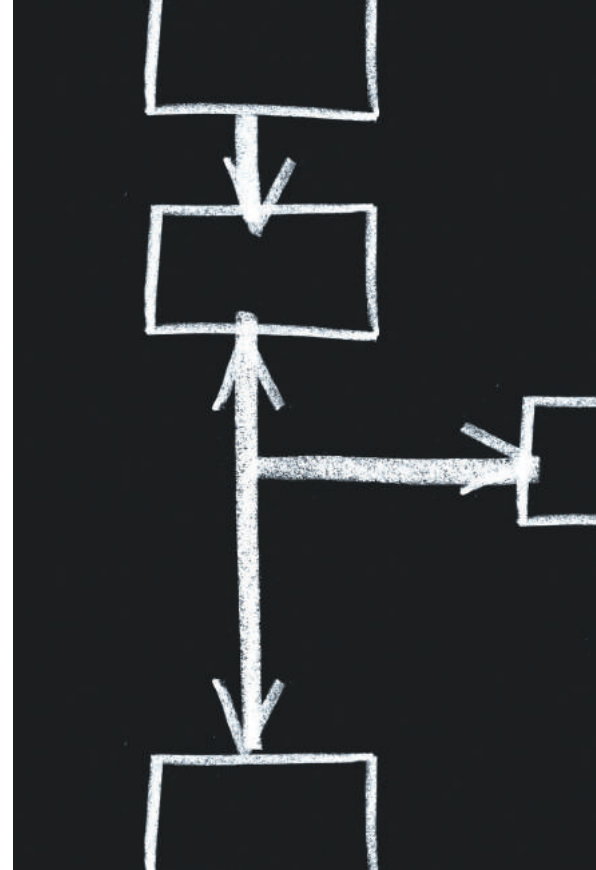
4.3 Low chance of enforcement

As detailed above, the limited content requirements of the MSA mean that any TSC Statement which meets the basic authorization and publication criteria complies with the letter of the law. Consequently, the key pressure exerted on companies to report on practical due diligence measures must come from reputational risk. Until market practice evolves to a standard which meets the recommendations set out in the TSC, and outliers can fear reputational damage, this is unlikely to be sufficient.

