



**British Institute of
International and
Comparative Law**

A UK Failure to Prevent Mechanism for Corporate Human Rights Harms

Irene Pietropaoli | Lise Smit | Julianne Hughes-Jennett | Peter Hood



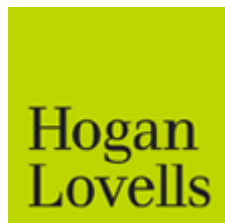


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Acknowledgements

BIICL is grateful for the support of Hogan Lovells and Quinn Emanuel in undertaking this project.

This report was authored by Irene Pietropaoli, Lise Smit, Julianne Hughes-Jennett and Peter Hood.



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Executive Summary

In April 2017, a report by the UK Joint Committee on Human Rights (“JCHR”) proposed that a failure to prevent mechanism, modelled on section 7 of the UK Bribery Act, may be “an appropriate one to apply to business and human rights”.¹ This study considers the legal feasibility of introducing such a mechanism within the UK context, with reference to the framework of the UN Guiding Principles on Business and Human Rights (“UNGPs”).²

The study included a survey of businesses to understand their experiences with the current legal landscape and the Bribery Act, and whether there would be benefits if a similar failure to prevent mechanism were to be introduced with respect to human rights. In summary:

- The majority of respondents (68.97%) indicated that existing law does not provide business with sufficient legal certainty about which procedures are required to avoid legal risks for human rights abuses.
- The vast majority of business indicated that additional regulation may provide benefits to business: through providing legal certainty (82.14%); through levelling the playing field, insofar as it will hold competitors and suppliers to the same standards (74.07%); and by facilitating leverage with third parties, including in the supply chain (75%).
- Of those respondents who have experience with section 7 of the Bribery Act, the majority agree that it has provided similar benefits: It has been effective in providing legal certainty (64.71%), in levelling the playing field by holding competitors and suppliers to the same standards (50%), and in facilitating leverage with third parties in the value chain through setting a non-negotiable standard (52.94%).

The study also provides a legal analysis as to whether and how the legal elements of section 7 of the Bribery Act could be transposed into a failure to prevent mechanism for corporate human rights harms. It concludes with the following recommendations.

Rights Covered

The provision should apply to “human rights”. This term should be defined in a Schedule to the Act, capable of amendment by statutory instrument and would include environmental harms. Our recommendation is that it should be defined to apply to all internationally recognised human rights.

Companies covered

We recommend that any failure to prevent legislative provision should cover companies of all sizes, including SMEs, carrying on business in the UK. Guidance should clarify the recognition that any due diligence processes should be proportionate to their size and the complexity of their operations.

¹ UK Joint Committee on Human Rights (“JCHR”), *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*, Sixth Report of Session 2016-17, 5 April 2017, available at: <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>.

² UN Office of the High Commissioner for Human Rights (“OHCHR”), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework*, HR/PUB/11/04, 2011 (“UNGPs”).

Duty

A failure to prevent mechanism should establish a duty to prevent human rights harms in its own activities and those of its business relationships. This is contingent on the inclusion of a statutory defence of procedures “reasonable in all the circumstances”.

Liability

A failure to prevent mechanism should establish a duty to prevent human rights harms in the company’s own activities and the activities of its business relationships. A failure to prevent such harms would result in possible civil liability for damages to those affected, unless the company could show that it has undertaken the due diligence required in the circumstances. This would not affect any criminal liability which could otherwise arise.

The corporate group and the supply chain

A failure to prevent mechanism should establish a duty to prevent human rights harms in the company’s own activities and the activities of its business relationships. The question as to whether a company should be liable for failing to meet this standard of care will be determined on the facts of each case. The Guidance should elaborate on the concept of leverage with reference to the wording of the UNGPs.

Defence and burden of proof

We recommend that the mechanism includes a defence of procedures “reasonable in all the circumstances”, or “reasonable” human rights due diligence, to prevent human rights harms. This should be accompanied by Guidance elaborating on the meaning of “reasonable” due diligence, with reference to the UNGPs, the concept of leverage, and clarifying that due diligence is accordingly not a “check-box” exercise or a “safe harbour”.

Extraterritorial application to transnational activity

A duty to prevent should extend to harms which take place in the entire value chain of a company, regardless of the jurisdiction of the harm, in accordance with the UNGPs. Guidance should elaborate on the meaning of harms in the company’s own activities and those of business relationships.

Enforcement and remedy

A failure to prevent mechanism should establish a right to civil action by those affected for compensation for damages suffered as a result of a failure to prevent human rights harms. In addition, it could provide for preventative and injunction orders, as well as state-based oversight mechanisms.

The report concludes with a model legal provision which incorporates the above recommendations.

I. Background

In June 2016, the UK Joint Committee on Human Rights (“JCHR”) announced an inquiry into human rights and business, to consider progress made by the UK government in implementing the UN Guiding Principles on business and human rights (“UNGPs”).³ As a result of the consultation, in April 2017, the JCHR published a report on *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*.⁴ In the report, the JCHR proposed that a failure to prevent mechanism, modelled on section 7 of the UK Bribery Act (“the Bribery Act”),⁵ may be “an appropriate one to apply to business and human rights”.⁶

In July 2011 the Bribery Act 2010 came into force. While the Act did not place a strict liability on companies for bribery, it did reverse the burden of proof, and created an offence of failure to prevent bribery for all companies, including parent companies. [...]

It has been suggested to us that the model of the Bribery Act might be an appropriate one to apply to business and human rights, both in civil and criminal law. [...]

This project considers the feasibility of a failure to prevent mechanism for corporate human rights harms modelled on the mechanism in the Bribery Act, and how such a mechanism could interact with the concept of human rights due diligence as articulated in the UNGPs. The UNGPs concept of human rights due diligence has been widely influential and incorporated into the OECD Guidelines for Multinational Enterprises, and multiple industry standards.⁷ This study takes place against the background of rapidly moving legal developments, in the UK and elsewhere, relating to corporate human rights responsibilities.⁸

In the UK, a group of civil society organisations launched a campaign for mandatory human rights and environmental due diligence legislation in April 2019.⁹ The independent review of the Modern Slavery

³ Ibid.

⁴ Above n 1.

⁵ UK Bribery Act 2010.

⁶ Above n 1 at para 186.

⁷ Such as, for example, the Equator Principles, June 2013 available at: https://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf, the International Financial Cooperation’s Performance Standards available at:

https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards, the Voluntary Principles on Security and Human Rights, 2000, available at: <https://www.voluntaryprinciples.org/>, the International Code of Conduct for Private Security Service Providers, 9 November 2010 available at: https://icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf, the Bangladesh Accord on Fire and Building Safety, available at: <https://bangladeshaccord.org/>, and various others.

⁸ For a comparative legal analysis of human rights due diligence and corporate liability laws in Europe, see European Coalition of Corporate Justice (“ECCJ”), “Comparative Table – mHRDD with Corporate Liability Laws in Europe”, September 2019, available at: http://corporatejustice.org/documents/publications/eccj/eccj_hrdd_pcl-comparative-table-2019-final.pdf.

⁹ Civil society campaign launched in the UK in April 2019, available at: https://corporate-responsibility.org/wp-content/uploads/2019/04/190409_UK-mHRDD-campaign-statement_FINAL-with-logos.pdf. See also, Amnesty International and Business and Human Rights Resource Centre (“BHRRC”), “Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse”, 4 September 2017, available at: <https://www.amnesty.org/en/documents/pol30/7037/2017/en/>.

Act was published in May 2019,¹⁰ and found that “a number of companies are approaching their obligations as a mere tick-box exercise”, and that around “40 per cent of eligible companies are not complying with the legislation at all”.¹¹ Also in April 2019, the UK Supreme Court handed down a judgment in *Lungowe v Vedanta*¹² which found that a company may have a duty of care to prevent its foreign subsidiaries or suppliers from causing harm to people affected by their operations, particularly where the company has demonstrated the assumption of a duty through corporate policies or commitments.

This study takes places against the background of rapidly moving legal developments, in the UK and elsewhere, relating to corporate human rights responsibilities.

Similarly, elsewhere in Europe various laws, legal proposals and legal campaigns are progressing for mandatory human rights and environmental due diligence regulation.¹³ As this study was ongoing, the Business and Human Rights Resource Centre launched a portal to document these developments.¹⁴ To date, it lists 13 jurisdictions, including the UK. For example, during 2019, the first legal action was instituted in terms of the French Duty of Vigilance Law,¹⁵ the Netherlands adopted a Child Labour Due Diligence Law,¹⁶ a legislative counter-proposal to a popular initiative for a mandatory human rights due diligence law continued in Switzerland,¹⁷ Finland committed to exploring a mandatory human

¹⁰ UK Government, *Independent Review of the Modern Slavery Act: Final Report*, 22 May 2019, available at: <https://www.gov.uk/government/publications/independent-review-of-the-modern-slavery-act-final-report>.

¹¹ *Ibid* at para 15.

¹² *Lungowe v Vedanta Resources plc* [2019] UKSC 20.

¹³ In addition to campaigns calling for mandatory human rights due diligence at the national level in a number of European countries, there are also calls for establishing an EU human rights due diligence legislation. On 3 October 2019, 88 civil society organisations and trade unions called for effective EU legislation that establishes a mandatory human rights and environmental due diligence framework for business, companies and financial institutions operating, or offering a product or service, within the EU. See ECCJ, “A call for EU human rights and environmental due diligence legislation”, 3 Oct 2019 available at:

http://corporatejustice.org/final_cso_eu_due_diligence_statement_03.10.19-compressed.pdf; ECCJ, “Over 100 civil society organisations demand human rights and environmental due diligence legislation”, 2 December 2019, available at: <https://corporatejustice.org/news/16800-over-100-civil-society-organisations-demand-human-rights-and-environmental-due-diligence-legislation>.

¹⁴ BHRRC, “National movements for mandatory human rights due diligence in European countries”, available at: <https://www.business-humanrights.org/en/national-movements-for-mandatory-human-rights-due-diligence-in-european-countries>.

¹⁵ Law No. 2017-399 of March 27, 2017 on the “Duty of Care of Parent Companies and Ordering Companies”.

¹⁶ *Kamerstukken I*, 2016/17, 34 506, A.

¹⁷ Swiss Coalition for Corporate Justice (“SCCJ”), “The Initiative Text with Explanations”, available at: https://corporatejustice.ch/wp-content/uploads/2018/06/KVI_Factsheet_5_E.pdf; SCCJ, “How does the parliamentary counter-proposal differ from the popular initiative (RBI)?”, May 2018, available at: https://corporatejustice.ch/wp-content/uploads/2018/07/Comparision_RBI_counter-proposal_EN-1.pdf.

rights due diligence law,¹⁸ and Norway released a draft proposal for such a law.¹⁹ In Germany, an unofficial outline of possible mandatory human rights and environmental due diligence requirements was circulated,²⁰ and in December 2019, an announcement was made of a potential proposal for a German supply chain due diligence bill.²¹

Moreover, at the international level, negotiations are underway for a UN treaty on business and human rights. The most recent version of the Draft Treaty, published in July 2019, provides for legal liability for a failure to prevent mechanism:²²

States Parties shall ensure that their domestic legislation provides for the liability of natural or legal persons conducting business activities, including those of transnational character, for its *failure to prevent* another natural or legal person with whom it has a contractual [relationship], from *causing harm* to third parties when the former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities, including those of transnational character, regardless of where the activity takes place. [Our emphasis]

These legal developments, coupled with a lack of a clear legal standard in relation to corporate human rights impacts, have resulted in significant legal uncertainty for companies with respect to their human rights due diligence.

Within this context, this study considers whether a failure to prevent mechanism modelled on section 7 of the Bribery Act is feasible as a means to improve accountability and remedy for business-related adverse human rights impacts, while also providing legal certainty for business.

¹⁸ See Ykkösketjuun official website available at: <https://ykkosketjuun.fi/en/>. There are also calls for mandatory human rights due diligence in Italy, see BHRRC "Over 50 academics & experts sign open letter to Italian gov. institutions on issue of business & human rights", 12 November 2019, available at: <https://www.business-humanrights.org/en/over-50-academics-experts-sign-open-letter-to-italian-govt-institutions-on-issue-of-business-human-rights>. On human rights due diligence laws in Italy see also, FIDH and HRIC, "Italian Legislative Degree no. 231/2001: A Model for Human Rights Due Diligence Legislation?", November 2019, available at: https://e6e968f2-1ede-4808-acd7-cc626067cbc4.filesusr.com/ugd/6c779a_d800c52c15444d74a4ee398a3472f64c.pdf.

¹⁹ Report from the Ethics Information Committee, appointed by the Norwegian government on June 1, 2018. Report delivered on November 28, 2019. Draft translation from Norwegian of sections of Part I. Available at: https://www.business-humanrights.org/sites/default/files/documents/Norway%20Draft%20Transparency%20Act%20-%20draft%20translation_0.pdf. See also BHRRC, "Norway: Government-appointed committee proposes human rights transparency and due diligence regulation", available at: https://www.business-humanrights.org/sites/default/files/documents/Norway%20Draft%20Transparency%20Act%20-%20draft%20translation_0.pdf.

²⁰ BHRRC, "German Development Ministry drafts law on mandatory human rights due diligence for German companies", available at: <https://www.business-humanrights.org/en/german-development-ministry-drafts-law-on-mandatory-human-rights-due-diligence-for-german-companies>. See also the statement by the German Bundestag dated 29 November 2019, available at: <https://www.bundestag.de/presse/hib/670510-670510>.

²¹ Manfred Schäfers "Regierung droht mit einem Lieferkettengesetz", *Frankfurter Allgemeine*, 11 December 2019; Caspar Dohmen, "Minister arbeiten an Lieferkettengesetz", *Süddeutsche Zeitung*, 11 December 2019.

²² Art 6(6) of the Revised Draft Treaty "Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises", 16 July 2019, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf.

II. Methodology

We conducted the study in three phases:

- Firstly, we undertook an anonymous online survey of business designed to understand their experience of the current legal landscape, whether they would support such a failure to prevent mechanism, and, for companies subject to section 7 of the Bribery Act, to understand the practical impact of this provision on business. The survey took place between late January and early March 2019.
- Secondly, we undertook consultations with: i) legal practitioners; ii) business representatives; and iii) academics and NGOs working on corporate human rights due diligence issues.
- Finally, we carried out a feasibility study into a failure to prevent mechanism for adverse human rights impacts. Taking section 7 of Bribery Act and the UK Ministry of Justice Guidance to the Bribery Act (“the Guidance”)²³ as a starting point, we considered whether section 7 could be meaningfully transposed so as to apply to adverse human rights impacts. This phase of the study consisted of a literature review, analysis of the legal elements of the mechanism within the framework of the UNGPs, and a comparison of current international standards, national legislation and legal proposals in other countries.²⁴

The results of the survey and the consultations are discussed in the study and inform the conclusions and recommendations. The study concludes with an analysis of how a failure to prevent mechanism for human rights harms could most effectively be modelled on section 7 of the UK Bribery Act.

²³ UK Ministry of Justice, *The UK Bribery Act 2010 Guidance*, available at: <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

²⁴ The study compares the key legal elements of a proposed failure to prevent mechanism with existing UK legislation such as the UK Modern Slavery Act 2015, and the UK Criminal Finances Act 2017, as well as with a number of other regulations recently passed or under negotiation in Europe, namely: i) the French Duty of Vigilance Law 2017; ii) the Dutch Child Labour Due Diligence law 2019; iii) the Swiss Responsible Business Initiative (“RBI”) and counter-proposal; and iv) an unofficial outline for a proposed German mandatory due diligence law discussed in n 20 above.

III. Business Survey Results

III.1. General Data

We received 40 survey responses from businesses. The majority of respondents (62.5%) were from large multinational companies, and the remainder represented all other **company sizes**: 17.5% identified themselves as small companies, 7.5% as large national and 7.5% as medium.²⁵

Survey respondents were spread across many **sectors**, including energy and natural resources,²⁶ IT and technology,²⁷ financial services,²⁸ manufacturing,²⁹ construction and real estate,³⁰ consumer goods,³¹ healthcare, pharmaceuticals and biotechnology,³² telecoms,³³ agriculture and agribusiness,³⁴ entertainment, media and publishing,³⁵ and transportation, travel and tourism.³⁶ One respondent indicated that they were a conglomerate which operated in more than one of the above sectors. No survey respondents selected the automotive, chemicals or retailing sectors.

The number of people employed by respondents ranged up to 105,000 with an average of 19,000. In total the companies responding to our survey had 68,902 first tier suppliers, averaging 5700 per respondent.³⁷

The majority of survey respondents indicated that their companies were **primarily based or headquartered** in the UK (62.5%), followed by the rest of Western Europe (31.25%), the US and Canada (25%), Sub-Saharan Africa (9.38%), Asia excluding India or China (3.13%), Australia, New Zealand and the Pacific (3.13%), and Latin American including Mexico (3.13%). None of the respondents were primarily based in Eastern Europe including Russia, China, India, the Middle East or North Africa.

However, survey respondents indicated that their companies' **operations** stretch across all regions of the globe. The majority of respondents operate in the UK (78.13%) and the rest of Western Europe (75%). Respondents also operate in the US and Canada (65.63%), Australia, New Zealand and the Pacific (59.38%), the Middle East and North Africa (56.25%), Latin America including Mexico (56.25%), China (53.15%), Asia excluding India and China (53.15%), Eastern Europe including Russia (50%), Sub-Saharan Africa (43.75%), and India (31.25%). One respondent specifically indicated that they operate "[g]lobally".

²⁵ The remaining 5% selected "other" including one which indicated that they were "multi-national, but still medium to small".

²⁶ 27.03% of respondents.

²⁷ 10.81% of respondents.

²⁸ 8.11% of respondents.

²⁹ 8.11% of respondents.

³⁰ 5.41% of respondents.

³¹ 5.41% of respondents.

³² 5.41% of respondents.

³³ 5.41% of respondents.

³⁴ 2.7% of respondents.

³⁵ 2.7% of respondents.

³⁶ 2.7% of respondents.

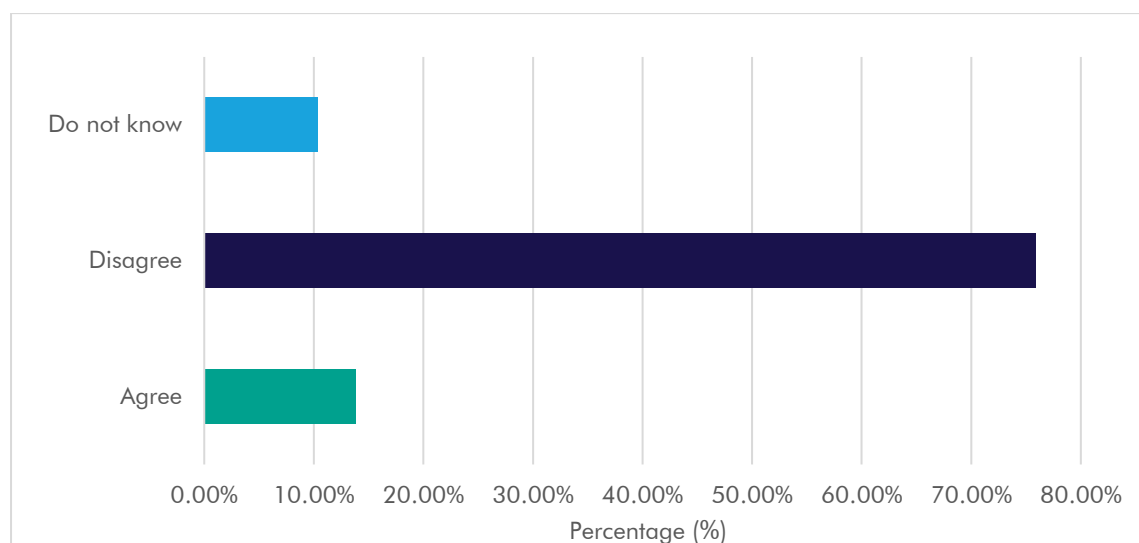
³⁷ These figures exclude respondents which similarly indicated that they have "thousands" of suppliers.

III.1.1. Views on the existing legal landscape regarding corporate respect for human rights

Survey respondents were asked about their views on the current legal landscape regarding corporate obligations to respect human rights, specifically relating to clarity and legal certainty, which are cornerstones of the rule of law. Respondents were also asked about benefits for business which regulation might provide, including by levelling the playing field and facilitating leverage by providing a non-negotiable standard to business partners.

A large majority of respondents (75.86%) **disagreed** with the statement that “existing law provides business with **clarity** about what are corporate human rights obligations”. Only 13.79% agreed that existing law provides clarity, and 10.34% indicated that they did not know.

Q6. Do you agree with this statement? “Existing law provides business with clarity about what are corporate human rights obligations”?



The majority of respondents (68.97%) also **disagreed** with the statement that existing law “provides business with sufficient **legal certainty** about which procedures are required to avoid legal risks for human rights abuses”. In contrast, only 6.9% agreed that existing law provides legal certainty, and 24.14% indicated that they do not know.

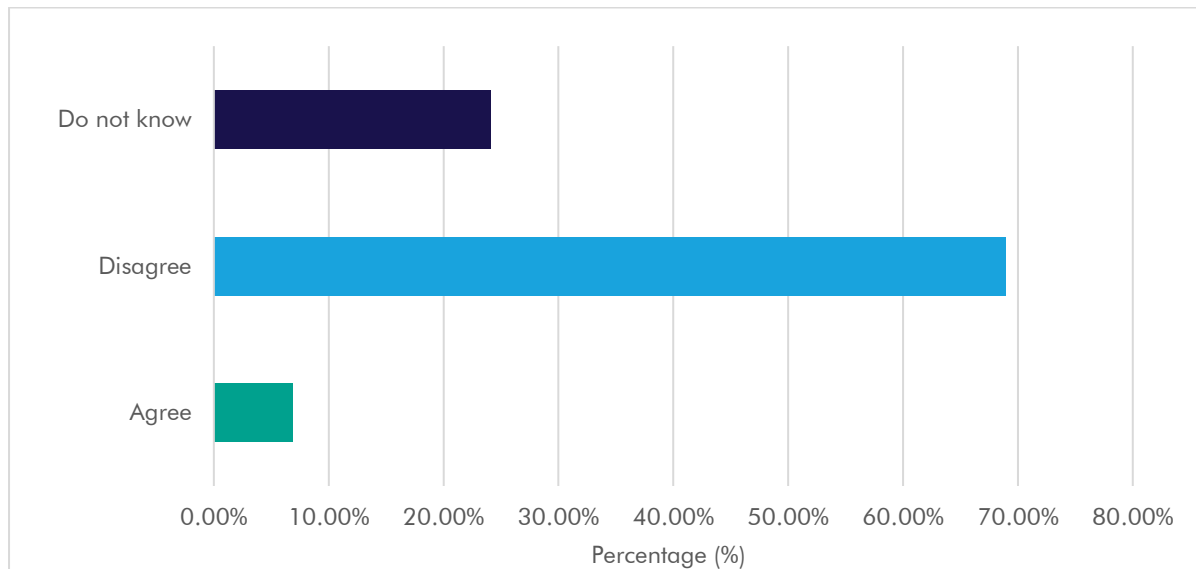
A large majority of respondents (75.86%) disagreed with the statement that “existing law provides business with clarity about what are corporate human rights obligations”.

It is noted that these results were obtained before the judgment of *Vedanta*,³⁸ which may have led to further uncertainty amongst companies about the legal risks they face by introducing corporate policies or public commitments to human rights.³⁹

³⁸ Above n 12.

³⁹ Julianne Hughes-Jennett and Peter Hood explain: “[T]he Supreme Court suggests, without limitation to other circumstances, that a duty of care may arise, according to established principles of negligence, where: in

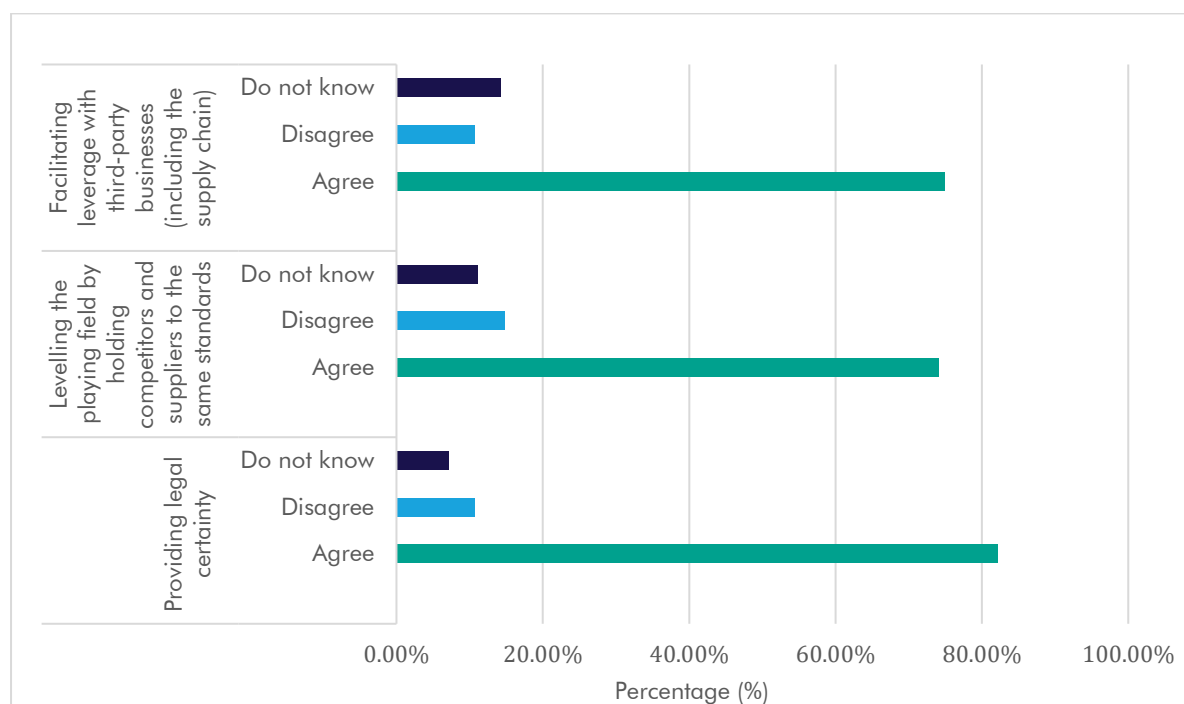
Q7. Do you agree with this statement? “Existing law provides business with sufficient legal certainty about which procedures are required to avoid legal risks for human rights abuses”



published materials, a parent holds itself out as exercising a degree of supervision and control of its subsidiaries, even if it does not in fact do so; and, perhaps more problematic from a policy perspective, where a parent company takes active steps, by training, supervision and enforcement, to see that a group policy is implemented by subsidiaries. This second situation is problematic, taken in isolation, it could have a dissuasive effect on businesses implementing group wide sustainability or environmental policies or respecting human rights according to Pillar II of the UN Guiding Principles. The Guiding Principles set out the expectation that, amongst other things, business enterprises publicly adopt human rights policies and seek to implement these throughout their value chain through effective and transparent due diligence. However, for as long as this remains voluntary [...], there will be an understandable concern that voluntarily taking steps to respect human rights will increase the scope for a duty of care arising under English negligence law. However, before tearing up a human rights or sustainability policy, it is important to put this development into context. First, it is axiomatic that the best way to reduce legal (never mind reputational) risk is to identify a human rights risk and take effective measures to stop it materialising in the first place. Second, depending on the wording of the relevant policy or public pronouncement, any duty could be discharged by adequately implementing a policy according to the relevant standard of care (i.e. what would be expected of an ordinary, reasonable and prudent person in the same circumstances). A policy does not, unless it is drafted to do so, establish some form of strict liability over outcomes which are not within the company's control. Third, in any event, in circumstances where a parent company lacks the ability to control the operations of an overseas subsidiary, it will be difficult for claimants to establish the necessary degree of causation. So the legal risk remains remote, notwithstanding the possible existence of a duty of care. But perhaps more significantly, stakeholders, including consumers and investors, increasingly expect companies to have policies and procedures in place that deal with human rights and the law, to a lesser or greater degree, is developing to reflect this requirement [...]. As such, it is unlikely that the decision on parent company liability in Vedanta will lead responsible businesses to withdraw policies or suspend engagement in human rights or sustainability issues in their value chain." Julianne Hughes-Jennett and Peter Hood, "Vedanta: UK Supreme Court takes the 'straitjacket' off claims against parent companies in the English Courts", *Hogan Lovells*, 11 April 2019. Similarly, see Peter Nestor and Jonathan Drimmer, BSR, "How companies should respond to the Vedanta ruling", BSR, 30 April 2019, available at: <https://www.bsr.org/en/our-insights/blog-view/how-companies-should-respond-to-the-vedanta-ruling>.

Of those respondents which indicated that existing law does not provide clarity, 68.18% are multinationals, and of those who stated that existing law does not provide legal certainty, 65% are multinationals. This may not be surprising given that the majority of legal cases and campaigns against companies involve allegations of adverse human rights impacts by multinational enterprises.

Q8. Do you agree with this statement? “Additional regulation on corporate human rights obligations may provide benefits for business through...”



Companies were asked about the possible benefits for business which additional regulation on corporate human rights obligations may provide:

- The vast majority of respondents (82.14%) agreed that additional regulation may provide benefits to business through providing **legal certainty**. Only 10.71% disagreed, and 7.14% indicated that they do not know.
- A large majority (74.07%) agreed that additional regulation may provide benefits to business through **levelling the playing field**, insofar as it will hold competitors and suppliers to the same standards. Only 14.81% disagreed, and 11.11% indicated that they do not know.
- A large majority (75%) agreed that additional regulation may benefit business by **facilitating leverage** with third parties, including in the supply chain. Only 10.71% disagreed, and 14.29% indicated that they do not know.

Respondents were also asked about these identical benefits in relation to their experiences with the Bribery Act. The responses and related graphics are set out in the subsection below.

Over a third (35.71%) of respondents indicated that their companies had been linked to allegations of adverse human rights impacts.

Half of survey respondents (50%) indicated that their companies **undertake human rights due diligence** in line with the UNGPs, and 28.57% indicated that they undertake due diligence in certain areas only, such as health and safety, anti-discrimination and equality, environment and labour rights.

In contrast, 10.71% indicated that they do not undertake human rights due diligence, and the remaining 10.71% indicated that they do not know.

The vast majority of respondents (82.14%) agreed that additional regulation may provide benefits to business through providing legal certainty.

Interestingly, of those respondents who indicated that their companies have been linked to allegations of human rights impacts, 80% are undertaking human rights due diligence, and a further 10% are undertaking human rights due diligence in certain areas only. Of those respondents which have been linked to adverse human rights impacts, 90% are multinational enterprises. The higher prevalence of human rights due diligence amongst those companies which have been linked to allegations of adverse human rights impacts may suggest that these allegations have spurred them to undertake human rights due diligence.

However, it could also be interpreted to confirm that those companies which publicly commit to undertaking human rights due diligence thereby expose themselves to a higher risk of scrutiny and allegations. This would echo the outcome in *Vedanta*,⁴⁰ in which the UK Supreme Court held that a company's efforts to introduce human rights into its policies could demonstrate an assumption of an actionable duty of care. Similar concerns were expressed during our consultations, in which companies indicated that they face meritless targeting by civil society organisations worldwide, due to their company's size, influence and willingness to put information on human rights impacts into the public domain. These considerations may explain why large multinational companies in particular are dissatisfied with the existing lack of legal certainty and clarity, as evidenced in the above survey responses. This is considered further below.

Our survey also asked which **department or function** of their company is primarily responsible for human rights due diligence. The most selected department was corporate social responsibility (25%), followed by legal (12.5%). Other functions included procurement or supply chains management (8.33%), compliance (8.33%), sustainability and environment (8.33%), and each at 4.17% respectively, operations management, human resources, CEO, public relations or government relations, an individual role dedicated to human rights, or external consultants.

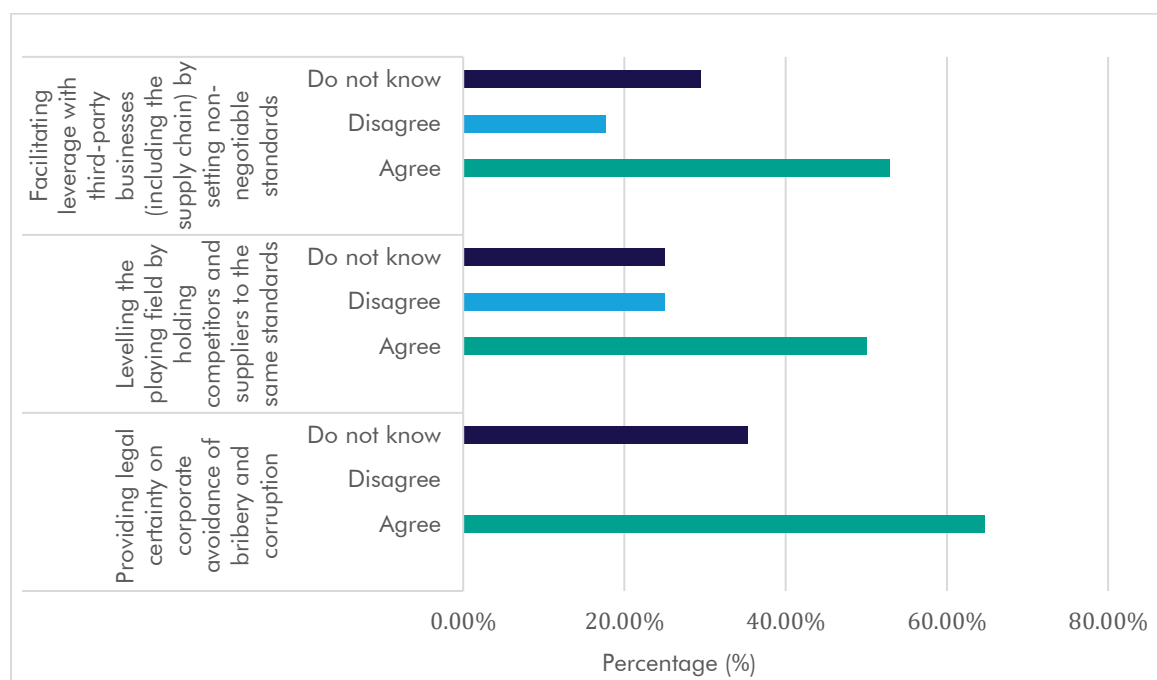
III.2. Business experience of section 7 of the Bribery Act

In order to gain insights about business experience with section 7 of the Bribery Act, we asked companies surveyed whether they take steps to comply with the Bribery Act. 17 out of 40 respondents indicated that they do, and only these respondents were asked further questions about the Bribery Act. Accordingly, the following statistics refer only to those which indicated that their company has experience with the Bribery Act.⁴¹

⁴⁰ Above n 12.

⁴¹ Of which 76.47% were multinational companies, again spanning most sector categories and operating in all regions.

Q14. Do you agree with this statement? “The UK Bribery Act has been effective in...”



Among respondents that are affected by section 7 of the Bribery Act:

- 64.71% of respondents agree that the Bribery Act has been effective in providing **legal certainty** on corporate avoidance of bribery and corruption. None of the respondents disagreed that the Bribery Act has provided legal certainty. The remaining 35.29% of respondents indicated that they do not know.
- 50% of respondents agreed that the Bribery Act has been effective in **levelling the playing** field by holding competitors and suppliers to the same standards. 25% disagreed that it has been effective in levelling the playing field, and 25% indicated that they do not know.
- 52.94% of respondents agreed that the Bribery Act has been effective in **facilitating leverage** with third party businesses (including supply chain) by setting a non-negotiable standard. Only 17.65% disagreed, and 29.41% indicated that they do not know.

It is noticeable that the number of respondents which anticipate benefits from a possible failure to prevent mechanism for human rights harms are proportionately slightly higher than those who have reported similar benefits from Bribery Act. Nevertheless, these positive results are based on respondents’ practical experiences with a mechanism which has now been in place for almost ten years, and suggest that it is not unrealistic to expect the same benefits from a similar mechanism for human rights.

Benefit anticipated / experienced	Failure to Prevent Human Rights Harms	Failure to Prevent Bribery (Section 7 of Bribery Act)
Legal certainty	82.14%	64.71%
Levelling the playing field	74.07%	50%
Facilitating leverage	75%	52.94%

Respondents were asked whether the introduction of the Bribery Act has impacted on their decision to invest in countries with high risks of corruption and bribery. This would be, for example, by decreasing investment in that country, divestment from that country, or refusing to make new investments in that country. The majority of respondents (53.33%) indicated that the Bribery Act has not had any impact on their company's investment decisions in any countries. However, a significant minority (40%) indicated that they have since decreased their investment in a certain country or countries based **in part** on corruption considerations, in addition to other considerations. Only 6.67% indicated that they have since decreased their investment in a certain country or countries based **exclusively** on corruption considerations.

Respondents were also asked whether the introduction of the Bribery Act has had an impact on their company's decision to invest in high risk **sectors**. Again, the examples were provided of decreasing investment in that sector, divestment from that sector, and refusing to make new investments in that sector. A large majority (73.33%) of respondents indicated that the Bribery Act has not had any impact on their investment decisions in any sectors. Only 20% indicated that they have since decreased their investment in a certain sector or sectors based **in part** on corruption considerations, in addition to other considerations. Only 6.67% indicated that they have decreased their investment in a certain sector or sectors based **exclusively** on corruption considerations.

[T]hese positive results are based on respondents' practical experiences with a mechanism which has now been in place for almost ten years, and suggest that it is not unrealistic to expect the same benefits from a similar mechanism for human rights.

Respondents were asked whether the introduction of the Bribery Act has affected their company's ability to compete with foreign companies. The vast majority (75%) indicated that it has not had any impact on their competitiveness. Only 12.5% indicated that the Bribery Act has put their company at a **disadvantage** to foreign companies, and the exact same number (12.5%) indicated that it has given their company an **advantage** over foreign companies.

Over two thirds of respondents (68.75%) that are affected by the Bribery Act indicated that their companies introduced **new procedures** in response to the Bribery Act. Only 6.25% indicated that their companies did not introduce new procedures, and 25% indicated that they do not know.

Of those procedures which respondents indicated that their companies introduced in response to the Bribery Act, training on anti-bribery and corruption was the most common step (selected by 80% of respondents which introduced such steps). This was followed by contractual clauses and codes of conduct (60% each), and audits (46.67%). A third of respondents (33.33%) indicated, respectively, that their company undertook internal or external investigations, acquired additional staff for anti-bribery and corruption, engaged with experts on anti-corruption and bribery, and reporting and transparency of anti-bribery and corruption measures. Other steps include additional budgetary resources for anti-bribery and corruption (26.67%), and engaging with local partners (20%).

Survey respondents were asked which **department or function** within their company is primarily responsible for implementing section 7 of the Bribery Act. Compliance was the top selected role (by 43.75%), followed by legal (37.5%). Other functions were selected by only 6.25% of respondents respectively, namely operations management and the board or non-executive directors.

It is noticeable that corporate social responsibility was not selected by any respondents as being tasked with responsibilities for bribery but was the top selected function in charge of human rights due diligence. If a regulation for human rights based on section 7 of the Bribery Act is introduced, primary responsibility for human rights due diligence may similarly move away from corporate social responsibility to the compliance and legal departments.