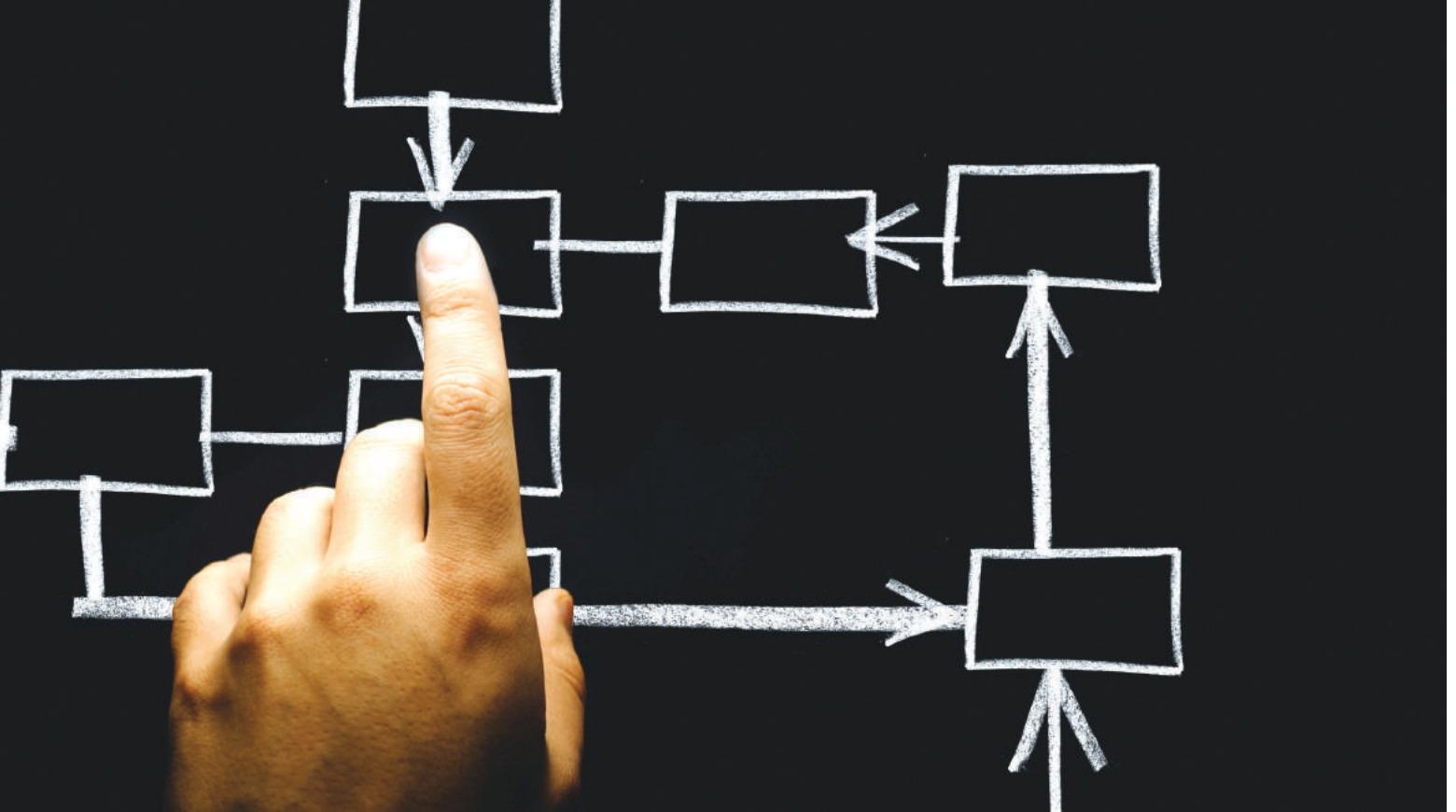
If a company does breach the TSC, the only redress mechanism available pursuant to the MSA is an injunction sought by the Secretary of State at the High Court. In practice this is unlikely to be a common occurrence. Arguably this is reflected by the lack of any enforcement action taken against the myriad of companies breaching the TSC. Although it is likely that the market was given a transition period within which to fully comply with the TSC, it would be a surprise to the author if injunctions ever became a real deterrent.

Consumers could bring actions against companies whose TSC are misleading pursuant to the UCPD or CPRs. The CPRs are wide in scope, covering both financial services and 'commercial transactions' in relation to a 'product', defined to be either goods or services, and are largely enforced by the Office of Fair Trading. The CPRs criminalise acting 'unfairly', however only where the misleading information has affected the consumer's transactional decision-making.³⁸ The EU 2016 guidance to the UCPD clarified that CSR, defined widely to cover any action taken to 'integrate social, environmental and

³⁸ Sections 3-12 CPRs.



As detailed above, the limited content requirements of the MSA mean that any TSC Statement which meets the basic authorization and publication criteria complies with the letter of the law



consumer concerns into' business, can have an impact on the 'transactional decision of a consumer' and consequently fall within 'commercial practices' as defined in the UCPD.³⁹ In the UK, the Consumer Protection (Amendments) Regulation 2014 (SI 2014/870) provide the consumer with a right to damages unless the trader can prove that it 'took all reasonable precautions and exercised all due diligence to avoid the occurrence of the prohibited practice.'⁴⁰ Although shifting the burden of proof for the second limb of the test onto the business facilitates this redress mechanism, the requirement for a consumer to prove its transactional decision-making was affected by the misleading nature of the TSC Statement is likely to prove too high a bar for the majority of cases.