III.3. Business support for human rights due diligence regulation

The survey findings seem to suggest a general dissatisfaction on the part of business respondents with the current **lack of clarity and legal certainty**. This is also evidenced by recent trends across Europe for certain large multinationals to support developments towards mandatory human rights due diligence requirements:

- In Finland, companies joined the campaign calling for mandatory human rights due diligence legislation. The coalition campaign, launched in September 2018, is made up of over 115 companies, civil society and trade unions. Another 20 companies and NGOs have publicly supported the call.⁴² Companies from different sectors are engaged in the coalition and call for a level playing field. For example, the homeware brand Finlayson stated: "This campaign calls for common, fair rules for all companies".⁴³
- Although "[m]any Dutch businesses fiercely opposed" the Dutch Child Labour law, the law was supported by a group of over 40 Dutch companies, including multinationals like ABN AMRO and Heineken.⁴⁴
- The Swiss Association "Groupement des Entreprises Multinationales", representing 90 large multi-national companies including JP Morgan, L'Oréal, Nissan International, PepsiCo International, and Procter & Gamble Europe,⁴⁵ supports the Swiss legislative proposal.⁴⁶

⁴² ECCJ, "Companies, Civil Society and Unions call on Finland to adopt mHRDD legislation", 24 September, 2018, available at: <https://corporatejustice.org/news/9039-civil-society-and-companies-call-finland-to-adopt-mandatory-hrdd-legislation>.

⁴³ ECCJ, "Civil society, companies and politicians call for mandatory Human Rights Due Diligence at a public event in Finland", 8 November 2018 <http://corporatejustice.org/news/10555-civil-society-companies-and-politicians-call-for-mandatory-human-rights-due-diligence-at-a-public-event-in-finland>.

⁴⁴ Joseph Wilde-Ramsing and Manon Wolfkamp, "Going Dutch: Four things you should know about the Netherlands' new law to eliminate child labour", *BHRRRC*, available at: <https://www.business-humanrights.org/en/going-dutch-four-things-you-should-know-about-the-netherlands%E2%80%99-new-law-to-eliminate-child-labour>.

⁴⁵ For a full list of members see GEM members, available at: https://www.gemonline.ch/uploads/Files/documents/Liste%20membres%20GEM_Juillet%202019_V2.pdf.

⁴⁶ Association of Multinational Enterprises ("GEM"): "The Groupement des Entreprises Multinationales (GEM) welcomes the adoption by the National Council of the counter-project to the initiative for responsible companies. [...] This legislation would benefit the attractiveness of Switzerland as a business location. [...] It now calls on the Council of States to give its assent." Translation of French press release dated 15 July 2018 "Entreprises mises devant leurs responsabilités", available at: https://www.gemonline.ch/uploads/Files/documents_publics/Revue_de_presse/2018/2018.06.15_Agefi_Entreprises%20mises%20devant%20leurs%20responsabilites.pdf.

- In June 2019, Ethos Foundation and 22 Swiss and foreign institutional investors sent a statement to the members of the Swiss Lower House in support of the counter-proposal to introduce mandatory human rights due diligence, stating:⁴⁷

As institutional investors, we have a responsibility to consider whether the companies we are investing in have negative impacts on human rights and the environment and, if so, to prevent and mitigate these impacts...Reputational and operational risks related to human rights breaches have a significant negative financial impact on the companies in which we are shareholders.

- Major chocolate companies are calling for the EU to pass a human rights due diligence regulation addressing environmental and human rights impacts in commodity supply chains.⁴⁸
- In April 2019, just after the head of the German Employers' Associations called the German human rights due diligence law "nonsense", several German companies like Kik (which had recently been sued for alleged negligence for human rights impacts in the factory of its supplier), Tchibo and Daimler expressed their support for the law.⁴⁹
- With respect to a failure to prevent mechanism modelled on section 7 of the UK Bribery Act specifically, Rob Billington from Mulberry stated before the UK Joint Parliamentary Committee on Human Rights:⁵⁰

If we all agree that the best way to remove or certainly minimise the risk is to have a more transparent, rigorous due diligence system that we adopt [...] compliance with and rigour in that system has to be the best answer.

- In December 2019, 42 German companies signed a joint statement calling for mandatory human rights and environmental due diligence legislation.⁵¹

In these examples, companies supporting regulatory reforms in this area are frequently large or multinational companies. As suggested by our survey, multinational companies may be particularly affected by the lack of legal certainty and risks in their global operations and supply chains.

In our survey, respondents were asked for their views on the general legal landscape regulating corporate respect for human rights, but not about the specific legal elements of a possible failure to

⁴⁷ Ethos, "Mandatory Human Rights Due Diligence in Switzerland: Institutional Investors Join Forces to Support Legislation", 11 June 2019, available at: <https://ethosfund.ch/en/news/mandatory-human-rights-due-diligence-in-switzerland-institutional-investors-join-forces-to>.

⁴⁸ FERN, "Chocolate companies and MEPs call for EU due diligence regulation", 10 April 2019, available at: <https://www.fern.org/fr/ressources/chocolate-companies-and-meps-call-for-eu-due-diligence-regulation-954/>; Euractiv, "Companies will support EU law on due diligence, but need assurance on liability", 19 March 2019, available at: <https://www.euractiv.com/section/economy-jobs/interview/companies-will-support-eu-law-on-due-diligence-but-need-assurances-on-liability/>.

⁴⁹ Birgit Marshall, "Kik fordert Menschenrechts-Gesetz für Lieferketten", *RP Online*, 10 April 2019, available at: https://rp-online.de/wirtschaft/unternehmen/erste-deutsche-unternehmen-fordern-lieferkettengesetz_aid-37996657.

⁵⁰ Rob Billington, Mulberry, JCHR above n 1 at 57, Q 74.

⁵¹ BHRRC, "Statement: Für Eine Gesetzliche Regelung Menschenrechtlicher und Umweltbezogener Sorgfaltspflichten", 9 December 2019, available at: <https://www.business-humanrights.org/en/statement-f%C3%BCr-eine-gesetzliche-regelung-menschenrechtlicher-und-umweltbezogener-sorgfaltspflichten>.

prevent mechanism.⁵² These legal elements were discussed with business and other stakeholders during our roundtable consultations. Although our consultations confirmed that companies are frustrated by the existing lack of legal certainty and clarity in the current legal landscape, and there is an appetite for smart, clear regulation, there was no consensus amongst business stakeholders about specific aspects relating to legal liability. Indeed, the legal elements relating to **liability** were in general **not supported** by business stakeholders.

Where relevant, the views of stakeholders expressed during our consultations on the specific legal elements of a possible failure to prevent mechanism are discussed below.

IV.4. Lessons from business experience of the Bribery Act

Our survey findings suggest that the experience in complying with the failure to prevent mechanism under the Bribery Act has, overall, been positive. Respondents indicated that their investment decisions have, overall, not been affected. Where investment decisions were affected, based in whole or in part on corruption considerations, these were more likely to be related to high risk countries than to high risk sectors. Initial fears about the impact of the failure to prevent bribery mechanism on companies' ability to compete with foreign companies were not borne out in practice. There were no respondents which did not agree that business benefitted from the legal certainty that the Bribery Act mechanism provides.

The results regarding business' experience with the Bribery Act are helpful for the purposes of our study, insofar as it informs how a transposed failure to prevent mechanism may apply. These experiences are also helpful for other legislative considerations in the area of mandatory due diligence. Most of the companies that responded to our survey's questions about the Bribery Act – which applies only to companies that have business in the UK – are multinational companies, and their section 7 experience relates to their global operations. Similar considerations and standards would apply to the practices of other multinational companies operating in Europe and the world. It is hoped that the generally positive experience of the Bribery Act, twinned with general enthusiasm for smart clear regulation in the field of business and human rights will help to reassure legislators about any adverse impact which the mechanism might have on UK business.

⁵² This was seen as too speculative and complex for an online survey.

IV. Legal Elements

As a preliminary point, it is important to note that there are a number of substantive differences between human rights and bribery which preclude a simple transposition of the mechanism into a human rights context. A workable and meaningful regime in relation to human rights abuses must necessarily cover a range of behaviours, contexts and degrees of involvement. In contrast, bribery is a relatively well-defined activity, which is defined with reference to the payment of a bribe with the intention to benefit the company.

The UNGPs mention that companies may “cause, contribute and [be] directly linked” to human rights impacts,⁵³ which is not similarly reflected in the concept of bribery offences. Moreover, anti-bribery regimes are not generally victim-focused,⁵⁴ whereas human rights impacts by definition always affect a rights-holder.⁵⁵ Provisions within the Bribery Act also focus on the criminal offence of bribery, which does not ordinarily provide a remedy for victims.

In this section, we consider the legal elements of the failure to prevent model in the Bribery Act, one by one, in order to arrive at a conclusion as to whether and how this could be transposed into a failure to prevent mechanism for human rights harms. We use as our framework the standards set up by the UNGPs, as well as existing UK law and similar legislation in other jurisdictions. It concludes with recommendations on the different legal elements of a possible failure to prevent mechanism for human rights harms.

The full text of the relevant sections of the Bribery Act and the Guidance are contained in Section V below.

⁵³ Guiding Principle 17(a).

⁵⁴ Today bribery is no longer considered a victimless crime, as evidenced in the UK General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases, 2017, available at: <https://www.cps.gov.uk/sites/default/files/documents/publications/General-Principles-to-compensate-overseas-victims-December-2017.pdf>.

⁵⁵ The UNGPs refer to those whose human rights are or may be adversely affected as “rights-holders” rather than “victims”. Anne Peters argues that corrupt conduct could be conceptualized and punished as human rights violations under certain preconditions, but that such legal construction should be undertaken within limits. Anne Peters, “Corruption and Human Rights”, *Basel Institute of Governance*, 2015, available at: https://www.mpil.de/files/pdf4/Peters_Corruption_and_Human_Rights20151.pdf. In contrast, Cecily Rose argues that despite increasing focus on a human rights approach to corruption, international human rights law does not provide a strong basis for addressing such conduct: “International human rights treaties make no mention of corruption, and human rights treaty bodies have not brought conceptual clarity to the question of how corruption violates or undermines human rights. Given that human rights law binds States alone, it is also ill-suited to a phenomenon that typically occurs at the intersection of the public and private sectors”. Cecily Rose, “The Limitation of a Human Rights Approach to Corruption” (2016) 65(2) *International and Comparative Law Quarterly* 405.

IV.1. Rights covered

IV.1.1. UK Bribery Act

Section 7 of the Bribery Act applies where a relevant commercial organisation bribes another person with the intention to obtain or retain business or an advantage in the conduct of its business. The term bribery is set out in sections 1⁵⁶ and 6⁵⁷ and relates to either:

⁵⁶ Section 1 of the UK Bribery Act provides:

1 Offences of bribing another person

(1) A person ("P") is guilty of an offence if either of the following cases applies.

(2) Case 1 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P intends the advantage—

(i) to induce a person to perform improperly a relevant function or activity, or

(ii) to reward a person for the improper performance of such a function or activity.

(3) Case 2 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

(4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.

(5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party.

⁵⁷ Section 6 of the UK Bribery Act provides:

6 Bribery of foreign public officials

(1) A person ("P") who bribes a foreign public official ("F") is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.

(2) P must also intend to obtain or retain—

(a) business, or

(b) an advantage in the conduct of business.

(3) P bribes F if, and only if—

(a) directly or through a third party, P offers, promises or gives any financial or other advantage—

(i) to F, or

(ii) to another person at F's request or with F's assent or acquiescence, and

(b) F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift.

(4) References in this section to influencing F in F's capacity as a foreign public official mean influencing F in the performance of F's functions as such an official, which includes—

(a) any omission to exercise those functions, and

(b) any use of F's position as such an official, even if not within F's authority.

(5) "Foreign public official" means an individual who—

(a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),

(b) exercises a public function—

(i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or

(ii) for any public agency or public enterprise of that country or territory (or subdivision), or

(c) is an official or agent of a public international organisation.

(6) "Public international organisation" means an organisation whose members are any of the following—

(a) countries or territories,

(b) governments of countries or territories,

(c) other public international organisations,

- offering, promising or giving some advantage to another person with the intention to induce them to or reward them for improperly performing a function or activity (section 1(2)); or
- offering, promising or giving some advantage to another person with knowledge that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity (section 1(3)).

IV.1.2. Transposition into a human rights mechanism

In relation to the scope of rights that could be covered by a failure to prevent mechanism, this section considers the definition of "human rights", human rights "harms" as well as "adverse human rights impacts"; and the type of rights covered.

The UNGPs require respect for "all internationally recognized human rights".

The conduct prescribed by section 7 of the Bribery Act is relatively self-contained, relating to the provision of an advantage to another with a particular intention. "Human rights" are much broader in material scope than bribery and there remains a degree of contention between States as well as non-State actors as to the precise definition of certain rights. This is set out below.

IV.1.2.a. "All internationally recognized human rights"

The UNGPs require respect for "all internationally recognised human rights". According to UNGP 12, internationally recognised human rights include – at a minimum – the Universal Declaration of Human Rights together with the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), as well as the eight core conventions from the International Labour Organization ("ILO"). The UN Special Representative on Business and Human Rights, John Ruggie, stated:⁵⁸

Some stakeholders believe that the solution lies in a limited list of human rights for which companies would have responsibility, while extending to companies, where they have influence, essentially the same range of responsibilities as States. For reasons this report spells out, the Special Representative has not adopted this formula. Briefly, business can affect virtually all internationally recognized rights. Therefore, any limited list will almost certainly

(d) a mixture of any of the above.

(7) For the purposes of subsection (3)(b), the written law applicable to F is—

(a) where the performance of the functions of F which P intends to influence would be subject to the law of any part of the United Kingdom, the law of that part of the United Kingdom,

(b) where paragraph (a) does not apply and F is an official or agent of a public international organisation, the applicable written rules of that organisation,

(c) where paragraphs (a) and (b) do not apply, the law of the country or territory in relation to which F is a foreign public official so far as that law is contained in—

(i) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned, or

(ii) any judicial decision which is so applicable and is evidenced in published written sources.

(8) For the purposes of this section, a trade or profession is a business.

⁵⁸ UN Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, 7 April 2008, at para 6.

miss one or more rights that may turn out to be significant in a particular instance, thereby providing misleading guidance.

To align with the UNGPs a failure to prevent mechanism would therefore need to relate to “all internationally recognised human rights”. This raises the question whether the definition of human rights under international law is sufficiently coherent and certain as to create legal liability.

Some “internationally recognised human rights” are clear and unambiguous, such as the definition of torture. In addition, definitions of offences have already been created in the UK for human rights violations such as trafficking in the UK Modern Slavery Act, and for most labour rights. For some human rights, the parameters of how they would apply to companies are not always immediately evident, although this is gradually being clarified since the UNGPs have described the corporate responsibility to respect human rights.⁵⁹ For example, because recent legislative developments around mandatory human rights due diligence expressly include environmental harms, the specific obligations which are required of companies for their climate change impacts are currently being defined and clarified.⁶⁰

This is not to say that the task of defining a particular international human rights norm is impossible: it can be achieved with reference to treaty; custom; and interpretative aids, such as General Comments from UN Treaty bodies and the decisions of courts. However, absent a clear statutory definition of the prescribed conduct, there will always be scope for divergent interpretations.

It was noted during the consultations that, if a failure to prevent mechanism were to cover “all internationally recognised human rights”, such a law would risk creating a higher standard for companies than for the UK government, which is only bound to those human rights treaties which it has ratified and by norms of customary international law. This, however, does not seem to be a particular concern as the UK has ratified the ICCPR, the ICESCR, the ILO Core Conventions, as well as most of the other major international human rights treaties. Relevant treaties which the UK has not ratified to date are the Migrant Workers Convention and the Convention on Enforced Disappearances, along with some of the Optional Protocols.

The Swiss legislative counter-proposal on mandatory human rights due diligence, which is currently being considered in response to the popular Responsible Business Initiative, defines human rights and environmental harms with reference to those treaties which were ratified by Switzerland.⁶¹ However,

⁵⁹ In the 2017 *Human Rights Translated 2.0. A Business Reference Guide*, the OHCHR and the UN Global Compact recognised that “many companies are still struggling to understand the meaning of human rights, how human rights may be relevant to their activities and what they can do to meet their responsibility to respect human rights set out in the UN Global Compact’s first principle and the UN Guiding Principles”. The purpose of *Human Rights Translated* is “to explain the meaning of universally recognised human rights in a way that makes sense to business”. OHCHR and UN Global Compact, *Human Rights Translated 2.0. A Business Reference Guide*, available at: https://www.ohchr.org/Documents/Publications/HRT_2_0_EN.pdf.

⁶⁰ For example, see the Netherlands National Contact Point for the OECD Guidelines for Multinational Enterprises, *Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) versus ING*, Final Statement, 19 April 2019, available at: <https://www.oecdguidelines.nl/documents/publication/2019/04/19/ncp-final-statement-4-ngos-vs-ing>. See also Reuters, “Campaign Groups Accuse Total of Breaching French Corporate Duty Law in Uganda”, 25 June 2019, available at: <https://www.reuters.com/article/us-total-uganda-ngos/campaign-groups-accuse-total-of-breaching-french-corporate-duty-law-in-uganda-idUSKCN1TQ10Q>.

⁶¹ On the differences between the Swiss RBI and the counter-proposal see, SCCJ above n 17. See also, Franz Werro, “The Swiss Responsible Business Initiative and the Counter-Proposal” (2019) 10(2) *Journal of European Tort Law* 166.

an approach whereby a definition of human rights is limited to those human rights treaties which the UK has ratified or incorporated⁶² would stand in tension with UNGP 11, the Commentary to which provides that:⁶³

The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.

UNGP 23 is also relevant, insofar as it expects companies to:

- a) Comply with all applicable laws and respect internationally recognised human rights, wherever they operate;
- b) Seek ways to honour the principles of internationally recognised human rights when faced with conflicting requirements;
- c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

The UNGPs distinguish the human rights obligations applicable to States from the human responsibilities of companies, which are to respect internationally recognised human rights in all contexts, regardless of the applicable local law. A duty which requires companies to respect international human rights beyond those which the relevant home State has ratified would accordingly be unproblematic and indeed expected within the framework of the UNGPs.

IV.1.2.b. "Gross human rights abuses"

Another option would be for the mechanism to cover only the most serious human rights abuses, such as "gross human rights abuses", or violations of *jus cogens* norms. This would include, for example, a failure to prevent slavery or to commit torture and racial discrimination.

Two UK statutes already define "gross human rights violations", to cover "torture or cruel, inhuman or degrading treatment or punishment". The UK Sanction and Anti-Money Laundering Act 2018 provides

⁶² States follow different practices in incorporating treaties within the state's legal structure. In the UK, international human rights law does not automatically form part of the national law after ratification: in order for the treaty obligations to be given the force of law domestically, the treaty must be incorporated into domestic legislation. An example of incorporation of a human rights treaty into UK domestic legislation is the Human Rights Act 1998, which gives legal effect in the UK to many fundamental rights and freedoms contained in the European Convention on Human Rights. The UK has ratified a number of international human rights treaties that have not been incorporated into the national legal system: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, and the Convention on the Rights of the Child. When the UK is a party to a treaty but has not implemented this domestically by statute, there is a "prima facie presumption that Parliament does not intend to act in breach of international law", so in cases of ambiguity, the treaty obligations are presumed to prevail (*Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143-4 (Diplock LJ)). See also the UK chapter in Dinah Shelton (ed) *International Law and Domestic Legal Systems: incorporation, transformation, and persuasion*, Oxford University Press, 2011.

⁶³ Guiding Principle 11, see also Guiding Principle 23.

for the imposition of financial or other sanctions in order to “provide accountability for or be a deterrent to gross violations of human rights”. Section 1(7) specifies that “gross violation of human rights” refers to conduct which “(a) constitutes, or (b) is connected with, the commission of a gross human rights abuse or violation” which is “to be determined in accordance with section 241A of the Proceeds of Crime Act 2002 [“POCA”]”.

Section 241A of POCA defines gross violations of human rights with reference to three conditions which all need to be met:

1. The conduct must involve the torture or cruel, inhuman or degrading treatment or punishment of a person who sought to either (a) expose illegal activities involving public officials, or (b) “obtain, exercise, defend or promote human rights and fundamental freedoms”.
2. The conduct must have been carried out in consequence of the person having sought to either expose such illegality, or obtain, exercise, defend or promote human rights.
3. The conduct must have been carried out by a public official or person acting in, or purported performance of, an official capacity.

Accordingly, these UK statutes define gross human rights abuse or violations rather narrowly to apply only to torture or cruel, inhuman or degrading treatment or punishment. Moreover, the definition is effectively limited to human rights abuses against human rights defenders and those aiming to exposing illegal activities of public officials. The human rights of other individuals who do not fall within this group would not be covered. The definition further envisages that only public officials or person acting in a related official capacity are deemed to be capable of carrying out gross human rights abuses. Companies acting in their private commercial capacity, unrelated to any public function, would be excluded from this definition.

Accordingly, these UK statutes define gross human rights abuse or violations rather narrowly to apply only to torture or cruel, inhuman or degrading treatment or punishment.

The above definition of gross human rights abuses or violations is notably different from the definition of a “severe” human rights impact described in the UNGPs. According to the UNGPs, a severe impact is measured in accordance with its scale, its scope and its irremediable character.⁶⁴ “This means that its gravity and the number of individuals that are or will be affected...will both be relevant considerations”, while irremediability means “any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the adverse impact”.⁶⁵

⁶⁴ OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, 2012, HR/PUB/12/02, available at: <https://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf> at 8; Guiding Principles 14 and 24.

⁶⁵ *Interpretative Guide* *ibid.* For a definition of gross human rights abuses that is also related to the severity criterion, see also Jennifer Zerk, “Corporate liability for gross human rights abuses: Towards a fairer and more effective System of domestic law remedies: A report prepared for the Office of the UN High Commissioner for

In a consultation paper, the UN Office of the High Commissioner for Human Rights (“OHCHR”) refers to the UNGPs terminology of “severe human rights impacts” in recommending that:⁶⁶

Domestic public law regimes make appropriate use of strict or absolute liability as a means of encouraging greater levels of vigilance in relation to business activities that carry particularly high risks of severe human rights impacts.⁶⁷

A reference to “gross human rights abuses” similar to those contained in the existing UK legislation mentioned above would narrow the scope of the failure to prevent mechanism in a way that is not UNGPs-aligned. It would only cover a small range of the most serious human rights violations. Insofar as these definitions are limited to human rights defenders or those exposing illegal public activity, they would not cover the rights-holders envisioned by the UNGPs. Moreover, these narrow definitions would not provide legal certainty with respect to any other human rights potentially harmed by companies, their subsidiaries or supply chains. It is also likely to exclude the increasing focus that is placed on environmental impacts and climate change.

IV.1.2.c. Human rights “impacts”, “violations” or “harms”

Aside from the question of which rights should be within the scope of the mechanism, there is also a question as to the appropriate terminology for the injury suffered by an affected rights holder: Should the mechanism apply to human rights “impacts”, “violations” or “harms”.

The UNGPs do not refer to “violations” but to “adverse human rights impacts”. While “human rights impacts” is not defined in the UNGPs, it does seem to be equated with human rights violations under international law⁶⁸ – although some scholars disagree with this view, arguing that “impacts” are broader than “violations”.⁶⁹ The Interpretative Guide provides a definition:⁷⁰

An “adverse human rights impact” occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.

If a failure to prevent mechanism is established, one option would be to use the terminology of the UNGPs and Interpretative Guide, namely “adverse human rights impacts”. However, the terminology of “impacts” may be too vague for the purposes of establishing legal liability.

Human Rights”, available at:

<http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>, at 25-28.

⁶⁶ OHCHR, “Consultation: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability Concept Note”, Palais des Nations, Room XXIII 5-6 October 2017.

⁶⁷ Ibid.

⁶⁸ Robert McCorquodale, Lise Smit, Stuart Neely, and Robin Brooks, “Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises”, *Business and Human Rights Journal*, 2 (2017), 195–224, at fn 18.

⁶⁹ See, for example, David Birchall, “Any Act, Any Harm, To Anyone: The Transformative Potential of ‘Human Rights Impacts’ Under the UN Guiding Principles on Business and Human Rights” (2019) 1 *University of Oxford Human Rights Hub Journal* 121. Birchall argues that “impacts” “cover any business act which removes or reduces an individual’s enjoyment of human rights. The formula is designed to capture business acts that are not paradigmatically understood as human rights violations but that nonetheless cause harmful outcomes. This can encompass, inter alia, acts which reduce market access to essential goods, harm caused by business-related tax abuse, and business contributions to climate change”.

⁷⁰ Above n 64 at 5.

The common law for civil liability refers to “damages” for “harms”. Several UK statutes also refer to “harms” in contexts related to human rights. For example, “significant harm” constitutes one of the threshold criteria which need to be met before a court can consider a care of supervision order under section 31(2) of the Children Act 1989. “Harm” is defined as: i) ill treatment; ii) the impairment of physical or mental health; or iii) the impairment of physical intellectual, emotional, social or behavioural development. The UK government’s Online Harms White Paper, which puts forward a new regulatory framework for companies’ responsibilities to online safety, discusses the scope of “harmful content or activity”. Harmful content or activity, based on an assessment of their prevalence and impact on individuals and society, is provided in a list, which is, by design, not exhaustive and not fixed.⁷¹

In conclusion, if the failure to prevent mechanism were to establish civil liability, “harms” or “damages” for human rights “harms” would be the recommended terminology as “harms” and “damages” is the language traditionally used for civil claims.⁷²

IV.1.2.d. Reference to Schedule

Our recommendation is that the term “human rights” is defined in a Schedule, with provision in the body of the Act for the amendment of the definition by statutory instrument.

In order to achieve policy coherence and maximum protection for rights-holders, the term should be defined to encompass “all internationally recognised human rights”. It is also noted that environmental harms which have human rights impacts, are considered to be included within the definition of human rights harms for the purposes of this study. This approach is also consistent with the literature and the case law.⁷³

However, if the legislator is cautious about adopting such a wide-ranging formulation, the term could initially be introduced to apply to a narrower subset of internationally recognised human rights, which would be specified and would include, for example, modern slavery, and torture or cruel, inhuman or degrading treatment or punishment.

⁷¹ UK Government, “Online Harms White Paper”, Consultation closed 25 June 2019, available at: <https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper#the-harms-in-scope>.

⁷² For example, in the Vedanta case (above n 12 at para 1), the claimants claimed that “both their health and their farming activities have been damaged by repeated discharges of toxic matter from the Nchanga Copper Mine into those watercourses, from 2005 to date”. Lord Briggs (at para 52) held: “Group guidelines about minimising the environmental impact of inherently dangerous activities, such as mining, may be shown to contain systemic errors which, when implemented as of course by a particular subsidiary, then cause harm to third parties”, *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)* [2019] UKSC 20 (10 April 2019), available at: <https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf>. In the case of *AAA v Unilever*, the court held that “the damage suffered by the appellants was not foreseeable by either UTKL or Unilever”, *AAA & Ors v Unilever Plc & Anor* [2018] EWCA Civ 1532, 4 July 2018, available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2018/1532.html> at para 3.

⁷³ We do not expressly refer to the term “human rights and environmental harms”, for two reasons: Firstly, insofar as environmental harms which have human rights impacts are understood to be included as human rights harms, an additional reference to environmental harms could cause confusion. Secondly, insofar as many existing environmental laws which create “no fault” obligations for companies do not provide for a due diligence defence, any new provision should not be used to potentially water down such existing environmental obligations.

For example, the UK Modern Slavery Act already creates an offence of modern slavery, as well as transparency requirements for companies. The recent independent review of the Modern Slavery Act⁷⁴ envisages reforms which would increase the scope and sanctions of this Act. Presumably, this could include a natural progression towards the introduction of a corresponding failure to prevent modern slavery offence. The Schedule could simply refer to the Modern Slavery Act to define the scope of the harms covered by the failure to prevent mechanism.

However, if the Schedule is limited to certain human rights harms only, this would depart from the scope of all internationally recognised human rights set out in the UNGPs. Moreover, laws which focus on particular areas, including the UK Modern Slavery Act and the Dutch Child Labour Due Diligence Act, have been criticised for requiring companies to prioritise their focus on specific issues, which may not be their most severe human rights risks, at the expense of others.

IV.1.3. Recommendation

Rights covered

The provision should apply to “human rights”. This term should be defined in a Schedule to the Act, capable of amendment by statutory instrument and would include environmental harms. Our recommendation is that it should be defined to apply to all internationally recognised human rights.

IV.2. Companies covered

IV.2.1. UK Bribery Act

Section 7 of the Bribery Act applies to any “relevant commercial organisation”. A relevant commercial organisation is defined in section 7(5) as:

- a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),
- b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,
- c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or
- d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,
- e) and, for the purposes of this section, a trade or profession is a business.

⁷⁴ Above n 10.

The Bribery Act therefore applies to all companies incorporated, or that carry on a business or part of a business in the UK, regardless of size or sector, including small and medium-sized enterprises (“SMEs”). However, the Guidance provides that for “small or medium sized the application of the principles is likely to suggest procedures that are different from those that may be right for a large multinational organisation”.⁷⁵

In UK company law, the definition of a small company is one which meets at least two of the following conditions: annual turnover must not exceed £10.2 million; the balance sheet total must not exceed £5.1 million; and the average number of employees must not exceed 50. To be a medium-sized company, it must meet at least two of the following conditions: annual turnover of under £36 million;⁷⁶ a balance sheet total under £18 million; and the average number of employees must not exceed 250.⁷⁷

This risk-based and context-specific description of the due diligence which is required from SMEs, in the existing law relating to tax evasion, echoes that of the UNGPs.

Her Majesty’s Revenue and Customs (“HMRC”) Guidance contains a number of passages aimed specifically at SMEs, relating to the duty to prevent tax evasion mechanism, including:⁷⁸

Burdensome procedures designed to perfectly address every conceivable risk, no matter how remote, are *not* required. Procedures need only be reasonable given the risks posed in the circumstances. It is expected that a relevant body will therefore first undertake an assessment of the risks that those who act on its behalf may criminally facilitate tax evasion [...]

To be “reasonable”, prevention procedures should be proportionate to the risks that the organisation faces [...]

The size of the organisation will be an important factor, as will the nature and complexity of its business, but size will not be the only determining factor. [Original emphasis]

This risk-based and context-specific description of the due diligence which is required from SMEs, in the existing law relating to tax evasion, echoes that of the UNGPs.

IV.2.2. Transposition into a human rights mechanism

The scope of section 7 with respect to entities covered is aligned with the approach of the UNGPs, which state that the business responsibility to exercise human rights due diligence applies to all

⁷⁵ Bribery Act Guidance above n 23 at 6.

⁷⁶ Commercial organisations wherever incorporated or formed that carry out business or supply goods or services in the UK with an annual turnover of £36 million or more are required to publish modern slavery statements.

⁷⁷ See the Companies Act 2006, the Small Companies and Groups (Accounts and Directors’ Report) Regulations 2008, and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008.

⁷⁸ HMRC, “Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion: Government guidance”, 1 Sept 2017, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf, 21.

business enterprises regardless of their size. Similar to the HMRC Guidance on tax evasion,⁷⁹ the UNGPs acknowledge that companies' due diligence processes should be proportionate to their size and the complexity of their operations. The UNGPs state that:⁸⁰

Small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms.

The UNGPs also state that some SMEs "can have severe human rights impacts, which will require corresponding measures regardless of their size".⁸¹ Accordingly, "the responsibility to respect human rights applies fully and equally to all business enterprises".⁸²

Most of the laws and proposed laws relating to mandatory due diligence for human rights and environmental harms in other jurisdictions have thus far been limited to certain large companies only as defined by turnover or employee numbers. A criticism of the French Duty of Vigilance Law is that the range of companies captured by it is defined too narrowly and as such the law only applies to around 150 of France's largest companies.⁸³ However, it is also noted that this law requires the introduction of a vigilance plan, which is a positive burden requiring resources. Moreover, a recent study shows that SMEs are being covered indirectly by the law, insofar as their larger business partners are expecting them to undertake certain due diligence steps.⁸⁴

Given that the scope of the French Duty of Vigilance Law is defined by reference to the number of employees, SMEs which do not fall within the supply chain of large companies are unlikely to be caught in practice. In contrast, the legislative counter-proposal in Switzerland and the unofficial draft which has been circulated in Germany do cover SMEs, but only those SMEs that are operating in high-risk sectors. High-risk sectors are yet to be defined for the purposes of these provisions.

One notable exception to this limitation of human rights due diligence laws to large companies is the Dutch Child Labour law. It applies to companies that sell or supply goods or services to Dutch end-users, including companies registered outside the Netherlands.⁸⁵ The Act does not contain an exemption for particular categories of companies. Instead, categories of companies may be exempted by General Administrative Order. In legislative debates in both the Dutch Senate and the Parliament, there appears to be a consensus that the size of a company will not necessarily determine whether it is exempt.⁸⁶

⁷⁹ Ibid.

⁸⁰ Commentary to Guiding Principle 14.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Amnesty International and BHRRC above n 9 at 6. For comments on the French Duty of Vigilance Law see also, Claire Bright, "Creating a Legislative Level-Playing Field in Business and Human Rights at the European Level: Is the French Law on the Duty of Vigilance the Way Forward?", SSRN, 8 August 2018, available at: <https://ssrn.com/abstract=3262787>.

⁸⁴ PWC, BPI France, ORSE, Résultats de l'enquête "RSE : La parole aux fournisseurs!", January 2020, available at: https://www.novethic.fr/fileadmin/user_upload/tx_ausynovethicarticles/BH/AD_Enqu%C3%AAt_e_BPI_France_ORSE_2019_Web.pdf.

⁸⁵ Art 4.1.

⁸⁶ Ropes & Gray LLP, "Dutch Child Labor Due Diligence Act Approved by Senate – Implications for Global Companies", *Lexology*, 5 June 2019, available at: <https://www.lexology.com/library/detail.aspx?q=aa15aca2-70f8-4731-baee-7e3792bc9ec0>.

A recent report by Shift highlighted that although there is a perception that SMEs lack the resources and leverage to undertake human rights due diligence, in reality SMEs “can boast some significant advantages over their larger counterparts when it comes to realizing their responsibility to respect human rights”.⁸⁷ This is partly because SMEs often have “fewer suppliers and customers”, as well as fewer employees. The smaller footprint of SMEs allows them to map, understand and address their risks better.⁸⁸ The UNGPs also allow for more informal processes and management structures within SMEs.⁸⁹ Therefore, there is a good policy reason for ensuring that the scope of the mechanism extends to cover SMEs.

A duty to *prevent* mechanism establishes a negatively phrased standard of care which does not, in the provision itself, require the publication of a plan, or similar burdensome steps. Rather it would be for each company to determine what, if any, due diligence it will carry out. If, as we propose, the mechanism is twinned with a statutory defence of reasonable procedures, businesses will be incentivised to carry out robust due diligence as a means to extinguish liability.

IV.2.3. Recommendation

We recommend that any failure to prevent legislative provision should cover companies of all sizes, including SMEs, recognising that any due diligence processes should be proportionate to their size and the complexity of their operations. This approach would be aligned with the UNGPs. It would also ensure that all companies, regardless of size, are held to the same standard, commensurate to their particular risks.

Companies covered

A failure to prevent mechanism should apply to all companies, regardless of size or sector, registered, incorporated, formed or carrying on business, or a part of a business, in the UK. The Guidance should specify that human rights due diligence procedures may be proportionate to the size of the company, and that SMEs may have more informal processes and management structures than larger companies.

IV.3. Duty

IV.3.1. UK Bribery Act

Section 7 of the Bribery Act is entitled “Failure of commercial organisations to prevent bribery”. A company is guilty of an offence of bribery if a person associated with it bribes another person intending to obtain or retain business for the company, or to obtain or retain an advantage in the conduct of business for the company. This constitutes a duty on the company to prevent bribery. This

⁸⁷ Francis West “SMEs and the Corporate Responsibility to Respect Human Rights”, May 2019, available at: <https://www.shiftproject.org/resources/viewpoints/busting-myth-smes-corporate-responsibility-respect-human-rights/>.

⁸⁸ Ibid.

⁸⁹ Commentary to Guiding Principle 14.

duty is coupled with a defence of “adequate procedures”,⁹⁰ which is described in the Guidance as a due diligence defence.

IV.3.2. Transposition into a human rights mechanism

This section considers the nature of the legal duty that would be imposed by a failure to prevent mechanism for human rights harms, as well as the link between duty to prevent and mandatory human rights due diligence.

IV.3.2.a. Duty to prevent and mandatory human rights due diligence

At the core of a failure to prevent mechanism is the duty that it would establish. The JCHR proposed a “duty to prevent” similar to the duty to prevent in the Bribery Act. This duty would operate as a negative duty to ensure that human rights harms do not take place in the company’s own operations or those of its third-party business relationships. Similar to the Bribery Act, unless an absolute liability (without a defence) is to be created, the duty to prevent human rights harms would need to be coupled with a due diligence defence.⁹¹

This proposed defence aligns with the approach of the UNGPs, which expects companies to undertake human rights due diligence to identify, prevent, mitigate and account for how they address their human rights impacts.⁹² It is noted that, in this way, it is in the company’s own interest to do comprehensive human rights due diligence in order to mitigate the risk of legal liability.⁹³

Similar to the Bribery Act, unless an absolute liability (without a defence) is to be created, the duty to prevent human rights harms would need to be coupled with a due diligence defence.

IV.3.2.b. Interaction with corporate reporting requirements

In accordance with UK law, companies have certain reporting obligations regarding their impacts on human rights and the environment.

⁹⁰ See further Section IV.6 “Defence and Burden of Proof” below.

⁹¹ OHCHR, *Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance*, 12 May 2016, A/HRC/32/19/Add.1 at 5: “Offences of ‘absolute liability’ do not require proof that the defendant intended the relevant acts or harm, or that it was negligent, in order to establish legal liability. Instead, liability flows from the occurrence of a prohibited event, regardless of intentions or negligence. However, the relevant domestic public law regime may permit the company to raise a defence on the basis of its use of ‘due diligence’ to prevent the prohibited event. Where this is the case, the offence may be described as one of ‘strict liability’ (rather than absolute liability)”.

⁹² Guiding Principle 17. Doug Cassel writes, with reference to the introduction of a corporate duty of care for human rights: “By recognizing this duty of care, courts would not impose on business enterprises any responsibility not already assigned to them by widely adopted international human rights standards, but would simply incorporate those standards into domestic tort law”. Doug Cassel, “Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence”, 1 *BHRJ* 179 (2016) at 180.

⁹³ For more details see Section IV.6 “Defence and Burden of Proof” below.

For example, the EU non-financial reporting directive⁹⁴ was incorporated into the UK Companies Act 2006 in 2016.⁹⁵ It requires companies to report in their strategic reports “material” information relating to the company’s impacts on the environment, employees, social matters, respect for human rights, and anti-bribery and corruption.⁹⁶ Guidance by the UK Financial Reporting Council (“FRC”) indicates that “immaterial information should be excluded as it can obscure the key message”.⁹⁷

Moreover, section 54 of the UK Modern Slavery Act requires certain companies to disclose the steps they have taken to “ensure that slavery or human trafficking is not taking place” in any part of its own business or supply chains.

The introduction of a failure to prevent mechanism for human rights harms is likely to influence the kind of information which companies are required to report in terms of these laws.

In addition, section 172(1) of the UK Companies Act 2006 imposes a duty on directors to “have regard” to the interests of the company’s employees, the company’s impacts on the community and the environment, amongst other considerations.