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Having set out the above, it seems likely that reputational concerns – cited by 97% of UK companies as the key driver for compliance in a 2016 OECD survey⁴¹ - will remain the principle push factor. The UK Home Secretary, Amber Rudd, recognised this by describing the aim of the TSC as:

"that information published by businesses will be used by consumers, investors, activists and competitors to give positive recognition to businesses who take action against slavery, while exposing laggards to public pressure and scrutiny that would ultimately hurt their brand and bottom line."⁴²

A comparison can be made to the field of data protection – in the UK pecuniary sanctions for companies breaching the Data Protection Act 1998 ("DPA") are, and will be until the coming into force of the General Data Protection Regulation in 2018, extremely low. However, as the public became increasingly concerned with privacy issues, reputational damage became a powerful sanction,

39 Commission Staff Working Document, Guidance on the implementation/application of Directive 2005/29 on unfair commercial practices SWD(2016). Available at: http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf

40 Consumer Protection (Amendment) Regulations 2014 (SI 2014/870).

41 Ethical Trading Initiative and Ashridge Business School (2016), How have companies responded to the UK Modern Slavery Act one year on?

42 Modern slavery and global supply chains Interim report of the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into establishing a Modern Slavery Act in Australia (August 2017).

In order to fully wield the impact of reputational damage, the MSA should include a 'name and shame' mechanism for non-compliance

utilized by the regulator in publishing breaches. Companies found to have breached the DPA suffered significant public outcry, in some instances measured in substantial drops in share prices. In order to fully wield the impact of reputational damage, the MSA should include a 'name and shame' mechanism for non-compliance, similar to the DPA where the regulator publishes the name of the company and details of the breach.

4.4 Lack of Public Register

A key criticism angled at the MSA is that it does not provide for a public register of all companies falling within the scope of the TSC requirement. This echoes the criticism levelled at the California TSA - each year California's Franchise Tax Board provides the Attorney General with a list of companies falling within the scope of the California TSA, however privacy concerns have prevented the list being publically available. This omission manifestly handicaps the TSC's stated purpose of enhancing consumers' ability to make more educated purchasing decisions.

The Government has defended the decision taken in the MSA not to publish a list of companies due to difficulties in maintaining the list's accuracy given the fact that the changing turnover of companies may cause companies to come into or fall out of scope. The Dutch Child Labour Due Diligence Law,⁴³ which requires companies to publicly report on efforts to identify whether child labour is present in supply chains and develop incident response plans, builds upon criticism levelled at preceding supply chain legislation by including such a requirement, demonstrating the practical concerns can be overcome.

The Modern Slavery (Transparency in Supply Chains) Bill (the "**Bill**"), which required the Secretary of State to publish such a list, was expected to resume its second reading debate in March 2017 but the order was not moved, meaning the Bill will not progress any further.⁴⁴ A number of, largely NGO-led, initiatives have been launched, perhaps the most important is the set up by the Business & Human Rights Resource Centre to store and track TSC Statements. The efficacy of such repositories is, however, hampered by their voluntary nature.

43 Adopted by the Dutch Parliament, the law requires Senate approval. If obtained, it would come into force in January 2020.

44 Modern Slavery (Transparency in Supply Chains) Bill [HL] 2016-17. Available at: <http://services.parliament.uk/bills/2016-17/modernslavery-transparencyinsupplychains.html>

4.5 No Obligations on the Public Sector

The MSA applies only to the private sector and places no parallel obligation on the public sector for HTSC risk mitigation. The Bill sought to remedy this weakness by requiring government contracting entities to exclude from procurement procedures economic operators who have not published a TSC Statement where they are required to do so.⁴⁵ Given that the UK Government awards circa GBP 45 million of contracts annually,⁴⁶ this would give the Government significant leverage in enforcing companies to at the very least publish a TSC Statement.