The introduction of a failure to prevent mechanism for human rights harms is likely to influence the kind of information which companies are required to report in terms of these laws. In particular, information which is currently viewed as “immaterial” is more likely to be viewed as “material” for the purposes of corporate reporting, when such information relates to the steps taken to avoid possible legal liability for human rights harms.⁹⁸

It is also noted that the UNGPs refer to “severe”⁹⁹ or “significant”¹⁰⁰ risks with reference to the risks beyond those of the company to risks of rights-holders.¹⁰¹ Similarly, the UNGP Reporting Framework by Shift and Mazars refers to the company’s “salient” human rights issues.¹⁰² Through a legal duty to

⁹⁴ Directive 2014/95/EU of the European Parliament and of the European Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial information and diversity information by certain large undertakings and groups.

⁹⁵ The UK Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016 (SI 2016/1245) inserted sections 414CA and 414CB into the UK Companies Act 2006.

⁹⁶ Section 414CB(2) of the UK Companies Act 2006.

⁹⁷ Financial Reporting Council, *Guidance on the Strategic Report*, July 2018, at 4. The reporting by Vedanta under this section was used as an example of a parent company’s statement of control of a subsidiary’s human rights impacts, *Vedanta* above n 12 at para 55.

⁹⁸ On this point see also, Alliance for Corporate Transparency Project, *2018 Research Report*, (2019), available at: <https://www.allianceforcorporatetransparency.org/>.

⁹⁹ Commentary to Guiding Principle 14.

¹⁰⁰ Commentary to Guiding Principle 17.

¹⁰¹ *Ibid.*

¹⁰² Shift and Mazars, “UN Guiding Principles Reporting Framework”, available at: <https://www.ungpreporting.org/>.

prevent human rights harms, the understanding of material risks to the company is likely to be extended to risks to rights-holders in this way.¹⁰³

Similarly, a financial services company regulated by the Financial Conduct Authority (“FCA”) which fails to report on principal human rights risks could in theory attract a court order or a fine by the FCA.¹⁰⁴ To date, no examples of such sanctions exist for a failure to report on human rights matters, but a failure to prevent mechanism may inform the expectations which shareholders and regulators have in this respect.

IV.3.2.c. Lessons from existing reporting requirements

Both the UK and other legislatures have introduced reporting measures relating to the disclosure of due diligence processes and procedures to address human rights impacts.¹⁰⁵ To date, apart from the French Duty of Vigilance Law which requires the publication of a vigilance plan, these reporting requirements do not contain a substantive legal duty relating to a standard of care. Moreover, many of these reporting requirements do not provide for sanctions in case of non-compliance, or remedies for victims.

Perhaps as a result, reporting requirements have been criticised for being ineffective in driving corporate behaviour.¹⁰⁶ For example, despite the reporting requirements of the UK Modern Slavery Act, it has been found that only 17 of the FTSE100 companies have in place mechanisms to track the effectiveness of their policies and procedures related to modern slavery.¹⁰⁷ The Final Report of the Independent Review of the Modern Slavery Act, published in May 2019, criticised section 54, which requires transparency in the supply chain, for the poor quality of statements and low levels of compliance:¹⁰⁸

[T]he impact of the section has been limited to date. Evidence gathered by our Expert Advisers shows that there is a general agreement between businesses and civil society that a

¹⁰³ See also Commentary to Guiding Principle 3: “Financial reporting requirements should clarify that human rights impacts in some instances may be ‘material’ or ‘significant’ to the economic performance of the business enterprise”.

¹⁰⁴ Article 17 of the EU Market Abuse Regulation 596/2014, 3 July 2016; UK Disclosure Guidance and Transparency Rules 4.1.8R.

¹⁰⁵ For example, the Australian Modern Slavery Act 2018 requires relevant companies to report on the risks of modern slavery in their operations and supply chains and their actions to address those risks. On 10 July 2019, a discussion draft of the US Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019 was introduced. It would require relevant US companies (publicly listed companies that file an annual report with the US Securities and Exchange Commission (“SEC”)) to “conduct an annual assessment of the human rights risks and impacts in their operations and throughout their value chains, rank those risks on their severity of harm to the rights holder, and disclose the process and results of their assessment, as well as any actions the company has taken to avoid, mitigate, or remediate the identified risks or impacts”. International Corporate Accountability Roundtable (“ICAR”), “ICAR welcomes the introduction of the Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019”, 11 July 2019, available at: <https://www.icar.ngo/news/2019/7/11/icar-welcomes-the-introduction-of-the-corporate-human-rights-risk-assessment-prevention-and-mitigation-act-of-2019>.

¹⁰⁶ NYU Stern Center for Business and Human Rights, *Research Brief: Assessing Legislation on Human Rights in Supply Chains: Varied Designs but Limited Compliance*, June 2019, available at: https://issuu.com/nyusterncenterforbusinessandhumanri/docs/nyu_jaco_research_brief_june14_fina?fr=xKAE9_zU1NQ at 7.

¹⁰⁷ BHRRC “FTSE 100 & The UK Modern Slavery Act: From Disclosure to Action”, 2018, available at: <https://www.business-humanrights.org/sites/default/files/FTSE%20100%20Briefing%202018.pdf>.

¹⁰⁸ Above n 10 at 39-40.

lack of enforcement and penalties, as well as confusion surrounding reporting obligations, are core reasons for poor-quality statements and the estimated lack of compliance from over a third of eligible firms. It is clear the current approach, while a step forward, is not sufficient and it is time for the Government to take tougher action to ensure companies are taking seriously their responsibilities to eradicate modern slavery from their supply chains.

A failure to prevent model would not in itself contain a reporting requirement. Similarly, the Bribery Act does not contain a reporting requirement regarding due diligence steps taken, although the reporting requirements implementing the EU non-financial reporting directive requires reporting on both human rights and corruption aspects that are viewed as material.

However, according to the UNGPs, due diligence consists of four main components, one of which is communication on actions taken. The Office of the UN High Commission for Human Rights has explained that:¹⁰⁹

In the UNGPs, addressing impacts and accounting to stakeholders form an integral part of the due diligence process and provide a “feedback loop” to the [company] that should in turn help shape and refine its due diligence processes in the future.

As such, a company wishing to rely on the defence of having undertaken due diligence would most likely seek to demonstrate that it has communicated as required by the relevant circumstances.

IV.3.3. Recommendation

Duty established

A failure to prevent mechanism should establish a duty to prevent human rights harms in its own activities and those of its business relationships. This is contingent on the inclusion of a statutory defence of procedures “reasonable in all the circumstances”.

IV.4. Liability

IV.4.1. UK Bribery Act

The Bribery Act provides for a criminal offence of failure on the part of a commercial organisation to prevent bribery.¹¹⁰ Under section 7, a commercial organisation would be liable where a person associated with that organisation bribes another person, and the bribe was made with the intention of obtaining or retaining business or an advantage in the conduct of business for the organisation.

¹⁰⁹ This statement related to the banking sector but applies to similarly applies to companies in other sectors. OHCHR, “OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector”, available at: <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf> at 5.

¹¹⁰ This is an ancillary offence to the principal offences created by the Bribery Act, including the offences of bribing (section 1), being bribed (section 2), and bribing a foreign public official (section 6), all of which provide for individual criminal liability.

The post-legislative scrutiny of the Bribery Act remarked that the:¹¹¹

[C]reation of an offence of failure by a commercial organisation to prevent bribery was an unprecedented way of enlisting the support of those most susceptible to being involved in the offence and most able to aid in its prevention.

Transparency International UK described this offence as “invaluable as a tool to incentivise improvements in corporate behaviour and for prosecutors to hold companies to account within a criminal law framework”.¹¹² The UK Criminal Finances Act 2017 has subsequently introduced similar failure to prevent offences for UK and foreign tax evasion respectively.

As far as the commercial organisation is concerned, this is a strict liability offence, insofar as knowledge or intent on the part of the company is not a requirement. However, it is coupled with a defence of having put in place “adequate procedures” to prevent bribery.¹¹³ The Bribery Act provides for both corporate and individual criminal liability.¹¹⁴

The Bribery Act does not provide for remedies for those affected by the bribery.¹¹⁵

IV.4.2. Transposition into a human rights mechanism

Perhaps the most significant contribution of a failure to prevent mechanism would be to establish legal liability for corporate human rights harms where there currently is none.

This section considers whether the liability could or should be civil or criminal, questions around parent company liability for harms involving their subsidiaries, and individual liability of natural persons.

IV.4.2.a. Criminal and/or civil liability

The report of the JCHR suggested that the model of the Bribery Act “might be an appropriate one to apply to business and human rights, both in civil and criminal law”.¹¹⁶ In relation to criminal liability the JCHR concluded:¹¹⁷

The consensus among all the witnesses who supported the introduction of a criminal offence of failure to prevent human rights abuses was that it should be modelled along the same lines

¹¹¹ House of Lords, Select Committee on the Bribery Act, *The Bribery Act 2010: post-legislative scrutiny*, 14 March 2019, available at: <https://publications.parliament.uk/pa/ld201719/ldselect/ldbriact/303/303.pdf>, at para 171.

¹¹² Ibid, written evidence from Transparency International UK (BRI0003) at para 171.

¹¹³ For more details see Section IV.6 on “Defence and Burden of Proof” below.

¹¹⁴ UK Bribery Act, Section 11 “Penalties”:

(1) An individual guilty of an offence under section 1, 2 or 6 is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, or to a fine, or to both.

(2) Any other person guilty of an offence under section 1, 2 or 6 is liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum,

(b) on conviction on indictment, to a fine.

(3) A person guilty of an offence under section 7 is liable on conviction on indictment to a fine.

See also the discussion on enforcement and remedies below.

¹¹⁵ For more details see “Enforcement and Remedy” section below, IV.8.

¹¹⁶ JCHR, above n 1, para 187.

¹¹⁷ Ibid., para. 191.

as section 7 of the Bribery Act. This would also seem consistent with the requirement of human rights due diligence on companies under the UNGPs.

A number of questions arise in considering whether it would be fair and feasible to attach criminal liability to a duty to prevent corporate human rights harms. In order to impose criminal liability, with all the consequences that flow for the liberty of the individual and rights of personal property, the definitions of conduct and scope need to be proportional, clear, and precisely defined.¹¹⁸

Perhaps most importantly, a criminal offence does not provide a remedy for those affected by the human rights harm.

It was suggested during our consultations that the establishment of a criminal sanction might be appropriate in some circumstances, for example, where a company is directly responsible for gross violations of clearly defined fundamental rights such as those relating to slavery or torture.¹¹⁹

However, as discussed above, corporate adverse human rights impacts cover a range of harms, not all of which are viewed as gross human rights violations and some of which may not be criminal offences. Moreover, in order to be UNGPs-aligned, the duty to prevent human rights harms would extend to the operations of third-party business partners, such as suppliers. The imposition of criminal liability seems less appropriate with relation to rights which would not otherwise engage criminal liability, those rights which lack a sufficiently precise definition and impacts to which a company or its executives are directly linked (as opposed to causing or contributing to) for the purposes of the UNGPs.

We note that it would be possible to include both criminal and civil liability in the same statute. The original bill for the French Duty of Vigilance Law contained a combination of criminal and civil sanctions, until the criminal sanction was struck out by the Constitutional Court for lack of clarity.¹²⁰

It was suggested during our consultations that a failure to prevent mechanism may contain one section which provides for criminal liability only with respect to certain gross human rights violations or *jus cogens*, and another section with more general application which provides for civil liability. However, it was highlighted that the bulk of corporate human rights impacts that are experienced in practice would not qualify as criminal actions. As such, the introduction of such limited criminal provision to cover a limited number of extreme cases may not be worth the costs or complexity of enforcement.

Perhaps most importantly, a criminal offence does not provide a remedy for those affected by the human rights harm. Access to remedy forms the basis of Pillar III of the UNGPs, and a lack of access to remedy is one of the key problems which the UNGPs framework seeks to address. It would therefore

¹¹⁸ On the principles of criminal law see generally, Lucia Zedner and Julian V Roberts (eds.), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*, Oxford Scholarship Online, 2012.

¹¹⁹ On this see also the “Rights Covered” section above IV.1.

¹²⁰ The Constitutional Court criticised the inadequate definition of the obligations created by the law, and in particular (i) the vagueness of the language used, such as “reasonable vigilance measures” and “adapted risk mitigation actions”, (ii) the broad and indeterminate nature of the reference to “human rights” and “fundamental freedoms” and (iii) the failure to strictly define the scope of the companies, contractors and activities covered by the vigilance plan, French Constitutional Court, decision 2017-750 DC of 23 March 2017.

be essential for any legislation introduced towards the implementation of the UNGPs to make provision for access to remedy for affected rights-holders.

For these reasons, it is recommended that the provision of a civil remedy for damages, as also provided for in the French Duty of Vigilance Law and the Swiss legislative proposal, may be more appropriate. Accordingly, we will continue our analysis on the basis of a provision for civil liability. This should not be construed as excluding the option of an *additional* provision for criminal liability.

Regarding a civil remedy, the BIICL-based Bingham Centre for the Rule of Law submitted to the JCHR:¹²¹

The civil offences regime could focus on having policies and processes to respect human rights, consistent with the UNGP approach of human rights due diligence. The regime would establish civil penalties for human rights harms arising from negligence by a business enterprise, i.e. failure to take reasonable steps to prevent human rights harms. The proper establishment of a human rights policy and proof of its implementation through processes and procedures that were in fact put into practice could provide evidence of a business enterprise taking reasonable steps to prevent human rights harms.

Enforcement and remedy are discussed in section IV.8 below.

IV.4.2.b. Individual liability

The Bribery Act provides for criminal liability of individual directors of the company when one of the principal offences of bribery is committed.¹²²

In tort, claims for damages can be sought against natural and legal persons. In addition, directors are also personally liable under the Senior Managers Regime, a part of UK financial regulation aimed at increasing personal accountability in the financial services industry. Under this regime, any bank, building society, credit union, large investment bank or insurance operating in the UK must establish clear accountability of its senior staff. While a senior leader may delegate their tasks to staff further down the line, they cannot delegate the accountability for oversight and results of actions taken by staff.¹²³

If the failure to prevent mechanism provides for civil liability for human rights harms, there seems to be no reason why this could not be applied to individual or natural persons.

¹²¹ JCHR above n 1 at para 187.

¹²² In terms of section 1, 2 and 6 of the Bribery Act.

¹²³ The Senior Managers Regime came into effect in March 2016 and covers both domestic and international firms with UK operations. It is part of an overall package of three regulations: i) The Senior Managers Regime; ii) The Certification Regime, which applies to all “material risk-takers” in a firm; and iii) Rules of Conduct, applicable to both senior managers and material risk-takers.

IV.4.3. Recommendation

Liability

A failure to prevent mechanism should establish a duty to prevent human rights harms in the company's own activities and the activities of its business relationships. A failure to prevent such harms would result in possible civil liability for damages to those affected, unless the company could show that it has undertaken the due diligence required in the circumstances. This would not affect any criminal liability which could otherwise arise.

IV.5 The corporate group and the supply chain

IV.5.1 UK Bribery Act

Under section 7 of the UK Bribery Act a company is guilty of the offence of failure to prevent bribery if a "person associated" with the company bribes another person intending (a) to obtain or retain business for the company, or (b) to obtain or retain an advantage in the conduct of business for the company. An associated person could be a legal or natural person, and could be anywhere in the world.¹²⁴ The associated person does not have to have a direct relationship with the company, as long as the bribe took place with the intention of benefiting the relevant company.¹²⁵

The UK government preferred the term "associated person" over the term "employee" in order to broaden the scope of people a corporation must supervise.¹²⁶ An associated person is any person who performs services for or on behalf of the commercial organisation and may be the corporation's employee, agent, or subsidiary.¹²⁷ In providing examples of "associated" persons, the government's Guidance refers direct suppliers, contractors, a supply chain with subcontractors as well as joint ventures.¹²⁸ It recommends that the principal way to address bribery would be to employ anti-bribery procedures with the company's direct suppliers, and to require these suppliers to request the same from their sub-suppliers.¹²⁹

The wide approach of the Bribery Act initially received some criticism. Shortly after the enactment of the Act, Amy Bell argued:¹³⁰

At first glance this looks like an extremely draconian measure. The commercial organisation will be liable for the act of its employee, agent or subsidiary of its organisation and that

¹²⁴ Bribery Act Guidance above n 22 at para 37.

¹²⁵ Ibid at paras 37-39.

¹²⁶ Bram Meyer, Tessa van Romen, Eelke Sikkema, "Corporate Criminal Liability for Corruption Offences and the Due Diligence Defence: A Comparison of the Dutch and English Legal Framework", *Utrecht Law Review* 10(3), 2014, at 41; Nicolas Bueno: "Swiss Multinational Enterprises and Transnational Corruption: Management Matters", *Swiss Review of Business Law* 2, 2017, at 206.

¹²⁷ Provision 8(3) UK Bribery Act. See also Meyer et al ibid at 42.

¹²⁸ Bribery Act Guidance above n 22 at paras 38-42.

¹²⁹ Ibid.

¹³⁰ Amy Bell, "The Bribery Act: What's all the Fuss About?", 11 *Legal Information Management* 104 (2011) at 106.

person, or entity, may be conducting themselves outside the remit of their employment or contract with the relevant commercial organisation.

However, it seems these early concerns have not proven to be an issue in terms of corporate practice or legal enforcement. LeBaron and Rühmkorf argue that, on the basis of the Guidance, the expectation is for companies to introduce due diligence mechanisms into the first tier of their supply chain, and that those policies would then be passed on further down the chain in order to avoid any danger of liability.^{F131}

IV.5.2. Transposition into a human rights mechanism

IV.5.2.a. “Associated” person, own “activities” and those of “business relationships”

Through the “associated person” link, the Bribery Act applies to activities that extend beyond the company itself. Using a similarly wide approach, the UNGPs expect companies to undertake due diligence for the impacts of its own activities as well as those of its business relationships. Guiding Principle 13 states:

The responsibility to respect human rights requires that business enterprises:

- a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

The Commentary to Guiding Principle 13 elaborates:

Business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties...For the purpose of these Guiding Principles a business enterprise’s “**activities**” are understood to include both actions and omissions; and its “**business relationships**” are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services. [Our emphasis]

A failure to prevent mechanism which aligns with the UNGPs would cover the company’s own activities and impacts to which it is directly linked through its business relationships.

Using a similarly wide approach, the UNGPs expect companies to undertake due diligence for the impacts of its own activities as well as those of its business relationships.

¹³¹ Genevieve LeBaron and Andreas Rühmkorf, “Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance” *Global Policy* 8(3) May 2017 at 20-22.

Corporate social obligations which extend into the supply chain in this open-ended way are not unprecedented in UK law. Section 172 of the Companies Act requires directors to have regard to, amongst other matters, “the need to foster the company’s business relationships with suppliers and customers and others”,¹³² and “the impact of the company’s operations on the community and the environment”.¹³³ Quoted companies are required to report information on “the impact of the company’s business on the environment”, and “social, community and human rights issues” which includes “information about any policies of the company in relation to those matters and the effectiveness of those policies”.¹³⁴ The implementation of the EU Non-Financial Reporting Directive into the Companies Act further requires certain companies to report on “the impact of the company’s business on the environment”, “social matters”, and “respect for human rights”,¹³⁵ as well as a brief description of the company’s “business model”.¹³⁶

These existing corporate law provisions imply an extension to risks arising from the activities of third parties, potentially including the supply chain, where these risks are “material” to the company. The legislation implies such extension down the supply chain without expressly delineating, defining or limiting these relationships in the legislation.

IV.5.2.b. Link to the impact rather than the actor

The UNGPs acknowledge that the question of how to determine the company’s responsibility for impacts caused by third parties is “complex”. Guiding Principle 19 further states:

Appropriate action will vary according to:

- (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;
- (ii) The extent of its leverage in addressing the adverse impact.

The Commentary to Guiding Principle 19 explains that there are three ways in which an enterprise can be involved in an adverse human rights impact: “causation”; “contribution”; and “direct linkage”:

Where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or *prevent* the impact.

Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or *prevent* its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.

Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will

¹³² UK Companies Act 2006, section 172(c).

¹³³ Ibid section 172(d).