This falls significantly short of the obligations imposed by Obama's executive order 13627, 'Strengthening Protections Against Trafficking in Persons in Federal Contracts' (the "EI"), which prohibits contractors and subcontractors entering into federal contracts from engaging in broadly defined trafficking or related activities, and in the case of contracts of over US\$500,000 in value, requires the contractors to maintain a compliance plan. The EI creates both reporting and monitoring obligations, and breach of the EI is sanctioned by termination of the contract, effectively withdrawing US Government funding from the relevant project or undertaking. The EI has had a marked impact in increasing the HTSC risk mitigation efforts of companies contracting with the US Government, given the Government significant leverage in enforcing due diligence, and in some cases permitted Government to require companies to hire specialist ethical recruitment firms to manage their recruitment processes (often high risk areas in the supply chain).⁴⁷ Companies are fearful of redress if they commit to Government HTSC contractual standards, which stipulate that no employee pays recruitment fees, and fail to adhere.

Introducing similar requirements for UK Government contracting would likely have similar effects.

In the author's view, the Bill's narrow focus on ensuring that a compliant TSC Statement is published if required, would limit the role of Government to a tick-box exercise. If content requirements were made mandatory, policing compliance could become a potent tool for the Government in ensuring the spirit of the TSC is met. Alternatively, public sector obligations should be go beyond (although include) policing the publication of a compliant TSC Statement and require due diligence similar to that mandated by the EI.

In the author's view, the Bill's narrow focus on ensuring that a compliant TSC Statement is published if required, would limit the role of Government to a tick-box exercise

45 Section 2 The Modern Slavery (Transparency in Supply Chains) Bill.

46 Hansard discussions of the Transparency in Supply Chains Bill, Lord Alton, 8 July 2016.

47 Interview with ethical recruitment agency with significant contracts with the US Government, October 2017.

5. The Extra-territorial reach of the TSC

Modern slavery is a global problem, and the supply chains of multinationals span multiple jurisdictions. To be effective the MSA must therefore govern breaches across international supply chains, rather than be limited to actions within the UK.

This is problematic in the context of the widely applied conception of corporate entities, as recognized by the International Court of Justice in the *Barcelona Transaction* case, ‘as an institution created by states in a domain essentially within their domestic jurisdiction,’ commonly referred to as entity law.⁴⁸ Entity law, which has failed to keep up with the changing realities of modern global economics, poses a significant obstacle to the international regulation of multinationals, and specifically to the regulation of international supply chains.

Voluntary codes of conduct seeking to regulate business responsibility for human rights have therefore largely adhered to enterprise principles, which recognize the multinational corporate group as a single enterprise for purposes of legal liability and responsibility. The UN Global Compact, a self-regulating initiative whose signatories commit to upholding ten key principles, requires responsibility to be taken at an enterprise level, and due diligence to be incorporated in broader enterprise risk-management systems.⁴⁹ Similarly, the Framework, which places due diligence obligations at the heart of the private sector’s responsibility to respect human rights, rejects entity law in making clear that the due diligence obligation requires enterprise-wide monitoring across all jurisdictions in which the MNE operates.⁵⁰

The MSA partially adopts enterprise principles in its formulation of the TSC,⁵¹ chiming with the approach taken in the Bribery Act, which similarly seeks to regulate a cross-border crime. The financial thresholds determining the scope of the MSA consider total turnover, which Government Guidance calculates ‘a. the turnover of that organisation; and b. the turnover of any of its subsidiary undertak-

Entity law, which has failed to keep up with the changing realities of modern global economics, poses a significant obstacle to the international regulation of multinationals

48 Okoye, Adaeze, (2017) ‘Corporate enterprise principles and UK regulation of modern slavery in supply chains’, *International Company and Commercial Law Review* (“Adaeze”), *The Barcelona Traction, Light & Power Co Ltd* (1970). Available at: <http://www.icj-cij.org/docket/files/50/5387.pdf>

49 The Guiding Principles. See supra note 3.

50 The Guiding Principles. See supra note 3.

51 Adaeze. See supra note 48.



ings (including those operating wholly outside the UK).⁵² Further, the Government Guidance emphasizes that 'If a foreign subsidiary is part of the parent company's supply chain or own business, the parent company's statement should cover any actions taken in relation to that subsidiary to prevent modern slavery.'⁵³ It goes further by suggesting that to comply with 'best practice' all parent entities should include the activities of their non-UK subsidiaries.⁵⁴ Some companies have explicitly gone against this 'best practice', noting in their TSC Statements that they are limited to UK operations and do not cover subsidiaries in high risk areas.⁵⁵ This is a disappointing development and has received some criticism, leading the author to believe that consumer facing multi-nationals will shy away from this practice.

The partial recognition of enterprise principles in the TSC recognizes that modern slavery spans global supply chains and does not respect entity law conceptions of corporations, and is a welcome step in multinational regulation on non-financial matters (in financial matters the enterprise principle is more commonly applied, e.g. group accounts used for tax purposes).

52 Government Guidance. See supra note 2.

53 Ibid.

54 Ibid.

55 Ergon Associates, MSA One year on, April 2017.

6. Social Transparency

One clear role of the public and civil society organisations is to pressure the private sector to go beyond compliance with TSC requirements, and provide evidence of steps taken to mitigate the risk of HTSC. This role, emphasized in the Government Guidance, is widely recognized and fits into a global trend of ‘social transparency’, the use of mandatory disclosure to advance social goals.⁵⁶ More specifically, the TSC is an example of ‘targeted social transparency’, whereby legislation requires ‘public disclosure to fulfil...issue specific noneconomic public policy objectives.’⁵⁷

Transparency is identified by Backer as a key accountability mechanism, both to stakeholders and the public.⁵⁸ The requirement to publish the statement on company websites seeks to leverage the power of transparency in this way.

However, less widely recognised is the importance that both the public and the third sector recognize the limitations to the appropriate role played by the private sector in HTSC. Companies have expressed fear that providing detailed information regarding the HTSC risks they face, or past breaches, would lead to naming and shaming by civil organizations and criticism by the public.⁵⁹ In the cocoa industry a number of key players received widespread criticism when child labour was found to form part of their supply chains. However, as Ryan highlights, an in depth understanding of the structure of the cocoa industry across West Africa reveals that it is largely fed by smallholders whose plantations are managed by individual families, and that children form an integral part of this.⁶⁰ Although reforms should be fought for, it is key to recognise that the power of companies to effect this change is limited, particularly given that the cocoa industry is part-nationalised in many states and the source of each coca bean impossible to determine. **It is therefore inappropriate to censure companies for admitting child labour exists in their supply chains, as this will merely hamper transparency. Instead the**

19 *However, less widely recognised is the importance that both the public and the third sector recognize the limitations to the appropriate role played by the private sector in HTSC*

56 Park, Stephen (2014) ‘Targeted Social Transparency as Global Corporate Strategy’, Northwestern International School of Law and Business, Vol. 35 Available at: http://heinonline.org/HOL/Page?handle=hein.journals/nwjil-b35&div=6&start_page=87&collection=journals&set_as_cursor=0&men_tab=srchresults

57 Ibid.

58 L.C. Backer, “Transparency and Business in International law: Governance Between Norm and Technique” in Transparency in International Law (2013).

59 Ethical Trading Initiative and Ashridge Business School (2016), How have companies responded to the UK Modern Slavery Act one year on? Available at: <https://www.ashridge.org.uk/faculty-research/research/current-research/research-projects/corporate-leadership-on-modern-slavery/>

60 Ryan, Orla, Chocolate Nations: Living and Dying for Cocoa in West Africa (2011), African Arguments





Photo by Peter Watson

public should support companies which identify and take some steps to remedy this, even if it is not possible to boast complete success.

Greater due diligence empowers companies to identify risk and detail mitigation measures, protecting against reputation storms.

The Barber v Nestle⁶¹ case brought under the California TSA highlights both a lack of understanding among the public, and the limitations of supply chain legislation in its current iteration. Barber alleged that Nestle had breached a number of consumer protection statutes by failing to disclose that some of its pet food may have been sourced using forced labour. This claim was based on a flawed interpretation of the California TSC as requiring companies to ‘straighten out supply chains,’ instead of merely requiring companies ‘to disclose what efforts they’re taking.’ The court dismissed Barber’s claim.