¹³⁴ Ibid section 414(C)(7)(b).

¹³⁵ Ibid section 414CB(1).

¹³⁶ Ibid section 414CB(2). The business model would include an extensive or complex supply chain if this posed material risks for the purposes of the reporting requirement.

enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences. [Our emphasis]

It is noted that the above descriptions of how a company should respond to those impacts which it causes or to which it contributes refer to the company's responsibility to *prevent* actual or potential impacts. This resonates with the "failure to prevent" language under consideration in this study.

The question as to whether a company causes, contributes to or is directly linked to an impact is not exclusively determined by the **relationship** which the company has with the relevant business partner. Instead, it is determined by how the company is linked to the **impact** itself (not the actor causing it). The Office of the UN High Commissioner for Human Rights has also explained that the way in which a business is linked to an impact could change over time:¹³⁷

In practice, there is a continuum between "contributing to" and having a "direct link" to an adverse human rights impact: a bank's involvement with an impact may shift over time, depending on its own actions and omissions. For example, if bank identifies or is made aware of an ongoing human rights issue that is directly linked to its operations, products or services through a client relationship, yet over time fails to take reasonable steps to seek to prevent or mitigate the impact – such as bringing up the issue with the client's leadership or board, persuading other banks to join in raising the issue with the client, making further financing contingent upon correcting the situation, etc. – it could eventually be seen to be facilitating the continuance of the situation and thus be in a situation of "contributing".

Both the French Duty of Vigilance Law and the Swiss legislative counter-proposal limit this liability based on the **relationship** which the company has with the **actor**, rather than the **impact**. The French Duty of Vigilance Law uses the "established relationship" test, so that the company would only be liable for the impacts of actors with which the company has an established relationship.¹³⁸ Although the proposed Swiss statutory duty to *exercise due diligence* applies to the entire supply chain, it *limits liability* for damages to harms attributable to the activities of Swiss parent companies and their foreign subsidiaries.¹³⁹

In contrast, the unofficial draft circulated amongst stakeholders in Germany follows the UNGPs insofar as it potentially applies to the entire supply chain. Liability is limited with reference to the adequacy of the due diligence undertaken under the circumstances.¹⁴⁰ In other words, if there was a linkage which was so indirect that the due diligence which the company undertook would be viewed as having been adequate, no liability should arise. The Dutch Child Labour Due Diligence Law of 2019 follows the same approach.

¹³⁷ This statement relates to the banking sector but similarly applies to companies in other sectors. OHCHR response to request from BankTrack, above n 108 at 6-7.

¹³⁸ Art. L. 225-102-4.

¹³⁹ Proposed articles Articles 716(a)(bis) and 55(1)(bis) of the Swiss Code of Obligations.

¹⁴⁰ For a discussion on the issue of the adequacy test see Amnesty International et al, "Legislative Proposal: Corporate Responsibility and Human Rights Legal Text and Questions and Answers on the Human Rights Due Diligence Act proposed by German NGOs", available at:

http://corporatejustice.org/news/mhrdd_lawproposal_and_faq.pdf.

If a failure to prevent mechanism should establish a due diligence defence, the company would similarly be able to defend itself by proving that it has exercised the appropriate leverage required in the circumstances, regardless of its formal relationship with the party which caused the harm.

It is noted that, whereas the UNGPs expect companies to undertake **due diligence** for actual or potential adverse impacts *caused, contributed to or directly linked* to the company, the expectation to **remediate** only applies to impacts *caused or contributed to* by the company. If a company is *directly linked* to an adverse impact, it is expected to exercise **leverage** to prevent the harm, take steps to increase leverage where it lacks leverage, and only in the absence of effective leverage, it is expected to consider termination of the business relationship. Although the company is not required to provide a remedy for impacts to which it is directly linked, nor is it necessarily required to terminate the relationship, the UNGPs state that:¹⁴¹

In any case, for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – *reputational, financial or legal* – of the continuing connection. [Our emphasis]

A duty to prevent mechanism which “hardens” the due diligence responsibilities of the UNGPs would accordingly apply also to those impacts to which the company is directly linked. However, the question as to the company’s linkage to the harm and whether it responded with the appropriate **leverage** would need to be determined on the factual circumstances by the court. This should allow a company which is directly linked to a human rights harm, but which can demonstrate that it has made the appropriate efforts to exercise the requisite leverage, to rely on the due diligence defence.

IV.5.2.c. Leverage and the factual circumstances

“**Leverage**” is an important concept in the UNGPs. It allows for the extension of due diligence responsibilities beyond those impacts which are caused by the company itself. Leverage is required where the company contributes to an impact, or where it is directly linked to an impact, an extension which the UNGPs acknowledge to be “complex”.¹⁴²

The concept of leverage would be similarly important in determining liability for a duty to prevent human rights harms when it is found that the company has not by itself caused the harm. For this, the wording of the UNGPs could be usefully echoed in any accompanying Guidance:¹⁴³

If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors.

There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so.

¹⁴¹ Commentary to Guiding Principle 19.

¹⁴² Ibid.

¹⁴³ Ibid.

The Commentary to Guiding Principle 19 states that further challenges are raised if the relationship is deemed “crucial”, and that “the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship”.

The same considerations which determine whether the company has exercised its leverage in accordance with its responsibility to respect could usefully inform the duty to prevent enquiry. This will be a matter to be decided on the facts of each case.

In this way, the factual enquiry will embody the UNGPs approach that the level of due diligence required would depend on the context. Our view is that the complex question of responsibility for actions of others is better determined by a court, with reference to reasonableness of the due diligence undertaken, including leverage exercised in the relevant circumstances, than in a superficial relationship-based test in a one-size-fits-all legal provision. This would align with the UNGPs and OHCHR approach in terms of which the standard expected is firmly based on the particular circumstances.

The same considerations which determine whether the company has exercised its leverage in accordance with its responsibility to respect, could usefully inform the duty to prevent enquiry.

IV.5.2.d. Parent company liability

The Bribery Act does not limit liability with reference to the separate corporate personality. Moreover, it does not seek to “pierce the corporate veil”. Instead, it ascribes a duty directly on the relevant company to prevent bribery from taking place in its own operations or its supply chain, regardless of whether the person who committed the act of bribery is a separate legal entity from the company.

Tort claims in the UK have illustrated some complexities in the allocation of liability between members of corporate groups, such as parent companies for their subsidiaries. Similar complexities are likely to apply if tort liability is sought to be extended to the acts of other third parties, such as suppliers. The infrequency with which these cases are litigated and the barriers for access to remedy which claimants face have further contributed to uncertainties about the nature and scope of civil liability in terms of existing tort law.

In terms of the traditional English law doctrine of separate corporate personality, companies are protected by a “corporate veil” from being held liable for harms caused by another legal entity.¹⁴⁴ This means that as a separate legal entity, a parent company is not liable for the conduct of its subsidiaries.¹⁴⁵ As a result, tort claims to date have been brought on the basis that the parent company allegedly owed a duty of care directly to the victim. In the case of *Lungowe v Vedanta*,¹⁴⁶ the UK Supreme Court in April 2019 found that a parent company may owe such a duty of care to those affected by the activities of its subsidiaries, depending on the degree of control, supervision,

¹⁴⁴ *Adams v Cape Industries Plc* [1990] Ch 433.

¹⁴⁵ In the UK, the doctrine of separation of legal entities was laid down by the House of Lords in 1897 in *Salomon v Salomon and Co Ltd* [1896] UKHL 1, [1897] AC 22.

¹⁴⁶ *Vedanta* above n 12.

interference, and omission. This level of control could be inferred from the parent company's corporate policies and public commitments.¹⁴⁷

Similar to the Bribery Act, the UNGPs are blind to separate corporate personality. The OHCHR states that it views the activities of subsidiaries as those of the (parent) company's own activities:¹⁴⁸

Enterprises should identify and assess risks by geographic context, sector and business relationships throughout own activities (both HQ and subsidiaries) and the value chain.

For this reason, Doug Cassel writes that a duty of care consistent with the UNGPs would extend beyond the corporate veil:

In the case of parent companies, a common law duty of care to exercise due diligence would not hold parents vicariously liable for wrongful actions of their subsidiaries. It would not purport to "pierce the corporate veil". Rather it would hold parent companies responsible only for the foreseeable consequences of their own failures to exercise due diligence with regard to the enterprises over which they have control or effective leverage.¹⁴⁹

It is recommended that the duty to prevent human rights harms mechanism should similarly extend beyond the traditional doctrine of separate corporate identity, to impose a duty on the relevant UK company itself to prevent human rights from taking place in its foreign subsidiaries.

IV.5.2.e. Implications for the supply chain

The UNGPs do not refer to the "supply chain", but instead to the wider "value chain". As mentioned above, while the Bribery Act does not refer to the "supply chain", the Guidance to the Act does.¹⁵⁰ In a similarly inclusive approach, the UNGPs define "business relationships" as "relationships with business

¹⁴⁷ Daria Palomo acknowledges that neither the UK case law, nor the French Duty of Vigilance Law or the Swiss initiatives set out a perfect model that could be adopted to ensure the accountability of European parent companies for extraterritorial human rights abuses committed by their subsidiaries or supply chains: "One could imagine a human rights-oriented interpretation of these duties which could be far-reaching in all jurisdictions. In the UK, courts could recognize that parent companies owe a duty of care towards any tort victim affected by the activities of their groups. Such a wide duty of care could also cover extraterritorial torts affecting nonemployees. [...] Conversely, one could also envision a conservative approach limiting the direct liability of parent companies. UK courts could require an extremely close relationship between parent and subsidiary companies to recognize the existence of a duty of care." Dalia Palombo, "The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals" (2019) 0 *Business and Human Rights Journal* 1, 21-22.

¹⁴⁸ OHCHR, "Corporate human rights due diligence – identifying and leveraging emerging practice" available at: <https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx>.

¹⁴⁹ Cassel above n 92 at 182.

¹⁵⁰ Bribery Act Guidance above n 23 at para 39: "Where a supply chain involves several entities or a project is to be performed by a prime contractor with a series of subcontractors, an organisation is likely only to exercise control over its relationship with its contractual counterparty. Indeed, the organisation may only know the identity of its contractual counterparty. It is likely that persons who contract with that counterparty will be performing services for the counterparty and not for other persons in the contractual chain. The principal way in which commercial organisations may decide to approach bribery risks which arise as a result of a supply chain is by employing the types of anti-bribery procedures referred to elsewhere in this guidance (e.g. risk-based due diligence and the use of anti-bribery terms and conditions) in the relationship with their contractual counterparty, and by requesting that counterparty to adopt a similar approach with the next party in the chain". See also Section IV.5.1 above.

partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services". Moreover, as discussed above, UNGP Principle 17(a) states that human rights due diligence:

Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.

The Commentary to Guiding Principle 17 recognises that companies may need to prioritize the areas of their value chains with the most significant risks:

Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.

Peter Muchlinski writes:¹⁵¹

Regarding sub-contractors, the UNGPs make clear that liability for indirect harm caused by business associates of a corporation should be part of the latter's due diligence analysis. Thus the issue of indirect liability for foreseeable harm caused by a sub-contractor can arise in line with the UNGPs where due diligence is not carried out, or carried out properly.

A failure to prevent mechanism which applies to the company's own activities and those of its "business relationship" will thereby not only apply to "upstream" suppliers but also to the so-called "downstream" supply chain.¹⁵²

The level of liability which a company could attract for the actions of its downstream suppliers and other enterprises in its value chain will similarly depend on the context, the nature of the relationship and the sector, whether the potential harm is severe, and whether the company is able to influence the downstream supplier. For example, the OECD guidance on *Responsible business conduct for institutional investors* states that whereas it is recognised that the "relationship between an investor and an investee company is qualitatively different from the relationship between purchaser and supplier companies", an investor is nevertheless able to "seek to influence the investee through

¹⁵¹ JCHR above n 1 at 57, written evidence from Peter Muchlinski (HRB001), full written evidence available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/human-rights-and-business/written/34900.html>.

¹⁵² Upstream supply chain refers to suppliers involved in searching for and extracting raw materials and in the other activities needed to gather the materials required to create a product. Downstream supply chain refers to suppliers involved in processing the materials collected during the upstream stage into a finished product as well as the sale of the product. For example, the OECD Supplement on Tin, Tantalum and Tungsten defines "upstream" as "the mineral supply chain from the mine to smelters/refiners" and "Downstream" "the minerals supply chain from smelters/refiners to retailers", OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, Supplement on Tin, Tantalum and Tungsten*, 2011 at 32-33.

ownership”.¹⁵³ These factors would need to be taken into account if the mechanism applies across the entire value chain.

IV.5.3. Recommendation

For these reasons, it is recommended that the failure to prevent human rights harms mechanism applies to the company’s **own activities**, and those of its **business relationships**. It is recommended that Guidance should elaborate on the meaning of these concepts with reference to the concept of **leverage** and the wording of the UNGPs.

Liability

A failure to prevent mechanism should establish a duty to prevent human rights harms in the company’s own activities and the activities of its business relationships. The question as to whether a company should be liable for failing to meet this standard of care will be determined on the facts of each case. The Guidance should elaborate on the concept of leverage with reference to the wording of the UNGPs.

IV.6 Defence and burden of proof

IV.6.1. UK Bribery Act

Section 7(2) of the Bribery Act provides for the defendant to protect themselves from liability through the defence of having put in place “adequate procedures” to prevent bribery:¹⁵⁴

But it is a defence for C [a commercial organisation] to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

The term “adequate procedures” was left undefined in the Act itself but is elaborated on in the Guidance. The Guidance outlines six principles which commercial organisations should employ when implementing their policies and procedures,¹⁵⁵ which includes “due diligence”. The Guidance further stipulates that adequate procedures should be informed by the following six principles:¹⁵⁶ 1)

¹⁵³ OECD, *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*, 2017, at 7.

¹⁵⁴ Section 7(2) of the Bribery Act. In contrast, the US Foreign Corrupt Practices Act of 1977 (“US FCPA”) does not provide for such a defence.

¹⁵⁵ Bribery Act Guidance above n 23 at 20.

¹⁵⁶ Ibid at 20-31.

proportionate procedures;¹⁵⁷ 2) top-level commitment;¹⁵⁸ 3) risk assessment;¹⁵⁹ 4) due diligence;¹⁶⁰ 5) communication (including training);¹⁶¹ and 6) monitoring and review.¹⁶²

With respect to due diligence, the Guidance indicates that this should be proportionate to the companies' risks.¹⁶³ The Guidance notes that due diligence procedures are a form of bribery risk assessment as well as a means of mitigating risk.¹⁶⁴ It also suggests that considerable care be exercised when entering into certain business relationships that are particularly difficult to modify or terminate.¹⁶⁵

It is noted that in addition to the "due diligence" bullet point, the other principles echo the components of due diligence as described in the UNGPs: communication, monitoring and review, risk assessment, proportionate procedures, and top-level commitment.¹⁶⁶

[The Guidance] also suggests that considerable care be exercised when entering into certain business relationships that are particularly difficult to modify or terminate.

The Guidance suggests that these principles are not prescriptive, but rather are intended to be flexible in order to apply to a wide variety of circumstances.¹⁶⁷ Adequate bribery prevention procedures only need to be proportionate to the bribery risks that an organisation faces. The Guidance further notes that if an organisation is small or medium sized "the application of the principles is likely to suggest

¹⁵⁷ "A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced". The guidance notes that a company's level of risk will be linked to the size of the organization to some extent, but that size will not be the exclusive determinant of such risk. Ibid at 21-22.

¹⁵⁸ "The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable". Ibid at 23.

¹⁵⁹ "The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented". Ibid at 25.

¹⁶⁰ "The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks". Ibid at 27.

¹⁶¹ "The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training that is proportionate to the risks it faces". Ibid at 29.

¹⁶² "The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary". Ibid at 31.

¹⁶³ Ibid at 27.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Guiding Principles 17-21.

¹⁶⁷ Bribery Act Guidance above n 23 at 20. Matt T Morley, Robert V Hadley, and Laura Atherton, "U.K. Bribery Act: What Non-UK Companies Need to Know", K & L Gates, Pittsburg, Pa., 31 March 2011, available at: <http://www.klgates.com/uk-bribery-act-what-non-uk-companies-need-to-know-03-31-2011>.

procedures that are different from those that may be right for a large multinational organisation” and that “[t]o a certain extent the level of risk will be linked to the size of the organisation and the nature and complexity of its business, but size will not be the only determining factor”.¹⁶⁸

The Law Commission, in its consideration of the due diligence defence in the Bribery Act, referred to the example of the due diligence defence in section 21(1) of the Food Safety Act 1990:¹⁶⁹

In any proceedings for an offence under any of the preceding provisions of this Part ... it shall ... be a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or by a person under his control.

The Law Commission concluded:¹⁷⁰

A company should not be liable for a serious offence, such as failure to prevent bribery, on the basis of a single instance of carelessness, if it can show that it had robust management systems in place to prevent bribery taking place.

The post-legislative scrutiny of the Bribery Act found the “adequate procedures” defence to lack sufficient clarity when it comes to the application to SMEs. The Committee concluded:¹⁷¹

The Ministry of Justice should, in consultation with representatives of the business community, and especially of SMEs, expand the section 9 Guidance to give more examples and to suggest procedures which, if adopted by SMEs, are likely to provide a good defence.

The Guidance should make clear that all businesses need to conduct a risk assessment, that all but the smallest are likely to need procedures tailored to their particular needs, and that staff will need to be trained to understand and follow those procedures.

In the 2018 case of *R v Skansen Interiors*,¹⁷² the question of “adequate procedures” was considered for the first time by a court. Skansen, a small UK-based refurbishment company, voluntarily self-reported to the police and co-operated with the police investigation but was nevertheless prosecuted and found guilty in terms of section 7. In seeking to rely on “adequate procedures” defence, Skansen highlighted that as it was a small organisation with a total of 30 employees and limited geographical reach. It argued that procedures should not need to be sophisticated in order to qualify as “adequate”. The jury did not accept Skansen’s defence and returned a guilty verdict. As Skansen was a dormant company with no assets, the judge ordered an absolute discharge. Skansen’s former managing

¹⁶⁸ Bribery Act Guidance above n 23 at para 1.2.

¹⁶⁹ Law Commission Report, *Reforming Bribery (Report No. 313)*, 19 November 2008, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/231183/0928.pdf, para 6.

¹⁷⁰ Ibid.

¹⁷¹ Above n 111 at paras 193-94.

¹⁷² *R v Skansen Interiors Limited*, Southwark Crown Court, Case Number: T20170224, 21 February 2018 unreported judgement. See also Hogan Lovells “Delusions of adequacy: The belated tale of adequate procedures”, 10 May 2018, available at: https://www.hoganlovells.com/~media/hogan-lovells/pdf/2018/2018_05_10_investigations_white_collar_and_fraud_alert_delusions_of_adequacy_the_belated_tale_of_adequate_procedures.pdf?la=en.

director and the recipient of the bribery were also found guilty and sentenced to 12- and 20-months' imprisonment respectively.

It is interesting to note that, at the relevant time, the company did not have a specific anti-bribery policy. Instead, it sought to rely on ethical conduct policies, arguing that the prohibition against bribes was common sense.¹⁷³ The *Skansen* case demonstrates how section 7 operates to expose companies to the risk of legal liability for the *failure* to introduce specific policies. This is contrasted to the *Vedanta*¹⁷⁴ case in terms of which a company could expose itself to parent company liability precisely because it put in place such specific policies. This contrast serves to highlight the counter-instinctive and problematic incentives which are currently created by the absence of legal standards for human rights due diligence, as also highlighted by our survey.

IV.6.2. Transposition into a human rights mechanism

IV.6.2.a. Human rights due diligence as a defence

Under the Bribery Act there is no substantive requirement for companies to have anti-bribery procedures. It is not an offence to have no such procedures in place, but the operation of the mechanism "adequate procedures" defence means that it is in the company's interest to put such procedures in place. As discussed above, the Guidance refers to "due diligence" in describing "adequate procedures".