A further limitation to the effectiveness of transparency is that coined by Kawakami as ‘collective consumer cognitive dissonance’, where consumers are aware inhumane labour practices are wrong but continue to knowingly purchase products made using such practices.⁶² This points towards the need for sanctions beyond ‘naming and shaming’.

61 Barber v Nestlé USA Inc No.15-01364-CJC (C.D. Cal. 9 December 2015).

62 Kawakami, Mark (2013), Psychological Oversight: Why Bills Advocating for Transparency Could do More Harm, Edinburgh Student Law Review. Available at: http://heinonline.org/HOL/Page?handle=hein.journals/edinslr2&div=14&start_page=87&collection=journals&set_as_cursor=12&men_tab=srchresults

The Barber v Nestle case brought under the California TSA highlights both a lack of understanding among the public, and the limitations of supply chain legislation in its current iteration

7. Recommendations

7.1 Publication of list of companies required to make a TSC statement

In order to leverage reputational damage in enforcing compliance the Government, or the Anti-Slavery Commissioner must publish a list of companies required to make a TSC Statement.

7.2 Effective Redress

The MSA should stipulate more specific sanctions for companies which breach the TSC. The redress mechanism could be pecuniary, however the quantum of such fines must be significant enough to act as a compliance driver – the GLA, where the quantum of fines is typically lower than the cost of obtaining a license – should serve as a cautionary tale.

In addition, redress could play on reputational concerns, following the approach taken in Brazil where a ‘Lista Suja’ or ‘Dirty List’⁶³ is published of all employers found to have HTSC. The List includes the company or employer’s name, the product being manufactured or sourced in the supply chain, and the estimated number of workers subjected to force labour conditions. Those named not only suffer from significant reputational damage, but are typically denied government funding and tax subsidies, and refused business by banks and other private companies.

7.3 Public Sector Involvement

The MSA should impose obligations on the public sector to fight HTSC, in part by ensuring Government does not contract with companies who fail to comply with the TSC, who do not disclose against the Information Categories and do not take sufficient steps to mitigate human rights violation risk. This takes inspiration from Obama’s EI, however ties it to legislation imposing obligations on the private sector, thereby creating a network of enforcement across public and private sectors where regulation of the former polices that of the latter.

63 Lista de Transparência sobre Trabalho Escravo Contemporâneo, Available at: http://reporterbrasil.org.br/wp-content/uploads/2017/03/Lista-de-Transpar%C3%Aancia_-dez2014-2016.pdf

In addition, redress could play on reputational concerns, following the approach taken in Brazil where a ‘Lista Suja’ or ‘Dirty List



7.4 Mandate disclosure categories

The TSC should mandate disclosure against the Information Categories, and bolster the comply and explain approach with mandatory principles. The first set of TSC Statements are disappointing in content, although mandating disclosure will not be panacea, it can accelerate the road to full disclosure and appropriate due diligence.

7.5 Restructuring Compliance

The TSC obligation should be restructured to make it an offence to fail to prevent HTSC without a valid defence. This structure, similar to that of the UK Bribery Act, both places greater onus on due diligence, an element of the TSC obligation which companies are largely failing to reflect in their TSC Statements, and can be crafted to ensure that parent companies are sanctionable for failures by subsidiaries, incorporating enterprise principles. This also reflects the emphasis placed on due diligence by the Framework, rightly recognising it as the crux of private sector respect for human rights.

Companies should be able to rely on the defence of having conducted effective due diligence, however the burden of proof should remain on the company to demonstrate such due diligence. This is the approach taken in the French Corporate Duty of Diligence Law which ascribes liability where companies found to have human rights violations in its supply chain where they cannot prove due diligence in monitoring their supply chains.



8. Supporting Businesses Achieve TSC Compliance: Top Tips

Early indications are that the majority of TSC Statements do not to meet the TSC's requirements.⁶⁴ In part this is due to significant confusion in the market regarding the TSC - practitioners are key in educating clients and should offer significant support to clients in tailoring their TSC to their supply chains, and improving upon them annually.

Practitioners should be proactive, offering tailored training at HR, procurement and board room level together with helpline structures (wherein a complementary helpline is given to significant clients to cover ad hoc queries) for the first and second publication periods. Practitioners should encourage clients to leverage existing frameworks, e.g. those built to comply with the SEC conflict minerals regulations rather than reinventing the wheel.

Practitioners should emphasise to clients the increasing reputational risk of not complying with the TSC and not implementing measures to mitigate HTSC – companies from Intel to M&S have been publicly lauded for the depth and detail of their TSC Statements – stragglers will likely face public condemnation imminently. A broad number of multi-nationals have faced public opprobrium when HTSC was discovered – being able to demonstrate due diligence – as Apple in particular has been able to do - is key in mitigating this reputational damage.

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When advising clients, practitioners could suggest the following recommendations as first steps towards ensuring appropriate due diligence and HTSC risk mitigation structures, which could then form the basis for HST Statements:

- A. ensure sub-contractors sign up to the company code of conduct, which should include HTSC risk mitigation pledges;
- B. ensure any external recruitment companies (or, where relevant, their own HR bodies) comply with the Dhaka principles, or at least that no fees are charged to workers in the recruitment process;⁶⁵
- C. conduct covert auditing⁶⁶ on high risk sub-contractors;⁶⁷
- D. make a key board member, ideally the CEO, directly responsible for compliance (often under the umbrella of 'ethics'); and
- E. establish an anonymous confidential and independent helpline to report instances of human trafficking (it has been found that even if not regularly used, this acts as a significant deterrent).

In addition, practitioners should warn clients against relying heavily on the HST Statements of other companies as precedent as this immediately reveals that the HST Statement is not tailored, and has been identified by several analyses.

64 The Transparency in Supply Chains Coalition. Available at: <http://corporate-responsibility.org/issues/modern-slavery-bill/>

65 This is common in the recruitment of blue collar workers internationally and a key indicator that a worker may be trafficked and in debt bondage (which affects 50% of forced labour victims).

66 Covert auditing entails entrusting members of the workforce to report directly to the client anonymously.

67 Working in geographies or sectors which are high risk.

9. Conclusion

Practitioners should ensure they are equipped to support clients in implementing new measures, being unafraid to recognising that they can do more to eradicate HTSC, as many key players in business have done

Beyond assessing compliance against the TSC's requirements we should question whether the TSC is fit for purpose in catalysing businesses to 'prevent modern slavery in organisations and their supply chains'.⁶⁸ Arguably, although the TSC has had some success in increasing dialogue, and elevating human trafficking discussions to the board room, its approach has permitted for a disappointing overall quality of TSC Statements which point towards little action being taken to mitigate the risk of HTSC.

Businesses should recognise that the TSC is as a fore-runner in a wave of supply chain legislation, and that each iteration will require more in-depth disclosure to avoid criticism. The movement to make the private sector take responsibility for HTSC is gathering momentum, businesses that fail to recognise this will face reputational damage and a steep path to full compliance later on. Practitioners should ensure they are equipped to support businesses in implementing new measures, being unafraid to recognising that they can do more to eradicate HTSC, as many key players in business have done.⁶⁹ Although guaranteeing eradication of HTSC may in some cases be unattainable, there is no longer any excuse for failing to conduct appropriate due diligence. HTSC mitigation frameworks enable businesses to make more informed decisions regarding risk, combat HTSC and realize possible cost savings – practitioners are key in pushing this message.

68 Government Guidance.

69 Deloitte TSC Statement, Available at: <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/about-deloitte/deloitte-uk-modern-slavery-act-statement-2016.pdf>

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