In a similar way, the UNGPs describe human rights due diligence as follows:¹⁷⁵

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse.

The UNGPs are also clear that human rights due diligence will not operate as a "check-box" procedure:¹⁷⁶

However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

In its June 2018 report, the OHCHR noted:

While not appropriate in all cases, the exercise of human rights due diligence could be a basis for a possible defence to liability. The equitability and rights-compatibility of permitting such a defence will depend on many factors, including what kind of harm was involved, the connection of a company to the harm, victims' alternative avenues to remedy, and the State's regulatory aims.¹⁷⁷

¹⁷³ Ibid.

¹⁷⁴ *Vedanta* above n 12.

¹⁷⁵ Commentary to Guiding Principle 17.

¹⁷⁶ Ibid.

¹⁷⁷ OHCHR, *Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability*, 2018, A/HRC/38/20/Add.2, at para 25.

The OHCHR also noted “serious concerns with the appropriateness of a human rights due diligence defense”, particularly with:¹⁷⁸

[T]he inappropriateness and unfairness of business enterprises seeking to raise due diligence defenses in cases where superficial “check box” approaches to human rights due diligence might be used as a reference point instead of genuine attempts to identify, mitigate, and address human rights risks as contemplated in the UNGPs.

It is accordingly clear that a pure procedural “check box” or “safe harbour” provision that would shield a company completely from liability if any kind of human rights due diligence was performed, would not be aligned with the concept of due diligence contained in the UNGPs. Moreover, as is evidenced from the Guidance on the Bribery Act and the *Skansen* case,¹⁷⁹ such a “safe harbour” approach¹⁸⁰ is clearly not the way in which a due diligence defence is interpreted by the English courts in the context of the Bribery Act.

If the UNGPs concept of human rights due diligence were to be introduced as a defence to a failure to prevent mechanism, it would allow a company to avoid liability where it can show that it had in place a robust system of human rights due diligence. In accordance with the UNGPs, the level of due diligence expected would depend on the specific circumstances. Whether a company has met its due diligence expectations would need to be determined by the court, with reference to the company’s particular size, sector, operations, risk, and the relevant industry standards,¹⁸¹ as well as other any other relevant factors.

Rather than promote a “check box approach”, if businesses know that they will ultimately have to stand behind the quality of their due diligence in order to extinguish liability, this could encourage a much more meaningful and substantive engagement with human rights due diligence. This is an advantage over, for example, a mandatory due diligence mechanism where the quality of a statement must somehow be monitored and regulated in the abstract.

IV.6.2.b. Burden of proof

In the Bribery Act, the failure to prevent offence is a strict liability offence with a due diligence defence. In this way, the operation of the due diligence defence effectively reverses the burden of proof to the company, once the prosecution has proven that the bribery offence was committed.¹⁸² Thus, the mechanism incentivises companies to have effective due diligence processes in place to prevent acts of bribery from occurring. Amy Bell explains how this interacts with the concept of mandatory due diligence, which requires a company to put due diligence procedures in place:¹⁸³

It is not an offence not to have policies in place. However with such stringent penalties who would take the chance that they would never need to avail themselves of the defence?

¹⁷⁸ Ibid at para 29.

¹⁷⁹ *Skansen* above n 172.

¹⁸⁰ The “safe harbour” principle was set out in the 2015 California case of *Barber v. Nestlé USA, Inc.*, 154 F. Supp. 3d 954.

¹⁸¹ UNGPs principle 17(b) states that the human rights due diligence will “vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations”.

¹⁸² Meyer et al above n 126 at 43 and 44; Bueno above n 126 at 207.

¹⁸³ Bell above n 130 at 106.

The same incentives could be expected to apply with a defence of human rights due diligence. The OHCHR highlights the particular potential of what it describes as the strict liability model which allows for a due diligence defence:¹⁸⁴

While the use of strict and absolute liability provides incentives to companies to exercise due diligence activities to avoid liability, allowing a strict liability defense based upon human rights due diligence in appropriate cases can potentially ensure even higher levels of vigilance.

With a failure to prevent human rights harms, the claimants would have to show that a human rights harm has occurred, that this was a result of the company's failure to exercise its duty to prevent such harm, and that the harm took place in the company's own operations or those of its business relationships. Once this is established, the company would be liable unless it can show that it has put in place reasonable procedures or human rights due diligence to prevent such human rights harms.

IV.6.2.c. "Adequate" or "reasonable" human rights due diligence

The Bribery Act provides a defence of "adequate procedures". It was raised during our consultations that one problem with a defence of "adequate" human rights due diligence is that if a human rights harm has taken place *despite* the company putting in place human rights procedures, this would by definition imply that those procedures were not actually adequate. In other words, it could be argued that if procedures were indeed "adequate", the harm would never have taken place.

Jonathan Rusch writes:¹⁸⁵

The most specific challenge that companies face in anti-bribery and corruption compliance is that the "failure to prevent" language of section 7 continues to create uncertainty about whether their procedures will be considered "adequate" in the eyes of a judge or jury if, despite their best efforts, an executive or manager engages in a single act of bribery. [...] Companies therefore remain concerned that if a single act of bribery slips through their compliance procedures, no matter how elaborate and well-supported by senior management they may be, a jury will conclude that by definition the procedures were "inadequate" and reject the company's affirmative defense.

A similar question arises in the human rights context, namely how the duty would apply if, despite the implementation of due diligence, harm occurs. The Commentary to Guiding Principle 22 foresees this scenario and states:

Even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent. Where a business enterprise identifies such a situation, whether through its human rights due diligence process or other means, its responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors.

The possibility that even with "the best policies and practices" an adverse human rights may not be foreseen is an important point, and one which should be embodied in a failure to prevent mechanism.

¹⁸⁴ OHCHR above n 177 at para 26.

¹⁸⁵ Above n 111 at para 205, written evidence from Jonathan Rusch, former Deputy Chief for Strategy and Policy in the Fraud Section of the Criminal Division of the US Department of Justice ("DOJ") and now Adjunct Professor at Georgetown University Law Center.

This should provide some reassurance to businesses concerned about “flood gates” and liability for remote human rights impacts, over which they could not reasonably have been expected to have control, and about which they could not have obtained knowledge. Human rights due diligence is a standard of conduct; it is not a standard of outcome. Where a company can demonstrate that it conducted due diligence which is reasonable in all the circumstances, it should not be liable under a duty to prevent mechanism.

During the passage of the Bribery Act in the House of Lords, there was a motion to replace “adequate procedures” with “reasonable” procedures. The argument was that the wording of “adequate” would effectively provide no defence, because any occurrence of bribery would mean that the procedures in place, however robust, were inadequate.¹⁸⁶ It is noted that the analogous provisions relating to tax evasion in sections 45(2) and 46(3) of the Criminal Finances Act 2017, which was enacted subsequently to the Bribery Act, refer to procedures “reasonable in all the circumstances”.

In the post-legislative scrutiny of the Bribery Act, the Law Commission indicated that it did not intend for the word “adequate” to deprive a company of a defence solely because a bribe has taken place. It further refers to “examples of carelessness leading to the commission of bribery that, in all probability, even an adequate preventative system could not reasonably be expected to have stopped in advance”.¹⁸⁷

The Committee explained:¹⁸⁸

Ultimately it is only the courts which can decide whether in this context there is a difference in meaning between “adequate” and “reasonable in all the circumstances”, and if so what that difference is. The wording was considered by the jury in the *Skansen* case. [...] The jury found the company guilty, from which it is clear that they did not consider the company to have implemented procedures which were adequate. But there is no way of knowing whether they might have come to a different conclusion if they had had to decide whether the procedures *Skansen* had in place were “reasonable in all the circumstances”.

The Committee considered it unnecessary to amend the wording of section 7, but it recommended that the statutory Guidance should be amended to draw attention to the different wording in the Criminal Finances Act 2017, and to make clear that “adequate” does not mean, and is not intended to mean, anything more stringent than “reasonable in all the circumstances”.¹⁸⁹

During the passage of the Bribery Act in the House of Lords, there was a motion to replace “adequate” procedures with “reasonable” procedures.

Neither the Bribery Act nor the Criminal Finance Act prescribes what constitutes “adequate” or “reasonable” procedures in the Act itself. Instead, these concepts are elaborated on in the government’s subsequent guidance, which are not prescriptive.

¹⁸⁶ Ibid at para 199.

¹⁸⁷ Ibid at para 197.

¹⁸⁸ Ibid at para 203.

¹⁸⁹ Ibid at para 211.

Although the Commentary to the UNGPs refer to taking “adequate” measures for the “prevention, mitigation and, where appropriate, remediation” of adverse human rights impacts,¹⁹⁰ the UNGPs also refer to taking “reasonable” steps, and particular in the context of a defence against claims of adverse impacts:¹⁹¹

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every *reasonable* step to avoid involvement with an alleged human rights abuse. [Our emphasis]

It is noted that in this context, and in various other places, the UNGPs uses the term “appropriate”. However, as a legal test, appropriateness may lead to the same concerns as “adequacy”, so that there is a preference for the established legal concept of “reasonableness”.

In light of the lack of clarity created by the use of the term “adequate” procedures in the context of the Bribery Act, it is recommended that the duty to prevent mechanism should follow the wording of the Criminal Finance Act of procedures “reasonable in all the circumstances”. The common law test for reasonableness moreover requires the same type of factual enquiry based on the circumstances that is envisioned by the UNGPs.

If a failure to prevent mechanism is established we recommend that it similarly refers to procedures “reasonable in all the circumstances” and that criteria about what constitutes reasonable human rights due diligence procedures should be contained in accompanying guidance.

IV.6.3. Recommendation

Defence and Burden of Proof

A failure to prevent legislation must include a defence of procedures “reasonable in all the circumstances”, or “reasonable” human rights due diligence, to prevent human rights harms. This should be accompanied by Guidance elaborating on the meaning of “reasonable” due diligence, with reference to the UNGPs, the concept of leverage, and clarifying that due diligence is accordingly not a “check-box” exercise or a “safe harbour”.

IV.7 Extraterritorial application to transnational activity

IV.7.1. UK Bribery Act

The Bribery Act established a duty to prevent bribery not only for organisations which have been incorporated in the UK, but also non-UK companies which carry on a business, or part of a business, in the UK. Accordingly, the link to the UK jurisdiction is established through the presence of the company to which the duty applies.

Further, section 7 of the Bribery Act has broad jurisdictional reach insofar as it establishes extraterritorial corporate criminal liability for acts of bribery that occur within a company’s global

¹⁹⁰ Commentary to Guiding Principle 11.

¹⁹¹ Commentary to Guiding Principle 17.

supply chain.¹⁹² An offence is committed by the UK-linked company irrespective of whether the acts or omissions take place in the UK or elsewhere.¹⁹³

In relation to jurisdiction, both the UN Convention against Corruption and the OECD Anti-Bribery Convention provide for extraterritorial jurisdiction. Article 42 of the 2004 UN Convention against Corruption, establishes that:¹⁹⁴

Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

- (a) The offence is committed in the territory of that State Party; or
- (b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

Similarly, Article 4 of the 2011 OECD Anti-Bribery Convention establishes that:¹⁹⁵

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.
2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

When the Bribery Act was passed it received some criticism for its extraterritorial reach.¹⁹⁶ However, this has not proved to be an issue in practice, insofar as convictions have been made for acts of

¹⁹² Para 37 of the Guidance (above n 23) states: "A commercial organisation is liable under section 7 if a person 'associated' with it bribes another person intending to obtain or retain business or a business advantage for the organisation.[...] The concept of a person who 'performs services for or on behalf of' the organisation is intended to give section 7 broad scope so as to embrace the whole range of persons connected to an organisation who might be capable of committing bribery on the organisation's behalf". At para 38: "[...] where a supplier can properly be said to be performing services for a commercial organisation rather than simply acting as the seller of goods, it may also be an 'associated' person".

¹⁹³ Bribery Act Guidance *ibid*.

¹⁹⁴ Art 42.1(a)(b) of the UN Convention against Corruption, 2004.

¹⁹⁵ Art 4(1)(2) of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 2011.

¹⁹⁶ For example, Jessica Lordi questioned if such extraterritorial provision for criminal liability was legal under international law: "If the UK uses the provision as a means to prosecute bribery anywhere in the world against companies with any level of connection to the UK, the law could reach beyond permissible extraterritorial jurisdiction and effectively establish universal jurisdiction for bribery offenses". Jessica A Lordi, "The U.K. Bribery Act: Endless Jurisdictional Liability on Corporate Violators", 44 *Case W. Res. J. Int'l L.* 955 (2011) at 956-57. See also the concept of universal jurisdiction which extends the state's jurisdiction for egregious acts, piracy, war crimes, genocide, and terrorism. Curtis A Bradley, "Universal Jurisdiction and US. Law", 2001 *U. Chi. Legal F.* 323 at 324; Evan P Lestelle, "Comment: The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction", 83 *Tul. L. Rev.* 527, 540-41 (2008). See also the Guidance above n 23 at 1 and 15.

bribery by which took place in other jurisdictions.¹⁹⁷ This approach would also be consistent with private international law, pursuant to which a UK domiciled company can be sued in a UK court for a harm which occurs overseas (as was the case, for example, in *Vedanta*).¹⁹⁸

IV.7.2. Transposition into a human rights mechanism

The UNGPs stipulate that the corporate responsibility to respect human rights “is a global standard of expected conduct for all business enterprises wherever they operate”.¹⁹⁹ UNGP Principle 23 clarifies that in all contexts, business enterprises should “comply with all applicable laws and respect internationally recognised human rights, wherever they operate”.

If a duty to prevent human rights harms were to conform with the UNGPs, it would apply to the relevant human rights harms regardless of where they occurred.

IV.7.3. Recommendation

We recommend that a duty to prevent human rights harms should apply to the company’s own activities and those of its business partners, regardless of whether the harm occurs within or outside of the UK.

Extraterritorial application

A duty to prevent should extend to harms which take place in the entire value chain of a company, regardless of the jurisdiction of the harm, in accordance with the UNGPs. Guidance should elaborate on the meaning of harms in the company’s own activities and those of business relationships.

IV.8 Enforcement and remedy

IV.8.1. UK Bribery Act

Companies commit a criminal offence if they contravene section 7 of the UK Bribery Act. The maximum penalty, if found guilty, is an unlimited fine. There is also the possibility of individual criminal liability for an individual who, if guilty of acts of bribery,²⁰⁰ is liable to a prison sentence,²⁰¹ a fine, or both.²⁰²

The Serious Fraud Office (“SFO”) is the lead agency tasked with investigating (jointly with the police in some cases) and prosecuting cases of overseas corruption. The Crown Prosecution Service (“CPS”) also prosecutes bribery offences investigated by the police, committed either overseas or in England and

¹⁹⁷ For example, in the case against Smith and Ouzman Ltd, a company specialising in printing security documents, the acts of bribery took place by managers of the company in Kenya and Mauritania. See SFO, “Smith and Ouzman Ltd”, 22 December 2014, available at: <https://www.sfo.gov.uk/cases/smith-ouzman-ltd/>. See also “Enforcement and Remedy” section below.

¹⁹⁸ See Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

¹⁹⁹ Commentary to Guiding Principle 11.

²⁰⁰ Sections 1, 2 or 6 of the Bribery Act.

²⁰¹ Imprisonment for a maximum of 10 years.

²⁰² Section 11(b) of the Bribery Act.

Wales.²⁰³ The Director of the SFO²⁰⁴ and the Director of Public Prosecutions must give personal consent to a prosecution under the Bribery Act.²⁰⁵

The SFO has urged companies to self-report cases,²⁰⁶ which is accompanied by incentives including a reduction in fines and confiscation, and a potential negotiated civil settlement under the Proceeds of Crime Act 2002. However, the SFO has also clarified that there is no presumption that self-reporting will exclude a criminal prosecution from following.²⁰⁷ Indeed, in the *Skansen* case discussed above, the company self-reported and was nevertheless prosecuted and fined.²⁰⁸

A mechanism which requires state-based oversight requires state resources for enforcement. This not only applies to criminal sanctions, such as in the Bribery Act, but also purely administrative rules which rely on state-based investigations, such as those contained in the unofficial German draft.

In the last five years, the SFO has successfully prosecuted only four British companies (of which only one has been convicted) and 10 individuals for bribery or corruption overseas.²⁰⁹ As the budget of the SFO was halved since the Bribery Act was passed,²¹⁰ the low number of prosecutions has been ascribed to a lack of resources. However, they may also be a sign of thorough investigations which take several years to lead to prosecution.²¹¹

The SFO used deferred prosecution agreements (“DPAs”) to resolve three of these four prosecutions. The first was with Standard Bank in November 2015 over a payment made to obtain business in Tanzania. This was the first time that an indictment was made in terms of section 7, and it was the first time that a DPA was approved in the UK.²¹²

The second example of the use of a DPA in this context was against an SME anonymised as XYZ in July 2016 in connection with contracts to supply its products to customers in a number of foreign jurisdictions.²¹³ The third DPA was with Rolls-Royce in January 2017 in relation to alleged corrupt payments and failure to prevent bribery in connection with its operations in Indonesia, Thailand, India, Russia, Nigeria, China and Malaysia. This DPA, the largest to date, involves payments of £497

²⁰³ CPS “Bribery Act 2010: Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions”, available at: <https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and>.

²⁰⁴ The SFO is a specialist prosecuting authority created by the Criminal Justice Act 1987 and it is unique among the UK criminal law enforcement agencies in that it both investigates and prosecutes cases.

²⁰⁵ Section 10 of the Bribery Act; Joint Prosecution Guidance above n 203.

²⁰⁶ SFO “Corporate Self Reporting”, 9 October 2012, available at: www.sfo.gov.uk/bribery--corruption/corporate-self-reporting.aspx.

²⁰⁷ Morgan Lewis LLP, “UK SFO director provides guidance on the Bribery Act”, *Litigation Lawflash*, 6 November 2013, available at: www.morganlewis.co.uk/pubs/LITLFLUKDirectorProvidesGuidanceonBriberyAct_06nov13.pdf.

²⁰⁸ *Skansen* above n 172.

²⁰⁹ JCHR above n 1 at para 186.

²¹⁰ After funding criticism, the SFO budget was increased by 50% from £34.3m to £52.7m for the financial year 2018-19. See Caroline Binham, “SFO core budget boosted by 50% after funding criticism”, *Financial Times*, 19 April 2018.

²¹¹ Transparency International UK, “How effective is the UK Bribery Act?”, 30 July 2014.

²¹² SFO, Standard Bank Plc, available at: <https://www.sfo.gov.uk/cases/standard-bank-plc/>. See also SFO, speech of Ben Morgan, joint head of Bribery and Corruption at the Managing Risk and Mitigating Litigation Conference 2015, “First use of DPA legislation and of s.7 Bribery Act 2010”, 1 December 2015, available at: <https://www.sfo.gov.uk/2015/12/01/first-use-of-dpa-legislation-and-of-s-7-bribery-act-2010/>.

²¹³ SFO, “SFO secures a second DPA”, 8 July 2016, available at: <https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/>.

million.²¹⁴ The SFO has convicted one company, Sweett Group, for an offence under section 7 in relation to its activities in the United Arab Emirates and in the Middle East. The company was sentenced in February 2016 and ordered to pay £2.25 million.²¹⁵

It has also been noted, regardless of low levels of enforcement, the potential of criminal prosecution or state-based sanction seems to have a significant impact on corporate behaviour. LeBaron and Rühmkorf compared corporate practices to implement the Bribery Act with steps taken to implement the UK Modern Slavery Act, which does not have any enforcement for a failure to report.²¹⁶ They found that while companies take governance steps to implement anti-bribery procedures, the Modern Slavery Act does not appear to result in a similar change in company practices.²¹⁷ They ascribe these differences to the Bribery Act model providing an incentive for companies to avoid sanctions by implementing adequate due diligence procedures, while the Modern Slavery Act only imposes reporting requirements with no sanction for non-compliance.²¹⁸

Although section 7 of the Bribery Act does not provide for compensatory remedies for those affected by bribery, the funds paid towards fines for bribery are dealt with in accordance with the UK Compensation Principles for Economic Crimes. These principles provide a common framework, agreed by the CPS, the National Crime Agency (“NCA”) and the SFO, to identify cases where compensation is appropriate and act to return funds to the affected countries, companies or people. Under these principles the UK government has committed to ensuring “overseas victims of bribery, corruption and economic crime, are able to benefit from asset recovery proceedings and compensation orders” made in the UK and, if compensation is appropriate, to using “whatever legal mechanisms are available to secure it”.²¹⁹ In accordance with these principles, compensation in the amount of £49.2 million has been secured for the overseas victims of bribery in five cases since 2014.²²⁰

IV.8.2. Transposition into a human rights mechanism

If a duty to prevent human rights harms is established, the question arises as to what types of sanctions are available for a failure to meet the duty. A criminal offence may imply a fine for the company, and possible prison sentences for individuals. A failure to prevent mechanism may also provide for a civil remedy, including compensation for victims, preventative measures, and restitution.

²¹⁴ SFO, *Rolls-Royce PLC*, available at: <https://www.sfo.gov.uk/cases/rolls-royce-plc/>.

²¹⁵ SFO, *Sweett Group*, available at: <https://www.sfo.gov.uk/cases/sweett-group/>.

²¹⁶ LeBaron and Rühmkorf above n. 131.

²¹⁷ Ibid at 26.

²¹⁸ Ibid.

²¹⁹ General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases, December 2017, available at:

<https://www.cps.gov.uk/sites/default/files/documents/publications/General-Principles-to-compensate-overseas-victims-December-2017.pdf>.

²²⁰ Two examples include: 1) The SFO has recovered £4.4 million for corrupt oil deals in Chad. These funds have now been transferred to the Department for International Development to identify key projects for investment to benefit the poorest in that country. 2) In the first SFO trial which resulted in a conviction of a company for foreign bribery, the printing firm Smith and Ouzman was sentenced and ordered to pay £2.2 million in January 2016. Of this, £349,000 was paid to the Government of Kenya, and used to pay for 11 new ambulances to service hospitals across Kenya. The managers were sentenced to 18 months’ imprisonment and three years’ imprisonment respectively. See, SFO, “New joint principles published to compensate victims of economic crimes overseas”, 1 June 2018, available at: <https://www.sfo.gov.uk/2018/06/01/new-joint-principles-published-to-compensate-victims-of-economic-crime-overseas/>.

In this study, for reasons set out above, we focus on the provision of civil liability for harms suffered. However, this would not necessarily exclude a state-based oversight mechanism, which exists in various areas of corporate practice, including public inspectorates for health and safety, labour conditions, and so forth.

The UNGPs state that remedy “may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred”.²²¹ Examples of remedies may include:

[A]pologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.

In this respect, enforcement through state-based criminal or administrative sanctions would not in itself constitute a remedy for the victims, as it would not “counteract or make good” those harms which have occurred. However, as we have seen with the Bribery Act, victims could receive compensation through a statutory or government-created compensation scheme. This approach aims to allocate the fines to those affected, rather than to the public purse.

It is not clear that existing law enforcement bodies, such as the police, the CPS, the SFO or the Environmental Agency have the appropriate expertise or capacity to undertake such oversight.

For example, health and safety laws affecting companies are enforced by Health and Safety Executive (“HSE”) inspectors. An HSE’s role is to investigate when accidents have happened or a complaint is made, require a company to take action to control risks, and take enforcement action in relation to any non-compliance. A similar ad hoc authority could be created to monitor human rights risks. If a company is found to be in violation of health and safety laws, HSE may recover its costs from the company by charging a fee for the time and effort it spends on investigating and taking enforcement action.

The costs of the Bribery Act investigation and monitoring by the SFO are also recoverable from the relevant company in terms of DPAs.²²² Therefore, a body enforcing a failure to prevent mechanism could potentially recover its fees through a similar scheme.

Further questions raised during our consultations regarding a state-based oversight mechanism relate to which body within the UK government would enforce a failure to prevent mechanism. It is not clear that existing law enforcement bodies, such as the police, the CPS, the SFO or the Environmental Agency have the appropriate expertise or capacity to undertake such oversight. The statute could create a new body, in the way which the UK Modern Slavery Act creates the office of the Slavery

²²¹ Commentary to Guiding Principle 25.

²²² See examples of DPAs on the SFO website, available at: <https://www.sfo.gov.uk/our-cases/>.

Commissioner.²²³ Also, in July 2019 the Australian government appointed an independent examiner to investigate reported instances of corporate misconduct by Australian multinational companies.²²⁴

Either way, insofar as the possible failure to prevent mechanism may apply to companies of all sizes, including SMEs, and a wide range of human rights and environmental impacts, it is likely that any public or independent body charged with oversight and enforcement would need significant resources and capacity.

It is therefore recommended that a provision which creates civil liability should *at a minimum* provide for a right of civil action by those affected for compensation for damages suffered as a result of the failure to prevent human rights harms. Doug Cassel describes the kinds of remedy that would be created through a duty of care for the exercise of human rights due diligence as follows:²²⁵

The common law duty of care would authorize judicial remedies, in the form of tort suits for negligence, for damages caused by the failure to exercise human rights due diligence. This, too, is consistent with the Guiding Principles, which call on both states and businesses to ensure effective remedies for business-related human rights violations.

In addition to a right of action for civil damages, the statute could also provide for preventative or injunctive relief. In this way, if a company fails to exercise human rights due diligence, a court could order the company to undertake specific due diligence activities, to cease ongoing harms, or to restore the former position, such as an order to clean up environmental damage. These orders could be made as part of a sanction, civil remedy, or as part of a plea agreement. In a similar way, the French Duty of Vigilance Law allows a court to order a non-compliant company to establish and implement a vigilance plan, and to pay periodic penalties until the company complies.²²⁶

IV.8.3. Recommendation

Sanctions and enforcement

A duty to prevent mechanism should establish a right to civil action by those affected for compensation for damages suffered as a result of a failure to prevent human rights harms. In addition, it could provide for preventative and injunction orders, as well as state-based oversight mechanisms.

²²³ UK Modern Slavery Act, Part IV.

²²⁴ Human Rights Law Centre, "Australia appoints first-ever independent examiner to investigate corporate human rights abuses overseas", 31 July 2019, available at: <https://www.hrlc.org.au/news/2019/7/31/australia-appoints-first-ever-independent-examiner-to-investigate-corporate-human-rights-abuses-overseas>.

²²⁵ Cassel above n 148.

²²⁶ Stéphane Brabant and Elsa Savourey, "France's Corporate Duty Of Vigilance Law, A Closer Look At The Penalties Faced By Companies, Revue Internationale De La Compliance Et De L'éthique Des Affaires – Supplément À La Semaine Juridique Entreprise Et Affaires N° 50", 14 Dec 2017, at 2.

V. Possible model text for a legislative provision modelled on section 7

Based on the above analysis, we conclude that a failure to prevent mechanism for human rights harms modelled on section 7 of the Bribery Act could look as follows.

Section 7 of the UK Bribery Act	Possible mechanism modelled on Section 7 [Section X]
Failure of commercial organisations to prevent bribery	Failure of commercial organisations to prevent human rights harms
<p>(1) A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—</p> <p>(a) to obtain or retain business for C, or</p> <p>(b) to obtain or retain an advantage in the conduct of business for C.</p>	<p>(1) A relevant commercial organisation (“C”) is liable for damages under this section if C fails to prevent human rights harms:</p> <p>(a) Which it causes or contributes to through its own activities, or</p> <p>(b) Which are directly linked to its operations, products or services by its business relationships, even if it has not contributed to those harms.</p>
<p>(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.</p>	<p>(2) But it is a defence for C to prove that C had in place procedures reasonable in all the circumstances to prevent such harms from occurring.</p>
<p>(3) For the purposes of this section, A bribes another person if, and only if, A—</p> <p>(a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or</p> <p>(b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.</p>	<p>(3) For the purposes of this section, human rights harms are defined as set out in [Schedule A].</p>
<p>(4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.</p>	<p>(4) See section [Y] on a duty on the Secretary of State to publish guidance.</p> <p>[Harms caused, contributed to and directly linked, leverage and procedures reasonable in all the circumstances to be defined with reference to the language of the UNGPs]</p>

<p>(5) In this section—</p> <p>“partnership” means—</p> <p>(a) a partnership within the Partnership Act 1890, or</p> <p>(b) a limited partnership registered under the Limited Partnerships Act 1907, or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,</p> <p>“relevant commercial organisation” means—</p> <p>(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),</p> <p>(b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,</p> <p>(c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or</p> <p>(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,</p> <p>and, for the purposes of this section, a trade or profession is a business.</p>	<p>(5) In this section—</p> <p>“partnership” means—</p> <p>(a) a partnership within the Partnership Act 1890, or</p> <p>(b) a limited partnership registered under the Limited Partnerships Act 1907, or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,</p> <p>“relevant commercial organisation” means—</p> <p>(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),</p> <p>(b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,</p> <p>(c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or</p> <p>(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,</p> <p>and, for the purposes of this section, a trade or profession is a business.</p> <p>“Foreign subsidiary” means –</p> <p>(a) a commercial enterprise which is not incorporated in the UK, and</p> <p>(b) (b) which does not carry on a business or part of a business in the UK, but</p> <p>(c) is wholly or partially owned by a relevant commercial enterprise as defined above (the “UK parent company”).</p>
<p>Section 9: Guidance about commercial organisations preventing bribery</p>	<p>Section Y: Guidance about commercial organisations preventing human rights harms</p>

<p>(1) The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1).</p> <p>(2) The Secretary of State may, from time to time, publish revisions to guidance under this section or revised guidance.</p> <p>(3) The Secretary of State must consult the Scottish Ministers [and the Department of Justice in Northern Ireland] before publishing anything under this section.</p> <p>(4) Publication under this section is to be in such manner as the Secretary of State considers appropriate.</p> <p>(5) Expressions used in this section have the same meaning as in section 7.</p>	<p>(1) The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent human rights harms in their own activities or those of their business relationships as mentioned in section [number of possible mechanism above (1)].</p> <p>(2) The Secretary of State may, from time to time, publish revisions to guidance under this section or revised guidance.</p> <p>(3) The Secretary of State must consult the Scottish Ministers [and the Department of Justice in Northern Ireland] before publishing anything under this section.</p> <p>(4) Publication under this section is to be in such manner as the Secretary of State considers appropriate.</p> <p>(5) Expressions used in this section have the same meaning as in section X].</p>
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VI. Scenarios

Scenario A

A UK domiciled food manufacturer (“A”) purchases hazelnuts from suppliers in Turkey. Through its human rights due diligence programme, A identifies one of its salient human rights risks as child labour in the Turkish hazelnut sector and states this publicly in its human rights policy. To address this risk, A engages with a range of stakeholders, designs and implements a suite of systems and processes to address the issue and periodically uses an external body to review the effectiveness of these measures against KPIs, publishing the results on its website and adapting its systems and processes accordingly. Nevertheless, an independent investigation finds an eleven year old child working 12 hour days in an orchard which supplies A with hazelnuts.

A failed to prevent a human rights harm to which it either contributed or was directly linked through its products. However, A appears to have in place systems and processes which are consistent with the UNGPs and would have a sound basis to demonstrate to a court that these were reasonable in the circumstances, such that it could rely on the statutory defence. On this basis, there would be **no liability**.

Scenario B

Another UK domiciled food manufacturer (“B”) also purchases hazelnuts from suppliers in Turkey. B does not have a human rights policy and does not carry out any meaningful human rights due diligence. The independent investigation finds child labourers working in the orchards which supply B with hazelnuts.

Like enterprise A, B failed to prevent a human rights harm to which it contributed or was directly linked. However, unlike enterprise A, B has no evidence which it can produce to demonstrate that it had procedures in place which were reasonable in all of the circumstances. On this basis, enterprise B would not be able to rely on the statutory defence and **would be liable for damages to the victim of the harm**.

Scenario C

A small UK domiciled security company (“C”) provides guards for a mining operation in Zimbabwe. C has a human rights policy in place and produces an annual report detailing its commitment to human rights standards as well as various CSR projects to improve livelihoods of local community members. As an SME, it considers itself to be quite advanced in this respect. Nevertheless, there is a dispute with a community affected by the mining operations which results in a strike and rioting. The mine management asks a British manager at C to “sort the problem out” and, in response, the manager instructs C’s employees at the mine site to “do what it takes” to suppress the protests. Acting on these instructions, C’s employees are involved in a violent crackdown on protestors which results in several individuals being detained and severely mistreated by state security forces.

C contributes to and therefore fails to prevent a human rights harm. The existence of a human rights policy and annual report would not be sufficient to demonstrate respect for human rights according to the standards set out in the UNGPs or accord with guidelines applicable in the extractive or private security sectors. As an SME, the systems and processes which it should have in place should be proportionate to the severity of the human rights issues which it may encounter. Given the sector and the nature of this particular contract, it would be reasonable to expect intensive due diligence, irrespective of the size of C. Accordingly, absent evidence of any other systems or processes to

identify and address human rights risks in their operations, it would be unlikely that C could demonstrate that it had in place procedures which were reasonable in the circumstances, meaning that C could not rely on the statutory defence and **would be liable for damages to the victims of the harm**. In addition, if it could be proved that C's manager or any of its employees made a culpable contribution to an act of torture, they may separately be liable for criminal offences in the UK under section 134 of the Criminal Justice Act (as well as any applicable sanction in Zimbabwe).

In this context, it should be noted that even if C had procedures reasonable in all of the circumstances such that it could rely on the statutory defence to extinguish liability under the failure to prevent mechanism, this would have no effect on the potential criminal liability of its employees.

Scenario D

A UK domiciled telecommunications company ("D") provides network services to consumers in Tanzania through its Tanzanian subsidiary ("E"). The Tanzanian government enacts legislation which enables it to force network providers to provide data on its users and to shut down the network in periods of national emergency. In the run up to the presidential election, the government declares a national emergency and law enforcement agencies demand that E provides data on the location and activity of political opponents and close down its network for three days in the run up to the election. E complies with the request. This makes it easier for the government to arrest, detain and mistreat political opponents and restricts members of the public from participating in demonstrations against the government.

D fails to prevent adverse human rights harms (related to privacy, freedom of expression, freedom of association and security of the person) which its subsidiary caused (through network shutdown) and contributed to (through complying with the third party access request). Without evidence of its human rights systems and processes, it would not be able to rely on the statutory defence. However, in circumstances where D can demonstrate that it had human rights compatible policies and procedures on third party access requests and network shutdown in place – perhaps influenced by the Global Network Initiative Principles on Freedom of Expression and Privacy – and that it had used best endeavours to ensure that these systems and processes were implemented, the defence may still be available. For example, if, adhering to D's policy on third party access, enterprise E assessed the legality, necessity and proportionality of the government's demand and used best efforts to resist provision of information in response to requests that did not comply, D may be able to invoke the defence.

As envisioned under the UNGPs, human rights due diligence is a standard of process rather than outcome. In circumstances where an enterprise can genuinely demonstrate that a harm occurred despite its best efforts to prevent it, the failure to prevent mechanism would not provide a basis for legal liability. However, enterprises must continuously learn from their human rights due diligence and seek to find new ways to exercise leverage over business partners to address human rights issues. Where it fails to do so, for example by refusing to engage or seek to exercise leverage over the government to prevent future such instances, it may no longer be able to demonstrate that it had in place systems and processes reasonable in all the circumstances.

VII. Conclusion

Legal certainty and clarity are foundational principles of the Rule of Law. Tom Bingham wrote:²²⁷

[T]he successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations. No one would choose to do business, perhaps involving large sums of money, in a country where the parties' rights and obligations were vague or undecided.

Our study has shown that companies, particularly large multinationals in the UK, are currently experiencing a lack of legal certainty and clarity as to their obligations with respect to human rights and the environment. On the one hand, the UNGPs expect them to undertake due diligence across their global operations. On the other hand, tort law claims such as *Vedanta* signal that such steps could expose them to legal liability which would not apply to other less proactive companies. Multinational companies often face different, sometimes contradictory, requirements in the various jurisdictions where they operate.²²⁸

The study also shows that the failure to prevent mechanism of the UK Bribery Act has generally had the desired effect in terms of providing companies with legal certainty. The vast majority of survey respondents agree that a similar failure to prevent mechanism for human rights harms would provide business with benefits, in terms of legal certainty, a level playing field, and a non-negotiable standard with which to improve leverage. In this way, our study provides some empirical evidence for the statement made by John Ruggie in preparing the UNGPs, which was also cited by the International Business Leaders Forum as part of a 2009 submission to the UK Joint Committee on Human Rights:²²⁹

Governments should not assume they are helping business by failing to provide adequate guidance for, or regulation of, the human rights impact of corporate activities. On the contrary, the less governments do, the more they increase reputational and other risks to business.

Our legal analysis has shown that it would be feasible to model a failure to prevent mechanism for human rights harms on section 7 of the UK Bribery Act, as suggested by the JCHR, provided that it is adapted to align with the framework of the UNGPs. Such a mechanism would create a duty to prevent human rights harms in the entity's own activities and those of its business relationships regardless of where the harm took place. The duty would be accompanied by a human rights due diligence defence, which would allow the entity to avoid liability if it could show that it had put in place processes which are reasonable in all the circumstances.

Guidance should clarify how the duty will be interpreted and applied, with reference to the language of the UNGPs, including the concept of leverage. Although the creation of a criminal offence could be considered as an additional feature, the main form of liability created would be for civil damages. This would allow victims to access a remedy in the UK courts, while simultaneously encourage companies

²²⁷ Tom Bingham, *The Rule of Law*, 2011, Penguin Books: London, at 38.

²²⁸ Guiding Principle 23. See also Lise Smit, Arianne Griffith and Robert McCorquodale, "When national law conflicts with international human rights standards: Recommendations for Business", May 2018, BIICL Business Network, at 33.

²²⁹ Above n 58 at para 22. Cited in the "Memorandum submitted by the International Business Leaders Forum" as part of the 2009 UK Joint Committee on Human Rights enquiry "Any of our business? Human Rights and the UK private sector", available at: <https://publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5we45.htm>.

to undertake comprehensive due diligence, which takes account of the entity's particular risk, in order to avoid the unwanted outcome of human rights or environmental harms.

Since the JCHR made their recommendation for a failure to prevent mechanism for business impacts on human rights, the legal landscape applicable to UK companies has witnessed accumulating developments. As noted in the study, a campaign was launched for mandatory human rights and environmental due diligence in the UK and similar calls for laws or legislative proposals are at various stages of progress in national jurisdictions across the EU and the world, where multinational UK companies frequently operate. France has already implemented a law, and in Switzerland, Finland, Norway and Germany potential regulatory developments are being discussed. A treaty is being considered at UN level, which also contains duties towards prevention of human rights and environmental harms. These developments underscore the urgency for legal standards which provide clarity.

The same considerations relating to the current legal landscape which apply to our survey respondents, many of which are multinational companies, would apply in the other jurisdictions where such companies operate. Although each jurisdiction would need to develop its legal mechanism to fit within its own legal system, these developments are all based on the framework of the UNGPs and the same principle of "do no harm"²³⁰ within the company's own operations and its global value chain. Accordingly, the same questions and legal elements which are discussed in this study would be relevant. The experiences of business in relation to the similar application of the Bribery Act, and the frustration regarding the gaps in the current human rights landscape would be informative for any legislative process.

In this way, the findings of this study are useful not only within the UK context, but also for the purposes of these ongoing global developments.

²³⁰ Ruggie summarised the corporate responsibility to respect as "put simply, to do no harm". Above n 58 at para 24; John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: "Clarifying the Concepts of 'Sphere of Influence and Complicity'"*, A/HRC/8/16, 15 May 2008 at para 3.



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